

# CORPORATE SOCIAL RESPONSIBILITY & CONCESSION THEORY

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## ABSTRACT

*This Essay examines three related propositions: (1) Voluntary corporate social responsibility (CSR) fails to effectively advance the agenda of a meaningful segment of CSR proponents; (2) None of the three dominant corporate governance theories—director primacy, shareholder primacy, or team production theory—support mandatory CSR as a normative matter; and, (3) Corporate personality theory, specifically concession theory, can be a meaningful source of leverage in advancing mandatory CSR in the face of opposition from the three primary corporate governance theories. In examining these propositions, this Essay makes the additional claims that Citizens United: (A) supports the proposition that corporate personality theory matters; (B) undermines one of the key supports of the shareholder wealth maximization norm; and (C) highlights the political nature of this debate. Finally, I note that the Supreme Court’s recent Hobby Lobby decision does not undermine my CSR claims, contrary to the suggestions of some commentators.*

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*Any model that commands the loyalty of one or more generations of scholars doubtless has more than a grain of truth.*<sup>1</sup>

*[P]ublic opinion ... ultimately makes law ....*<sup>2</sup>

#### INTRODUCTION

This Essay was written in response to an invitation to participate in a “Conference and Micro-Symposium on Competing Theories of Corporate Governance” sponsored by the Lowell Milken Institute for Business Law and Policy at the UCLA School of Law (the “Symposium”).<sup>3</sup> The particular theories of corporate governance under consideration were director primacy, shareholder primacy, and team production. Invitees were asked to “define the competing models, critique them, and explore their implications for various important legal doctrines.”<sup>4</sup> Specifically, I was asked by Stephen Bainbridge to participate as part of a panel on the “Implications for Corporate Purpose,” which was to “explore whether the competing models have descriptively accurate and normatively appealing implications for the corporate purpose (a.k.a., stakeholder or corporate social responsibility) debate.”<sup>5</sup> As will be explained in more detail below, my answer to the first part of this question is that the director primacy and team production models appear to have descriptively accurate implications for corporate purpose, at least from the perspective of the current corporate law status quo, because they both locate control within the board of directors, and neither requires a shift from shareholder wealth maximization to stakeholder primacy or corporate social responsibility (CSR) as the goal of control.<sup>6</sup> However, I argue that all three of the primary models of

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<sup>1</sup> Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

<sup>2</sup> E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).

<sup>3</sup> Letter from Stephen Bainbridge, William D. Warren Distinguished Professor of Law, UCLA School of Law (June 3, 2013) (on file with author) [hereinafter Bainbridge Letter].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> I note that many commentators and judges use “shareholder primacy” when they likely mean “shareholder wealth maximization.” Frequently, this is not a significant problem given the context, but it is worth noting that “shareholder primacy” is best understood as referring to the identification of shareholders as the locus of control of the corporation, while “shareholder wealth maximization” is best understood as a goal of corporate governance independent of which group holds power. *See* Bainbridge, *supra*

corporate governance have less normatively appealing implications—at least from the perspective of those who favor a mandatory form of corporate social responsibility. In light of this, I conclude that proponents of mandatory CSR should turn to corporate personality theory, particularly concession theory, to provide support for their agenda, and I point to the Supreme Court’s 2010 *Citizens United* decision as an example of the current practical relevance of corporate personality theory.

Following this Introduction, Part I of this Essay provides an overview of the three competing theories of corporate governance as indicated above. In addition, I include a brief discussion of managerialism because I believe, along with many others, that there are still many corporations where the CEO reigns supreme. Part II then discusses corporate social responsibility, ultimately defining the concept in a way that challenges the hegemony of the previously described theories of corporate governance. In Part III, I then discuss the primary corporate personality theories—including concession theory, aggregate theory, and real entity theory—which I have previously aligned with the various theories of corporate governance described in Part I.<sup>7</sup> Part IV combines all of the foregoing to argue that anyone favoring mandatory corporate social responsibility should also support concession theory because it is the theory that most empowers the state to mandate socially responsible behavior on the part of corporations. Finally, Part V addresses some foreseeable criticisms of my argument, and the last Part provides concluding remarks.

## I. THE COMPETING THEORIES OF CORPORATE GOVERNANCE

In 1932, Adolf Berle and Gardiner Means published their famous book, *The Modern Corporation and Private Property*, wherein they identified the agency problem created by the separation of ownership from control in public corporations as the primary focus of corporate governance.<sup>8</sup> As Brian Cheffins has noted: “The primary function of corporate governance in the United States has been to address the managerial agency cost problem

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note 1, at 574 (“Although often used interchangeably, the terms ‘shareholder primacy’ and ‘shareholder wealth maximization’ express distinct concepts.”).

<sup>7</sup> See Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209 (2011); Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013); Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014).

<sup>8</sup> See Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 605 (2001) (“The history of corporate governance ‘reform’ begins with Adolf Berle and Gardiner Means’s ‘The Modern Corporation and Private Property’ ....”).

that afflicts publicly traded companies with dispersed share ownership. Berle and Means threw the spotlight on this type of agency cost problem—using different nomenclature—in their famous 1932 book ....”<sup>9</sup>

However, it was arguably not until 1976, when Melvin Eisenberg published *The Structure of the Corporation: A Legal Analysis* that modern corporate governance theory took off.<sup>10</sup> Brian Cheffins attributes the delay to “changing market conditions and a deregulation trend that provided executives with unprecedented managerial discretion as the 20th century drew to a close.”<sup>11</sup> In response to this, “Eisenberg challenged the insider-dominated boards of the day, positing that the modern board should serve as an independent monitor that works to safeguard shareholder interests.”<sup>12</sup>

A related timeline begins with Ronald Coase’s 1937 article, *The Nature of the Firm*,<sup>13</sup> which “characterized the boundaries of the firm as the range

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<sup>9</sup> Brian R. Cheffins, *The Corporate Governance Movement, Banks and the Financial Crisis*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Jan. 27, 2014, 9:18 AM), <http://blogs.law.harvard.edu/corpgov/2014/01/27/the-corporate-governance-movement-banks-and-the-financial-crisis/>. I note that I, too, am focusing on publicly traded corporations. Private or closely held corporations pose separate issues.

<sup>10</sup> See Usha Rodrigues, *A Conflict Primacy Model of the Public Board*, 2013 U. ILL. L. REV. 1051, 1054 (2013) [hereinafter Rodrigues, *Conflict Primacy*] (“Melvin Eisenberg’s revolutionary vision of the board as independent monitor now dominates corporate governance.”) (citing MELVIN ARON EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* (1976)); STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 53 (2012) (“Although the modern understanding of the board’s role and function has no single parent, if one were to insist on finding someone to whom to give the bulk of the credit—or blame—the leading candidate probably would be Professor Melvin Eisenberg.”).

<sup>11</sup> Brian R. Cheffins, *The Corporate Governance Movement, Banks and the Financial Crisis* (Univ. of Cambridge, European Corp. Governance Inst., Law Working Paper No. 232, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2365738](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365738).

<sup>12</sup> Rodrigues, *Conflict Primacy*, *supra* note 10, at 1056. *Cf. id.* at 1059 (“Developments in the 1970s ranging from the Penn Central Railroad bankruptcy and Watergate scandal to the birth of the corporate social responsibility movement led to the support for empowering independent directors.”).

<sup>13</sup> R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937). Margaret Blair and Lynn Stout explain:

One of the central questions in economic theory is: Why do firms exist? ... In the wake of Ronald Coase’s seminal piece on the nature of the firm, the literature on this question has developed along three main paths, each of which focuses on a different aspect of organizing productive activities. The first path explores contracting problems that arise when one actor hires another to act on her behalf (the principal-agent problem). The second path examines problems associated with coordinating productive activities where it is too costly to write and enforce complete

of exchanges over which the market system was superseded and resource allocation was accomplished instead by authority and direction.”<sup>14</sup> This was ultimately followed by the 1976 article of Michael Jensen and William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*,<sup>15</sup> which “substituted, for Coase’s conception of the firm, the competing conception that the firm was a nexus of contracts.”<sup>16</sup>

Thus, as Stephen Bainbridge put it in his letter announcing his Symposium: “Corporate law and economics scholarship initially relied mainly on agency cost and nexus of contracts models.”<sup>17</sup> In recent years, however, “various scholars have built on those foundations to construct three competing models of corporate governance: director primacy, shareholder primacy, and team production.”<sup>18</sup> These models all seek to identify, as a normative and/or positive matter, (1) where the locus of control over the corporation does and/or should reside, and (2) toward what end that control is and/or should be exercised.<sup>19</sup> The following sub-parts will examine these models, along with managerialism, in greater detail.

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contracts, focusing especially on the role played by property rights as a solution for closing contractual gaps (the property rights approach). The third path considers the role hierarchy may play in policing against shirking problems that may arise in coordinating team production (the team production approach).

Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 257–58 (1999).

<sup>14</sup> Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 820 (1999).

<sup>15</sup> 3 J. FIN. ECON. 305 (1976).

<sup>16</sup> Eisenberg, *supra* note 14, at 822. Cf. Blair & Stout, *supra* note 13, at 319 n.189 (noting that “[t]he idea that a firm is a ‘nexus of contracts’ is usually traced to Alchian & Demsetz” but also noting that “Eugene Fama and Michael Jensen may have been the first to have used the phrase”) (citing Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 302 (1983)).

<sup>17</sup> Bainbridge Letter, *supra* note 3.

<sup>18</sup> *Id.*

<sup>19</sup> See generally Bainbridge, *supra* note 1, at 605.

Any model of corporate governance must answer two basic sets of questions: (1) Who decides? In other words, which corporate constituency possesses ultimate decisionmaking power? (2) When the ultimate decisionmaker, whoever it may be, is presented with a zero sum game in which it must prefer the interests of one corporate constituency over those of all others, whose interests prevail?”

*Id.*

*A. Director Primacy*

Stephen Bainbridge is most frequently associated with the director primacy model of corporate governance.<sup>20</sup> Director primacy posits that control of the corporation rests with the board of directors, and that this control is to be used to maximize shareholder wealth.<sup>21</sup> As a positive matter, it appears clear that state corporate law does indeed place control over the corporation into the hands of the board of directors.<sup>22</sup> As Usha Rodrigues has noted: “In the 1970s corporate codes were amended to add that the corporation is managed by ‘or under the direction of’ the board of directors—a nod to the changed reality of corporate America.”<sup>23</sup> However, Usha Rodrigues has also recently pointed out that the ultimate day-to-day control may actually be better described as managerial.<sup>24</sup> Furthermore, while the law nominally elevates shareholder wealth maximization as the goal of corporate governance, cases like *A.P. Smith Manufacturing Co. v. Barlow* (upholding board’s decision to donate money to Princeton University in face of shareholder challenge),<sup>25</sup> *Shlensky v. Wrigley* (upholding board’s decision not to install lights at Wrigley Field despite shareholder’s evidence that the team was losing money due to the decision and that the decision was motivated primarily by the board’s feelings about the sanctity of daytime baseball and concerns about the surrounding community),<sup>26</sup> and even *Dodge v. Ford Motor Co.* (forcing corporation to pay out dividends to shareholders rather than use the money to benefit non-shareholders)<sup>27</sup> make clear that the deference granted directors to choose the course of action taken to pursue creation of shareholder wealth under

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<sup>20</sup> Bainbridge Letter, *supra* note 3 (“In Stephen Bainbridge’s director primacy model, the board of directors is not a mere agent of the shareholders, but rather is a sui generis body whose powers are ‘original and undelegated.’”).

<sup>21</sup> See Bainbridge, *supra* note 1, at 550.

<sup>22</sup> Cf. Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1653–54 (2013) (“In the context of antitakeover defenses, [board] insulation advocates have thus far prevailed.”).

<sup>23</sup> Rodrigues, *Conflict Primacy*, *supra* note 10, at 1086.

<sup>24</sup> *Id.* at 1056 (“Despite the central role the board plays in statutes, in practice the CEO and other executives have long dominated corporate life.”).

<sup>25</sup> 98 A.2d 581, 585 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953). Cf. Bainbridge, *supra* note 1, at 561 n.70 (“In *Barlow*, the court broadly endorsed the corporate social responsibility doctrine. As I have argued elsewhere, however, *Barlow*’s result is not inconsistent with the wealth maximization norm and, in any event, represents the minority view among decided cases.”) (citing Stephen M. Bainbridge, *Interpreting Non-Shareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 979 (1992)).

<sup>26</sup> 237 N.E.2d 776, 779 (Ill. App. Ct. 1968).

<sup>27</sup> 170 N.W. 668, 685 (Mich. 1919).

the business judgment rule makes shareholder wealth “satisfaction” a more apt descriptor.<sup>28</sup> The reason I cite *Dodge v. Ford* here as an example of how much freedom boards have to ignore shareholder wealth maximization is because I believe that opinion can fairly be read as standing for the proposition that Henry Ford would have been free to deny his shareholders dividends and use the cash on hand for “the primary purpose of benefiting others”<sup>29</sup> if he had only put forth even a modicum of effort in defending his plan as good for business, which should have been quite easy in light of *Barlow* and *Shlensky*,<sup>30</sup> as opposed to defiantly defending his right to allocate corporate assets purely for the benefit of his workers and consumers.<sup>31</sup> All of which is to say that, so long as the corporation creates sufficient wealth for shareholders to keep them satisfied enough to avoid revolt, the board will be free to pursue any number of non-shareholder-wealth-maximizing paths.<sup>32</sup> However, as will be discussed in more detail below, this is still a far cry from mandatory CSR.

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<sup>28</sup> Cf. Bainbridge, *supra* note 1, at 602 n.269 (“I concede that the business judgment rule has the effect of insulating the board of directors from liability when they put the interests of nonshareholder constituencies ahead of those of shareholders, but deny that that is the rule’s intent.”) (discussing *Wrigley*).

<sup>29</sup> *Dodge*, 170 N.W. at 684.

<sup>30</sup> While *Barlow* and *Shlensky* were decided years after *Ford*, the willingness of the courts in those cases to protect corporate decision making from shareholder challenge suggests it would not have taken much for the *Ford* court to do the same. However, the timing of the cases may distinguish them as well.

<sup>31</sup> Cf. Kent Greenfield & John E. Nilsson, *Gradgrind’s Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799, 814 (1997) (“In the press, Ford had been defiant, proclaiming his decision to reinvest in the company ‘[in order] to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.’”) (quoting *Dodge v. Ford*, 170 N.W. at 671).

<sup>32</sup> Some have argued that it is impossible for management to merely satisfy shareholders in a competitive market. This proposition, however, is highly contested. See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 763–64 (1995) (exploring path dependency theory of corporate law in which inefficient legal rules persist due to network externalities); Michal Barzuza, *Noise Adopters in Corporate Governance*, 2013 COLUM. BUS. L. REV. 627, 627 (2013) (“[N]oise adopters,’ namely firms whose corporate governance is determined by non-substantive factors such as attorneys’ boilerplates, network externalities, and mere inertia, provide camouflage to insiders with a strong preference for entrenchment.”); John W. Cioffi, *Book Review*, 52 AM. J. COMP. L. 763, 764 (2004) (reviewing MARK J. ROE, *THE POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (2003)) (“[Mark Roe] argues that incorporation of political forces in the analysis provides a fuller and more robust account of cross-national divergence in corporate governance systems and ownership than do purely legal and economic theories of corporate governance regimes.”). Cf. Blair & Stout, *supra* note 13, at 252–53, 282 (“[S]o long as each member of the coalition receives even a modest premium over his opportunity cost, he has incentive to remain in the team.”).

As for whether placing control in the hands of the board is best as a normative matter, Lucian Bebchuk has recently made a compelling argument that shareholders at the very least deserve more power than they currently have.<sup>33</sup> Furthermore, whether shareholder wealth maximization is normatively the best goal of corporate governance has been debated extensively.<sup>34</sup> For purposes of this Essay, I am asking what the implications are of adopting mandatory corporate social responsibility as the goal, and thus I leave the normative debate to others for now. In other words, I posit that given the number of scholars and other commentators who have advocated for some form of mandatory CSR, the mandatory CSR model of corporate governance deserves to be taken seriously.<sup>35</sup> Furthermore, if none of the current primary models of corporate governance can accommodate mandatory CSR as a normative matter, then there may be reason to question the hegemony of these models.

To sum up on director primacy, while there is good evidence to support the theory as a positive matter, there are also strong arguments suggesting corporations operate differently in the real world. More importantly for purposes of this Essay, director primacy does not appear to provide normative support for mandatory CSR,<sup>36</sup> and thus we must look elsewhere

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<sup>33</sup> See Bebchuk, *supra* note 22, at 1637 (“[T]he available empirical evidence provides no support for the claim that board insulation increases overall value in the long term. To the contrary, the evidence favors the view that board insulation at current or higher levels does not serve the long-term interests of companies and their shareholders.”).

<sup>34</sup> See William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 100 (2008) (“A continuing and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy, those who favor management discretion, and those who believe that corporations have a social responsibility to other constituencies, such as the corporation’s employees, and the wider public interest.”).

<sup>35</sup> See, e.g., Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 585 (1992) (“Having established a theoretical justification for the new constituency statutes and their relationship to emerging case law, I will then in Part III offer a two-part model for enforcement of these statutes.”); Gary von Stange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L.J. 461, 490 (1994) (“If legislatures truly wish to accomplish corporate social responsibility through constituency statutes, then legislatures must ... expressly mandate consideration for nonshareholder constituencies ....”); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 902 (1993) (“In this [a]rticle, I focus on expanding the existing fiduciary duties of directors to encompass obligations to employees.”). Cf. Bainbridge, *supra* note 1, at 550 (“Any model that commands the loyalty of one or more generations of scholars doubtless has more than a grain of truth.”).

<sup>36</sup> See Stephen Bainbridge, *Director Primacy Is About the Allocation of Power, Not How It Used*, PROFESSORBAINBRIDGE.COM (Aug. 2, 2012, 10:57 AM), <http://www.professorbainbridge.com/professorbainbridgecom/2012/08/director-primacy-is-about-the-alloca>

if we are to answer the question of where proponents of mandatory CSR can find theoretical support for their position. To that end, we next examine the theories of team production, shareholder primacy, and managerialism.

### *B. Team Production*

Like the director primacy theory of corporate governance, the team production theory locates control of the corporation in the board of directors.<sup>37</sup> However, team production theory posits the goal of that control to be the mediation of the competing interests of the various relevant stakeholders.<sup>38</sup> Thus, like director primacy, team production theory seems to capture the legal reality of board control and may provide a better description of the practical reality of how that control is implemented, again subject to the claims of managerialism regarding personal enrichment by those in control.<sup>39</sup>

Stephen Bainbridge has noted that, “[a]lthough team production is not explicitly normative, many commentators regard it as at least being compatible with stakeholder theorists who promote corporate social responsibility.”<sup>40</sup>

Although Blair and Stout tend to downplay the normative implications of their model, they acknowledge that it “resonates” with the views of progressive corporate legal scholarship. They differ from the progressive wing of the corporate law academy mainly on positive grounds. Many progressives believe that corporate directors currently do not take sufficient account of nonshareholder constituency interests and that legal reform is necessary. In contrast, Blair and Stout believe that corporate directors do take such interests into account and the current law is adequate in this regard.<sup>41</sup>

However, Margaret Blair has clarified that “[t]he team production argument is that all the parties will be better off if they delegate decision-making to a

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tion-of-power-not-how-it-used.html (“[D]irector primacy is about the allocation of power within the firm, and has little to say about how that power is to be used (other than requiring that it be used to maximize shareholder wealth).”).

<sup>37</sup> See generally Blair & Stout, *supra* note 13, at 280–81 (“[T]he directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members’ competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.”).

<sup>38</sup> *Id.*

<sup>39</sup> Cf. Donald E. Schwartz, *Book Review: In Search of Corporate Soul: The Structure of the Corporation: By Melvin Aron Eisenberg*, 87 YALE L.J. 685, 687 (1978) (“Eisenberg finds ... managerialism is dangerous because management’s interests may conflict with those of the stockholders.”).

<sup>40</sup> Bainbridge Letter, *supra* note 3.

<sup>41</sup> Bainbridge, *supra* note 1, at 593–94.

non-team member. But it does not say that the decision-maker must pursue CSR goals.”<sup>42</sup> In other words, to the extent I am viewing the implications of the primary corporate governance models through the lens of those who seek mandatory CSR, team production theory still leaves much to be desired.

### C. Shareholder Primacy

The shareholder primacy model differs from director primacy and team production theory by arguing that shareholders, rather than the board of directors, should serve as the locus of control for corporations—or at least hold more control than they currently do.<sup>43</sup> Not surprisingly, shareholder primacy agrees with director primacy that the goal of corporate governance should be shareholder wealth maximization.<sup>44</sup> Lucian Bebchuk recently authored a compelling defense of shareholder primacy, wherein he addressed criticisms coming from those who argue that it is best to insulate directors from shareholder power:

Although insulation advocates often lump them together, there are two different mechanisms through which shareholder pressure is alleged to produce long-term costs .... I refer to [the first] claim—that activists with short-term orientation urge actions that are profitable in the short term but value-reducing in the longer term—as *the myopic activists claim* .... [A] complementary claim [is] that fear of shareholder intervention (or even removal by shareholders) in the event that management fails to deliver good short-run outcomes leads management itself to initiate and take actions that are profitable in the short term but detrimental in the long term. I refer to this claim as *the counterproductive accountability claim*.<sup>45</sup>

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<sup>42</sup> Email from Margaret Blair to author (Jan. 15, 2014, 9:57 PM) (on file with author).

<sup>43</sup> See generally Bebchuk, *supra* note 22, at 1644 (“I would like to stress that I do not argue—nor do I believe—that the optimal level of board insulation is zero. The board insulation view—the view that I do seek to challenge—refers throughout to the view that existing or higher levels of insulation are beneficial in the long term.”); Bainbridge Letter, *supra* note 3 (“Scholars such as Lucian Bebchuk working with this model are generally concerned with issues of managerial accountability to shareholders. In recent years, these scholars have been closely identified with federal reforms designed to empower shareholders.”).

<sup>44</sup> Cf. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (noting that “[s]hareholder wealth maximization is usually accepted as the appropriate goal in American business circles”).

<sup>45</sup> Bebchuk, *supra* note 22, at 1658.

Bebchuk then proceeded to examine various empirical studies relevant to the claims and concluded:

Overall, analyzing the publicly available data on stock returns provides no support for the myopic activists claim that activist intervention makes shareholders of target companies worse off in the long term .... [Likewise], the counterproductive accountability claim advanced by insulation advocates is not supported by the empirical evidence. To the contrary, the existing body of evidence supports the view that existing or higher levels of board insulation are value-decreasing both in the short term and the long term.<sup>46</sup>

Thus, Bebchuk has made a strong argument for shareholder primacy as providing a better normative model of who should control the corporation.<sup>47</sup> However, Usha Rodrigues has noted that “the shareholders themselves cannot be in charge of the corporation, or they lose the benefits of the separation of ownership and control.”<sup>48</sup> In addition, Stephen Bainbridge has noted that, “[a]t the most basic level, the mechanical difficulties of achieving consensus amongst thousands of decisionmakers impede shareholders from taking an active role.”<sup>49</sup> Finally, the shareholder primacy goal of shareholder wealth maximization is subject to the same criticisms as it is under director primacy.<sup>50</sup> Most importantly for purposes of this Essay,

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<sup>46</sup> *Id.* at 1676, 1686.

Board insulation eliminates or substantially weakens ... incentives to serve shareholders. Thus, it can be expected to increase slack, empire building, excessive pay, and other forms of private benefits. It can also be expected to make insiders more inclined to act in ways that are beneficial to or convenient for themselves but costly to shareholders. The evidence indicates that board insulation does indeed have such adverse effects .... In addition, there is evidence that board insulation enables managers to increase their own benefits.

*Id.* at 1679–80.

<sup>47</sup> One might argue that current shareholder voting rights, along with the right to sue directors for breach of fiduciary duty, make shareholder primacy compelling as a positive matter as well. However, “[c]areful analysis reveals ... that these rights are so limited as to be almost nonexistent.” Blair & Stout, *supra* note 13, at 320.

<sup>48</sup> Rodrigues, *Conflict Primacy*, *supra* note 10, at 1058. *Cf.* *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247, 255 (C.C.E.D. Wis. 1905) (justifying piercing the corporate veil to hold shareholders personally liable for the debts of the corporation by stating that “[i]f any general rule can be laid down ... it is that a corporation will be looked upon as a legal entity as a general rule ... until sufficient reason to the contrary appears”).

<sup>49</sup> Bainbridge, *supra* note 1, at 557.

<sup>50</sup> *Cf.* Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 908–13 (responding to the claim that increasing shareholder power may have adverse effects on stakeholders); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 729–31 (same).

the shareholder wealth maximization norm of shareholder primacy leaves no room for mandatory CSR as a normative matter.

#### *D. Managerialism*

While managerialism was not one of the corporate governance models identified for discussion at the Symposium, the reality of board capture by inside management makes the perspective worth at least mentioning here.<sup>51</sup> Essentially, managerialism posits that corporate executives, particularly the CEO, are the true bearers of control in the corporation. Usha Rodrigues recently advanced this position in her paper, *A Conflict Primacy Model of the Public Board*, wherein she notes: “Despite the central role the board plays in statutes, in practice the CEO and other executives have long dominated corporate life.”<sup>52</sup> This executive dominance has only been exacerbated by what Rodrigues refers to as modern corporate law “fetishizing independence” among directors, thereby decreasing entity-specific expertise on boards with concomitant increased dependence on corporate insiders.<sup>53</sup> In addition:

The American Bar Association Task Force on Corporate Responsibility noted that many aspects of an outside director's role reflect a dependence on senior management: “Typically, senior management plays a significant part in the selection of directors, in proposing the compensation for directors, in selecting their committee assignments, in setting agendas for their meetings, and in evaluating their performance.”<sup>54</sup>

It is worth noting that Stephen Bainbridge himself has acknowledged this reality to some extent.<sup>55</sup>

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<sup>51</sup> Cf. LUIGI ZINGALES, PREVENTING ECONOMISTS' CAPTURE, IN PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., Cambridge Univ. Press 2013) (“Regulatory capture is so pervasive precisely because it is driven by standard economic incentives, which push even the most well-intentioned regulators to cater to the interest of the regulated.”).

<sup>52</sup> Rodrigues, *Conflict Primacy*, *supra* note 10, at 1056. Cf. *id.* at 1062 (“The average director spends roughly twenty hours a month on the governance of his or her company.”).

<sup>53</sup> *Id.* at 1053 (“By fetishizing independence, we have created boards of individuals especially ill-suited to monitoring the corporation's full range of work.”).

<sup>54</sup> *Id.* at 1060–61.

<sup>55</sup> STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 19 (2008) (acknowledging the view that “[n]either shareholders nor directors run the corporation; CEOs do,” and that “[m]anagerialism may have fallen out of favor as a normative theory of corporate governance, but it remains the work-a-day world reality,” but arguing that “the balance of power is shifting from imperial CEOs to boards”). Cf. Noemie Bisserbe, Jeanne Whalen & Hester Plumridge, *Sanofi Fires CEO as Tensions Boil Over*, WALL ST. J. (Oct. 29, 2014) (“Sanofi directors say the episode wasn't the first

As alluded to above, managerialism arguably exacerbates the agency problem even more than what one might reasonably expect under director primacy or team production.<sup>56</sup> That is to say, the control wielded by executives can be expected to be used by the executives to enrich themselves at the expense of shareholders and other stakeholders.<sup>57</sup> For this reason, Rodrigues argues for a “conflict primacy view of the board [which] makes a virtue out of a vice by limiting the independent board’s responsibilities to those areas where independence matters: problems of conflict of interest.”<sup>58</sup> In light of this heightened risk of self-dealing, advocates of mandatory CSR are unlikely to find any more support for their agenda via managerialism than via director primacy or team production.<sup>59</sup>

Having set forth the primary theories of corporate governance, and found them all wanting in terms of supporting mandatory CSR, we turn now to explore corporate social responsibility in more detail before proceeding to consider corporate personality theories as a possible source of support for advocates of mandatory CSR. Clarifying the construct of corporate social responsibility should make it easier for the reader to understand why the modern theories of corporate governance may fall short from the perspective of advocates of mandatory CSR. The discussion will also set the stage for an explication of how corporate personality theory may provide the sought after theoretical support.

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time they felt ill informed about [CEO] Viehbacher’s plans. Despite having general confidence in the turnaround strategy he’s pursued, they say he displayed an uncommunicative management style that led to his abrupt ouster on Wednesday.”), *available at* <http://on.wsj.com/1zHXYcf>.

<sup>56</sup> See Hansmann & Kraakman, *supra* note 43, at 444 (noting “the conventional wisdom that, when managers are given great discretion over corporate investment policies, they tend to serve disproportionately their own interests”).

<sup>57</sup> Cf. Rodrigues, *Conflict Primacy*, *supra* note 10, at 1066 (“The evidence suggests that ... modern boards merely rubber-stamp managerial decisions when asked to evaluate them.”); *id.* at 1068 (“Professor Lawrence Mitchell notes that the advent of independent boards has made boards overly dependent on the CEO for information and thus placed ‘the CEO in an enormously powerful position, with every incentive to present information to the board in a light that is most favorable to him.’”) (quoting Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313, 1349 (2005)).

<sup>58</sup> Rodrigues, *Conflict Primacy*, *supra* note 10, at 1068.

<sup>59</sup> As a positive matter, the expectation is that managers will use their power to enrich themselves at the expense of other stakeholders. As a normative matter, there may be room to argue that managers should be in control because they are in the best position to balance the competing interests of stakeholders in a way not entirely opposed to CSR. However, it is highly doubtful that, like in the case of team production theory, there exists a clear path from managerialism to mandatory CSR. Cf. Bainbridge, *supra* note 1, at 550 (“Managerialist models assume that top management controls the corporation, but differ as to the interests managers should pursue.”).

## II. CORPORATE SOCIAL RESPONSIBILITY

One version of the history of corporate social responsibility is provided by Douglas Branson in his article, *Corporate Governance “Reform” and the New Corporate Social Responsibility*:

The history of corporate governance “reform” ... has been the postulation, by academics and others, of solutions to problems posed by the separation of ownership from control. One subset of proposed reforms, those of the 1970s, formed the “corporate social responsibility movement.” During that era, reformers urged governmental intervention which, as a matter of general corporate law, would expand corporate responsibility from primarily shareholders, to workers, consumers, suppliers, communities in which the corporation had a significant presence, clean air, clean water, and other constituencies. At times, most particularly during the heyday of the law and economics movement, scholars posited that the separation of ownership from control posed no problem at all. Instead it was an efficient allocation of investor and managerial resources. Thus, law and economics eclipsed the corporate social responsibility movement. Seldom in the annals of jurisprudence has one jurisprudence ascended so quickly, while the one it supplanted simultaneously faded into oblivion.<sup>60</sup>

One way of thinking about corporate social responsibility is to view it as an alternative to the previously discussed models of corporate governance in terms of goals.<sup>61</sup> That is to say, while both director primacy and shareholder primacy view shareholder wealth maximization as the proper goal of corporate governance, and team production theory espouses a goal of stakeholder mediation that also does not extend to mandating social responsibility,<sup>62</sup>

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<sup>60</sup> Branson, *supra* note 8, at 605; *see also* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1038 n.1 (2013) (“Many scholars recognize that the famous exchange of articles between Professors Berle and Dodd was critical in launching the debate on a corporation’s social responsibility.”); Bainbridge, *supra* note 1, at 561 (“Berle thought the law should put renewed emphasis on managers’ fiduciary duty to maximize shareholder wealth. In contrast, Dodd argued that corporations have a ‘social service [responsibility] as well as a profit-making function.’”); Blair & Stout, *supra* note 13, at 303 (“By the 1950s, Berle was ready to concede that, as a matter of law, [corporate] powers [are] held in trust for the entire community.”).

<sup>61</sup> *Cf.* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1351 (2011) (“Despite vigorous debate since the 1930s, the notion of corporate social responsibility (CSR) remains in flux.”).

<sup>62</sup> *Cf.* Blair & Stout, *supra* note 13.

[O]ur analysis appears to parallel many of the arguments raised in recent years by the “communitarian” or “progressive” school of corporate scholars who believe that corporate law ought to require directors to serve not only the shareholders’ interests, but also those of employees,

mandatory CSR supports affirmatively elevating social responsibility over shareholder wealth maximization in at least some cases.<sup>63</sup> Simply put, the CSR position is that shareholder wealth may be sacrificed if the net social gain is positive, so that a board may defend its actions by pointing to some accounted-for social benefit even when it demurs on the issue of shareholder wealth maximization.<sup>64</sup>

For purposes of this Essay, I am going to focus on constituency statutes as my proxy for CSR because they represent arguably the only “positive corporate law that directly seeks to advance the cause of CSR or constituency theory.”<sup>65</sup> Constituency statutes arose out of the takeover boom of the 1970s, when legislatures sought to protect local jobs and businesses by granting boards express permission, if not a mandate, to consider interests other than short-term shareholder value, which might otherwise be the

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consumers, creditors, and other corporate “stakeholders.” We believe, however, that our mediating hierarchy approach ... carries very different policy implications: Where progressives have argued that corporate law ought to be reformed to make directors more accountable to stakeholders, the mediating hierarchy approach suggests that directors should not be under direct control of either shareholders or other stakeholders.

*Id.* at 253–54.

<sup>63</sup> *Cf. id.* at 308 n.157 (“The team production model explains how sacrificing shareholders’ interests to stakeholders’ can sometimes serve the interests of both groups in the long run.”).

<sup>64</sup> *Cf. MILTON FRIEDMAN, CAPITALISM AND FREEDOM* 133 (2002) (“Few trends could so thoroughly undermine the very foundation of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their shareholders as possible. This is a fundamentally subversive doctrine.”). *But see* Bainbridge, *supra* note 1, at 565 (“[O]wnership of the residual claim is not the same as ownership of the firm itself .... Hence, we can throw Friedman’s concept of ownership out the window, along with its associated economic and ethical baggage.”).

<sup>65</sup> Matthew T. Bodie, *Nascar Green: The Problem of Sustainability in Corporations and Corporate Law*, 46 WAKE FOREST L. REV. 491, 498 (2011) (“Other than constituency statutes, there has been little in the positive corporate law that directly seeks to advance the cause of CSR or constituency theory.”); *see also* Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 653 (2013) (identifying “several examples of CSR, including corporate responsibility reporting (CR reporting), corporate codes of conduct, and constituency statutes” as well as shareholder proposals); *id.* at 660 (“While most lawmakers likely had change-of-control decisions in mind when enacting constituency statutes, CSR proponents observe that the application of constituency statutes is not necessarily limited to situations in which the corporation is for sale ....”); Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & COM. 257, 257 (1995) (identifying the “stakeholder theory of corporate social responsibility [as] codified in part by state corporate constituency statutes”).

requirement under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*<sup>66</sup> In *Revlon*, the Delaware Supreme Court held that “when ... it became apparent to all that the break-up of the company was inevitable ... [t]he duty of the board ... changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.”<sup>67</sup> The statutes have been heavily criticized because none of the stakeholders implicated could actually sue the board, and thus the statutes basically turned into cover for insider entrenchment.<sup>68</sup> For this reason, I am going to focus on mandatory constituency statutes that grant certain enforcement rights to covered stakeholders.<sup>69</sup>

In other words, in assessing the viability of the various theories discussed herein for supporting mandatory CSR, the reader may find it useful to use mandatory constituency statutes as a relevant yardstick. If the theory under consideration could support a mandatory constituency statute, then it is likely a good fit for mandatory CSR more generally. I note that while constituency statutes have been heavily criticized as inefficient, adding stakeholder enforcement rights arguably should serve as an additional monitoring tool against management self-dealing. One possible route to accountability and enforcement via constituency statutes is to mandate stakeholder impact statements and allow stakeholders to sue for corrections of misstatements and material omissions, with plaintiffs’ attorneys acting as private

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<sup>66</sup> 506 A.2d 173, 182 (Del. 1986).

<sup>67</sup> *Id.* at 182. *Revlon* provided a gloss on *Unocal v. Mesa Petroleum*, which had held that directors may consider the “impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally),” *Unocal Corp. v. Mesa Petroleum Co.* 493 A.2d 946, 955 (Del. 1985), when deciding on defensive measures in the face of a hostile acquisition attempt. Compare Blair & Stout, *supra* note 13, at 308 (“*Unocal* squarely rejects shareholder primacy in favor of the view that the interests of the ‘corporation’ include the interests of nonshareholder constituencies.”) (citing *Unocal Corp.*, 493 A.2d at 954), with *id.* at 308 n.157 (“In [*Revlon*], the Delaware Supreme Court suggested that directors could consider other constituencies’ interests only when doing so ultimately provided some benefit to shareholders as well.”). But see generally Lyman Johnson & Rob Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167 (2014); Mohsen Manesh, *Nearing 30, Is Revlon Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107 (2014), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss2/6>, (responding to Johnson & Ricca article); Lyman P.Q. Johnson & Robert Ricca, *The Still-Dwindled Revlon*, 71 WASH. & LEE L. REV. ONLINE 150 (2014), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss3/1> (responding to Manesh article).

<sup>68</sup> *Cf.* Mitchell, *supra* note 34, at 580.

<sup>69</sup> *Cf.* von Stange, *supra* note 34, at 490 (1994) (“If legislatures truly wish to accomplish corporate social responsibility through constituency statutes, then legislatures must: (1) expressly mandate consideration for nonshareholder constituencies; (2) encourage accountability of incumbent management; (3) alter the composition of the board of directors to include nonshareholders; and (4) enable nonshareholder constituencies access to remedies.”).

attorneys general incentivized by fees.<sup>70</sup> In addition, I qualify all the foregoing by noting that the implementation of mandatory constituency statutes that are enforceable by stakeholders should not preclude consideration of the shareholder wealth consequences of the relevant business decision under consideration, nor should they preclude shareholder wealth maximizing activities simply because they are shareholder wealth maximizing.<sup>71</sup> Finally,

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<sup>70</sup> The use of disclosure to drive changes in corporate behavior is nothing new. See Rahim Kanani, *The Future of Corporate Social Responsibility (CSR)*, FORBES (Feb. 9, 2012, 7:38 PM), <http://www.forbes.com/sites/rahimkanani/2012/02/09/the-future-of-corporate-social-responsibility-csr/> (“In 2000 there might have been a dozen Fortune 500 companies who issued a CSR or sustainability report. Now almost all of them do.”). Cf. Celia Taylor, *CSR—and Other—Disclosure as “Compelled Speech”: The US and the EU Consider Very Different Approaches*, THE RACETO THE BOTTOM.ORG (Apr. 24, 2014, 6:00 AM), <http://www.theracetothebottom.org/miscellaneous/csr-and-other-disclosure-as-compelled-speech-the-us-and-the-e.html> (“The fate of compelled commercial speech is the subject of great uncertainty in the US at the moment [since] the conflict minerals rules issued by the SEC [were] subject to many legal challenges including one based on the First Amendment”); Celia Taylor, *Conflict Minerals: On We Go: Challenge to be Heard by Full Court*, THE RACETO THE BOTTOM.ORG (Nov. 21, 2014, 06:00AM), <http://www.theracetothebottom.org/home/conflict-minerals-on-we-go-challenge-to-be-heard-by-full-court.html> (“[T]he United States Court of Appeals for the District of Columbia agreed to reconsider the last ruling in the on-going dispute of ... the SEC’s conflict minerals rule ...”). One could even argue that in today’s globalized and interconnected world, the duty of care—which requires directors to become informed of all material information reasonably available—may already require such factors to be considered. Cf. Adam J. Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting is Practiced, Required & More Would Be Better*, 10 U. ST. THOMAS L.J. 1060, 1061 (2013) (arguing that “existing laws and related rules already require greater disclosure of data on environmental and societal impacts than commonly understood”). Furthermore, I believe the courts have recently demonstrated, in the context of Dodd-Frank’s advisory say-on-pay mandate, that they can effectively keep frivolous claims to a minimum. See generally Alison Frankel, *Citi shareholders have slim chance of enforcing say-on-pay vote*, REUTERS (Apr. 19, 2012), <http://blogs.reuters.com/alison-frankel/2012/04/19/citi-shareholders-have-slim-chance-of-enforcing-say-on-pay-vote/> (“About a dozen corporations that failed say-on-pay votes in 2011 were sued in shareholder derivative actions accusing board members of breaching their duty. Only one of those suits has so far survived a dismissal motion.”). But see Bainbridge, *supra* note 1, at 558 (“Overcoming the collective action problems that prevent meaningful involvement by the corporation’s various constituencies would be difficult and costly.”).

<sup>71</sup> See Bainbridge, *supra* note 1, at 583 n.176 (“[T]hese statutes do not reject the traditional shareholder wealth maximization norm. Instead, they modify the norm by allowing the board to make tradeoffs between shareholder and stakeholder interests.”).

Boards of directors sometimes face decisions in which it is possible to make at least one corporate constituency better off without leaving any constituency worse off. In economic terms, such a decision is Pareto efficient because it moves the firm from a Pareto inferior position to the Pareto frontier. Other times, however, boards face a decision that makes at least one constituency better off but leaves at least one worse

I note that while it has been said that “[s]takeholderist models rarely focus on control issues, but instead emphasize that shareholders should not be the sole beneficiaries of director and officer fiduciary duties,”<sup>72</sup> I am assuming the board will need to be the locus of control because this is the body the regulatory state has the most direct control over.<sup>73</sup>

If we assume that constituency statutes can serve as a useful proxy for CSR, and take seriously the criticisms levied against the effectiveness of these statutes when unaccompanied by any sort of stakeholder enforcement mechanism (i.e., when they are not in any meaningful sense mandatory), then the failure of the primary theories of corporate governance to provide a normative basis for strengthening these statutes serves as an example of how these theories fail to meet the needs of proponents of mandatory CSR. We now turn our attention to an alternative foundation for mandatory CSR: corporate personality theory.

### III. THE COMPETING THEORIES OF CORPORATE PERSONALITY

Theories of corporate personality seek to define the nature of corporations so as to provide a framework within which to determine the rights and responsibilities of corporations vis-à-vis the rest of society.<sup>74</sup> Thus, it may not be fair to try to align theories of corporate personality with theories of corporate governance, since the latter are concerned primarily with the internal relations (primarily between the shareholders and managers) of the corporation. However, on at least some level the distinction between internal and external relations becomes artificial, since the internal

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off. For example, imagine a decision with a payoff for one constituency of \$150 that leaves another constituency worse off by \$100. As a whole, the organization is better off by \$50. In economic terms, this decision is Kaldor-Hicks efficient. With these concepts in mind, the shareholder wealth maximization norm can be described as a bargained-for term of the board-shareholder contract by which the directors agree not to make Kaldor-Hicks efficient decisions that leave shareholders worse off.

*Id.* at 583–84.

<sup>72</sup> *Id.* at 550.

<sup>73</sup> *Cf.* Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J. L. & BUS. 63, 64 (2009) (“The board of directors is created by the state through its corporation statute and serves as a reminder of the public nature of the corporation.”). The distinction between theories such as director primacy and team production, which place corporate control in the hands of the board, and theories of corporate personality that grant the state broad discretion to use the board as a vehicle for regulation, will be made more clear in the discussion in the next Part distinguishing real entity theory from concession theory.

<sup>74</sup> Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 331–33.

decision making frequently implicates external parties.<sup>75</sup> Partly for this reason, I have sought in my recent scholarship to align the dominant theories of corporate governance with the primary theories of corporate personality.<sup>76</sup> However, in this Essay I focus on a divergence. While none of the three primary models of corporate governance support mandatory CSR as a normative matter, I hope to show that concession theory, one of the three primary corporate personality theories discussed below, may do so because of its focus on the corporation as a state creation intended to serve society at large under the umbrella of an active and engaged regulatory scheme—as opposed to the market-based orientation of the other models and theories.

Specifically, the three primary theories of corporate personality are aggregate theory, real/natural entity theory, and concession/artificial entity theory.<sup>77</sup> At the risk of oversimplifying, aggregate theory and real entity theory essentially presume corporations stand in the shoes of natural persons (shareholders in the former case, and the board of directors in the latter), and thus have available to them all the rights of natural persons in resisting government regulation.<sup>78</sup> Concession theory, on the other hand, views the corporation as fundamentally a state creation, and presumes the state has the right to regulate its creation as it sees fit.<sup>79</sup> Thus, it is most likely that concession theory, rather than aggregate or real entity theory, holds the most promise for mandatory CSR as conceived herein.<sup>80</sup> What follows is a further explanation of each of the three theories.

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<sup>75</sup> Cf. Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 113–14 (2013) (“Corporate law ... governs the ‘internal affairs’ of discrete legal entities within a given jurisdiction, each protected by a limited liability shield. Questions of global corporate accountability for human rights practices have therefore been viewed as beyond its reach. This Article challenges this accepted wisdom ....”).

<sup>76</sup> See Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 331 (2014) (“While one should be careful not to overstate the overlap between conceptualizations of the corporation for purposes of constitutional and corporate governance analysis ... I have previously aligned real entity theory with the director-primacy and team-production theories.”); Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, *supra* note 7, at 835 (“director-primacy/team-production theory and ‘real entity’ theory are synonymous”); Padfield, *The Dodd-Frank Corporation: More Than A Nexus-of-Contracts*, *supra* note 7, at 215 (“The ... real entity theory arguably captures the director-primacy view of the corporation.”).

<sup>77</sup> Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 330.

<sup>78</sup> *Id.* at 336–37.

<sup>79</sup> *Id.* at 333.

<sup>80</sup> Cf. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 767 (2005) (“[U]nder the real entity view, which is historically the dominant view of the

*A. Artificial Entity/Concession Theory*

In the 1819 Supreme Court 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. These are such as are supposed best calculated to effect the object for which it was created .... The objects for which a corporation is created 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>81</sup>

This formulation has commonly been associated with concession theory, also known as artificial entity theory.<sup>82</sup> As I have stated elsewhere, “of the three traditional theories of the corporation under constitutional law ... concession theory is the only one that legitimizes presumptive deference to state regulation.”<sup>83</sup> Interestingly, concession theory has no good counterpart among the primary theories of corporate governance discussed above.<sup>84</sup> This may be due to the fact that corporate governance theory is primarily concerned with the internal affairs of the corporation (that is, the allocation of power among the board and shareholders),<sup>85</sup> and thus is arguably more focused on private ordering. However, it should also be noted that excluding the state from analysis of the internal affairs of the corporation can also be explained as a purposeful move that shifts the debate to the private side of the public-private divide and furthers a deregulatory agenda consistent with the law and economics movement of the late 1970s.<sup>86</sup> In other words, to say that the corporation is a nexus of contracts but then ignore the state as one of the primary contracting parties assumes many things that are likely contestable.<sup>87</sup>

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corporation, CSR is normatively acceptable even when it does not contribute to the long-run welfare of the shareholders.”)

<sup>81</sup> *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636–37 (1819).

<sup>82</sup> See Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 332.

<sup>83</sup> *Id.* at 329.

<sup>84</sup> *Id.* at 330–31.

<sup>85</sup> See Bainbridge, *supra* note 1, at 549–50.

<sup>86</sup> See Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 340–41 (“[N]otable landmarks in the modern contract vs. concession ‘war’ include the emergence of the law and economics movement in corporate law in the 1970s ....”).

<sup>87</sup> Cf. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127 (2011) (“A corporation is not a contract. It is a state-created entity.”).

At the risk of moving too far afield, I think a recent blog post by Stephen Bainbridge regarding the recently decided *Hobby Lobby* case might be useful for further illuminating concession theory.<sup>88</sup> *Hobby Lobby* involved a challenge to the contraception insurance mandate of the Affordable Care Act.<sup>89</sup> Specifically, the for-profit corporation Hobby Lobby claimed an exemption under the Religious Freedom Restoration Act.<sup>90</sup> Among other things, the Court concluded that corporations have religious freedom rights.<sup>91</sup>

I was one of forty-four corporate and criminal law professors to sign on to a brief arguing that the religious freedom rights of the owners should not be ascribed to the corporation.<sup>92</sup> Stephen Bainbridge raised a number of challenges to this brief, including the following:

[M]any of the signers are associated with the corporate social responsibility movement. In their vocational role as advocates of that view, they argue

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<sup>88</sup> Compare 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/professorbainbridgecom/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.”), with Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 329 (“I want to ‘rehabilitate’ concession theory ... because (1) of the three traditional theories of the corporation under constitutional law ... 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>89</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Supreme Court explained:

We must decide ... whether the Religious Freedom Restoration Act ... permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners. We hold that the regulations ... violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

*Id.* at 2759.

<sup>90</sup> *Id.*

<sup>91</sup> See generally Stefan J. Padfield, *The Role of Corporate Personality Theory in Hobby Lobby*, BUSINESS LAW PROF BLOG (July 6, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/the-role-of-corporate-personality-theory-in-hobby-lobby.html](http://lawprofessors.typepad.com/business_law/2014/07/the-role-of-corporate-personality-theory-in-hobby-lobby.html) (noting that while Justice Alito’s majority opinion equated the closely held corporation with its controlling shareholders, and thus granted the corporation standing to claim interference with its free exercise rights, Justice Ginsburg argued in dissent that the corporation could not, as an artificial entity, exercise religion).

<sup>92</sup> Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

that corporations should consider the good of society when making corporate decisions. Except it seems when ... Catholic and other religiously-motivated shareholders want the corporation to address the social issue of abortion. I find all that more than just a little inconsistent.<sup>93</sup>

I believe concession theory helps explain why the positions referenced above are not inconsistent.

I begin with two fundamental propositions: (1) the republican form of government created by our Constitution, and of which our states are a part, is good and worth defending; (2) the grant of corporate status can be viewed as a subsidy from the state to further economic growth. The reason I say the grant of corporate status can be viewed as a subsidy is because without the limited liability shield provided by incorporation the investors/owners would be at risk of personal liability for the debts of the business.<sup>94</sup> Essentially, the state is shifting the cost of a certain subset of claims against the business from the owners to the claimants (at least in those cases where the corporation cannot satisfy the claim), and its justification for doing so is the overall net gain generated by allowing business to operate in the corporate form.<sup>95</sup> However, at the same time there is a risk that the benefits of incorporation will also foster powerful factions that could undermine the very state that created the corporation in the first place.<sup>96</sup> Thus, the state is justified in limiting the scope of the corporate subsidy to economic activity.

Therefore, when a group of shareholders proclaim that not only should they be allowed to benefit from the corporate form for economic gain, but

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<sup>93</sup> Stephen Bainbridge, *The Odd Inconsistencies in the Corporate Law Professor Brief in the Mandate Cases*, PROFESSORBAINBRIDGE.COM (Jan. 29, 2014, 5:23 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2014/01/the-odd-inconsistencies-in-the-corporate-law-professor-brief-in-the-mandate-cases.html>.

<sup>94</sup> See Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 337 (“If one ... 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>95</sup> See Martin Petrin, *Reconceptualizing the Theory of the Firm-from Nature to Function*, 118 PENN ST. L. REV. 1, 50 (2013) (“[L]imited liability is thought to offer two main advantages. First, it minimizes the risks associated with investing and thereby assists in aggregating capital. Second, it reduces the need for investors to monitor managers and fellow investors, which, in turn, reduces the cost of investing.”).

<sup>96</sup> See Stefan J. Padfield, *The Separation of Church and For-Profit Corporations*, BUSINESS LAW PROF BLOG (Feb. 23, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/02/the-separation-of-church-and-for-profit-corporations.html](http://lawprofessors.typepad.com/business_law/2014/02/the-separation-of-church-and-for-profit-corporations.html) (“[B]ecause of their unique ability to consolidate power, corporations are aptly considered by many to be one of Madison’s feared factions that threaten to undermine the very democracy that supports their creation and growth.”).

also to further individual political and religious beliefs, the state may properly assert that this was never a part of the bargain and thus the shareholders are over-reaching.<sup>97</sup> In fact, for the state to essentially subsidize the furtherance of shareholders' religious beliefs at the expense of employees implicates the separation of church and state and risks running afoul of the Establishment Clause.<sup>98</sup>

On the other hand, striking the right balance between shareholder empowerment and managerial discretion, as well as experimenting with secular corporate purpose to maximize overall gain, seems perfectly within the proper scope of the laboratory of the states. This view of the state as the creator of the corporate form, which it then contracts with the incorporators to use for the general welfare, is representative of concession theory.<sup>99</sup> Thus, of all the models and theories discussed herein, it is arguably only concession theory that has the ability to both provide a normative basis for mandatory

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<sup>97</sup> Cf. Ian S. Speir, *Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia* (Apr. 2011), available at <http://ssrn.com/abstract=1820868> ("Reservation clauses, reserving to the legislature a power to amend or repeal corporate charters, are included in the constitutions or corporation statutes of 49 states and the District of Columbia."); 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 ....").

<sup>98</sup> Cf. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 343-44 (2014) ("If RFRA exemptions from the mandate violate the Establishment Clause, then that is the end of RFRA exemptions, regardless of whether for-profit corporations are persons exercising religion, the mandate is a substantial burden on employers' anti-contraception beliefs, or the mandate is not the least restrictive means of protecting a compelling government interest."); Sasha Volokh, *Is RFRA Unconstitutional?*, THE VOLOKH CONSPIRACY (July 1, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/01/is-rfra-unconstitutional/> ("Justice Stevens is the only one who ever showed any sympathy for the argument that RFRA violates the Establishment Clause .... Nonetheless, Justice Stevens may have been right as a philosophical matter ....").

<sup>99</sup> Cf. Bainbridge, *supra* note 1, at 549.

Proponents of shareholder wealth maximization typically treat corporate governance as a species of private law, such that the separation of ownership and control does not in and of itself justify state intervention in corporate governance. In contrast, stakeholderists commonly treat corporate governance as a species of public law, such that the separation of ownership and control becomes principally a justification for regulating corporate governance so as to achieve social goals unrelated to corporate profitability.

*Id.*

secular CSR, while at the same time restricting the ability of individuals to leverage the corporate subsidy (which has arguably been provided solely to further societal economic growth) for personal religious evangelism, and there is nothing inherently “inconsistent” about this line-drawing.<sup>100</sup>

Finally, it has been suggested that *Hobby Lobby* meaningfully expanded the ability of corporations to pursue CSR activities. However, I believe the better view is that any expansion in this area attributable to *Hobby Lobby* is limited to closely held corporations with no complaining shareholders. Thus, while Lyman Johnson argued that in order “[t]o hold that close corporations were ‘free’ from the contraceptive mandate of the Affordable Care Act ... the Court ... had to determine that, under state corporate law, such companies are likewise ‘free’ from some imagined state legal mandate to maximize profits,”<sup>101</sup> Stephen Bainbridge noted that “*Hobby Lobby* ... is best understood as recognizing the well-established principle that shareholders of a closely held corporation can alter the default rules of corporate law, including the issue of corporate purpose” and that *Hobby Lobby* should not be understood as changing the default rule, “especially by way of what is arguably dicta.”<sup>102</sup> I agree with Bainbridge here because at the very least the doctrine of waste should allow any shareholder who disagreed to challenge corporate conduct that was pursued for purely religious or social responsibility purposes without any claimed shareholder wealth benefit,<sup>103</sup> and I do not believe *Hobby Lobby* changed that rule.<sup>104</sup> Thus, the rules of

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<sup>100</sup> Some have argued that forcing individuals to choose between operating a business in the for-profit corporate form or staying true to their individual First Amendment rights in all their business activities constitutes the imposition of an unconstitutional condition on the privilege of incorporation. I have addressed this challenge elsewhere. See Padfield, *Rehabilitating Concession Theory*, *supra* note 7 (“[T]here 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.”).

<sup>101</sup> Haskell Murray, *Lyman Johnson—Hobby Lobby, a Landmark Corporate Law Decision*, BUSINESS LAW PROF BLOG (July 2, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html](http://lawprofessors.typepad.com/business_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html).

<sup>102</sup> Stephen Bainbridge, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.?*, PROFESSORBAINBRIDGE.COM (July 3, 2014, 2:35 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/07/does-hobby-lobby-sound-a-death-knell-for-dodge-v-ford-motor-co.html>.

<sup>103</sup> See Jonathan Romiti, Note, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United*, 53 B.C. L. REV. 737, 740 (2012) (“Through suits based on the fiduciary duty of loyalty and the doctrine of waste, shareholders should be entitled to sue directors for use of the corporation’s wealth for what is often a nonbusiness purpose.”).

<sup>104</sup> See Joshua Fershee, *Does Hobby Lobby Create a First Amendment Out for Fiduciary Duties?*, BUSINESS LAW PROF BLOG (June 30, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/06/does-hobby-lobby-create-a-first-amendment-out-for-fiduciary-du](http://lawprofessors.typepad.com/business_law/2014/06/does-hobby-lobby-create-a-first-amendment-out-for-fiduciary-du)

shareholder wealth maximization and shareholder wealth satisfaction that I discussed earlier are best understood to remain the dominant default rules even after *Hobby Lobby*, and the problems this creates for mandatory CSR also remain, with concession theory thus also continuing to remain the most viable theory of corporate personality or governance to challenge that norm.<sup>105</sup>

### B. Aggregate Theory

In the 1886 Supreme Court case of *Santa Clara County v. Southern Pacific Railroad Co.*, the Court famously asserted that:

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>106</sup>

I have previously noted that “Morton Horwitz has convincingly argued that [*Santa Clara*] represented a shift to the aggregate view of the corporation.”<sup>107</sup> The aggregate view rejected the fiction of the corporation as an

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ties.html (“Can a corporation now choose to give a majority of its funds to a church, even if it harms the entity? I think no ....”).

<sup>105</sup> I have a friend who is fond of saying that all questions regarding the proper role of corporations in society are ultimately questions of political philosophy. For example, while concession theory may work as an argument against the majority’s opinion in *Citizens United* because the government in that case was clearly trying to regulate the corporation (see discussion of *Citizens United* *infra* Part IV), things get a bit trickier in *Hobby Lobby* because the government there is represented in both the ACA (imposing regulation) and RFRA (providing exemption). Put another way, even if one agrees that concession theory is the most accurate of the available theories of the corporation because it most realistically reflects the dominant role of the state in corporate issues, one is still left with the question of how the state should exercise its authority. At the risk of leaving an elephant standing unaddressed in the living room, I will beg the reader’s indulgence in accepting my claim that wandering down this particular rabbit hole is simply beyond the scope of this Essay. Ultimately, the fact that questions may remain to be answered after choosing concession theory as the best theory for mandatory CSR purposes does not equate to making that choice pointless. It is doubtful that any of the theories under consideration here answer all relevant questions, nor would denying any role for corporate theory at all be likely to stop the debating. On this last point, I stand with those who argue that corporate personality theory matters. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 68 (1992) (arguing that “the rise of a natural entity theory of the corporation was a major factor in legitimating big business and ... none of the other theoretical alternatives could provide as much sustenance to newly organized, concentrated enterprise”).

<sup>106</sup> *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

<sup>107</sup> Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 336.

artificial entity that was promoted by concession theory, and instead focused on the property rights of the underlying shareholders to conceive of the corporation as simply an association of individuals.<sup>108</sup> Furthermore, “[m]odern nexus-of-contracts theory is understood by many to carry on this aggregate theory tradition,”<sup>109</sup> and shareholder primacy is fairly understood as the corporate governance correlate.<sup>110</sup>

Importantly, contractarianism eschews government regulation. As Stephen Bainbridge has noted:

The contractarian model has important implications for a range of corporate law issues, most obviously the debate over the proper role of mandatory legal rules. As a positive matter, contractarians contend that corporate law is comprised mainly of default rules, from which shareholders are free to depart, rather than mandatory rules. As a normative matter, contractarians think this preference for default rules is just as it should be.<sup>111</sup>

Thus, because mandatory CSR likely requires meaningful government regulation, and aggregate theory is commonly associated with a de-regulatory

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 337.

<sup>110</sup> *Cf.* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 236 n.140 (1990) (“Advocates of shareholder primacy, while accepting an aggregate theory of the corporation, have responded to arguments in favor of broader participation in corporate governance by focusing on the unique position that shareholders occupy within the network of contracts.”). It should be noted that all three of the primary theories of corporate governance discussed herein routinely claim contractarian roots. *Cf.* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1200 (2010) (“In the canonical account, firm directors are charged with running the firm in the best interests of shareholders not because shareholders ‘own’ the corporation, but because shareholder primacy in firm governance is the ‘term’ that all of the parties to the corporate nexus would agree to if they actually sat around a bargaining table and negotiated with each other.”).

<sup>111</sup> Bainbridge, *supra* note 1, at 577–78; *see also id.* at 584 (“One of the chief tenets of contractarianism is that the law ought to facilitate private ordering.”). *Cf.* 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”); William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1525 (1982) (“[T]his Article rejects the notion that corporate status is a ‘privilege.’ It views corporation codes as a device ‘to reduce the transaction costs of private bargaining by providing a code of standard legal arrangements.’”). *But see* Bainbridge, *supra* note 1, at 585 (“Yet, the law should not always facilitate private ordering. In particular, regulatory intervention may be appropriate where there is a market failure. Welfare economics classically recognizes four basic sources of market failures: (1) producer monopoly, (2) public goods, (3) information asymmetries, and (4) externalities.”).

agenda, advocates of mandatory CSR will again need to look elsewhere for theoretical support.<sup>112</sup>

### C. Real/Natural Entity Theory

As I have previously written:

The problem with aggregate theory ... 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. 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. 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>113</sup>

As opposed to aggregate theory, which essentially boils the corporation down to an association of shareholders, real entity theory (also known as natural entity theory) places the board of directors at the control center of the corporation.<sup>114</sup> This view is certainly not without its critics,<sup>115</sup> but it

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<sup>112</sup> Perhaps aggregate theory could support mandatory CSR as a normative matter if it (1) denied shareholders the status of owners and (2) viewed the status quo of the shareholder wealth maximization norm as a function of market failure via regulatory capture and the race to the bottom. Cf. Bainbridge, *supra* note 1, at 547–48. (“[T]he ‘nexus of contracts’ or ‘contractarian’ model ... denies that shareholders own the corporation. Instead, it argues that shareholders are merely one of many factors of production bound together in a complex web of explicit and implicit contracts. Contractarian theory nevertheless continues to treat directors and officers as contractual agents of the shareholders, with fiduciary obligations to maximize shareholder wealth.”).

<sup>113</sup> Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 337.

<sup>114</sup> Cf. Bainbridge, *supra* note 1, at 553 (“[J]ust as the law treats the corporation as [an] entity for some purposes, the contractarian model should treat the corporation as a real entity to the limited extent necessitated by the need for an actual nexus within the firm capable of contracting with factors of production.”); *id.* at 560 (“[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.”); Blair & Stout, *supra* note 13, at 290 (“[T]he board of directors is the ultimate decision-making body of the corporation (and in a sense is the group most appropriately identified with ‘the corporation’) ...”) (quoting Robert C. Clark, *Agency Costs versus Fiduciary Duties*, PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985)).

<sup>115</sup> Cf. Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 331 n.17.

This decision [to equate director primacy and team production theory with real entity theory] is controversial at the very least because Stephen Bainbridge, the scholar most commonly associated with director-primacy theory, rejects the characterization. See [Stefan J. Padfield, *The*

is a useful way of distinguishing shareholder primacy from the director primacy and team production models in the corporate personality context, since all three claim contractarian and agency roots.<sup>116</sup> Regardless, while real entity theory arguably provides more support for voluntary CSR than aggregate theory (at least when real entity theory is aligned with team production theory), it still does not provide the theoretical support advocates of mandatory CSR are looking for like concession theory can because it, like aggregate theory, casts the corporation as a predominantly private actor with essentially all the concomitant rights against regulatory restraint.<sup>117</sup>

#### IV. WHY CORPORATE SOCIAL RESPONSIBILITY NEEDS CONCESSION THEORY MORE THAN EVER POST *CITIZENS UNITED*

Some have argued that corporate personality theory is irrelevant to determining the proper rights and responsibilities of corporations. They point to cases where the same personality theory has been used both to embolden and restrict corporations.<sup>118</sup> What really matters, these critics argue, is whether the goals of the relevant statute, for example, are advanced by treating corporations one way or another—there is simply no reason to always conceive of corporations as artificial entities or aggregates of

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*Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 843 n.41 (2013)] (citing “our multi-blog post discussions 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.’”).

*Id.*

<sup>116</sup> Cf. Padfield, *Rehabilitating Concession Theory*, *supra* note 7, at 338 (identifying “three versions of real entity theory ...: the organic view, the representative view, and the pragmatic view”).

<sup>117</sup> *Id.* at 335.

<sup>118</sup> See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1022–23 (2010) (“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.”) (citing John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669, 673 (1926)). *But see* Horwitz, *supra* note 101, at 68 (“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.”).

shareholders.<sup>119</sup> However, as I have previously argued, the blockbuster *Citizens United*<sup>120</sup> case provides a sound basis for concluding that corporate personality theory still carries great weight—even when, as there, the Justices deny it.<sup>121</sup>

It may seem counterintuitive to cite a case wherein the majority was silent on the issue of corporate personality theory, and the dissent expressly disavowed any role therefor,<sup>122</sup> as standing for the proposition that corporate personality theory matters. However, the academic commentary on *Citizens United* leaves little doubt that corporate personality theory was reinvigorated by the case<sup>123</sup> and, perhaps more importantly, the opinion generated intense interest in corporate personality by politicians and voters.<sup>124</sup>

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<sup>119</sup> See Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN ST. L. REV. 1, 43 (2013) (“[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.”); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1631 (2011) (“[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.”).

<sup>120</sup> See Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, *supra* note 7, at 833 (“In *Citizens United v. Federal Election Commission*, a 5-4 majority of the Supreme Court ruled that corporate political speech could not be regulated on the basis of corporate status alone.”).

<sup>121</sup> See *id.* (“Despite protestations to the contrary ... a closer reading of the *Citizens United* opinion reveals that both the majority and dissent not only adopted diverging theories of the corporation, but that those theories were likely dispositive.”). A similar role for corporate personality theory can be seen in *Hobby Lobby*, though perhaps at a more muted level. See generally Padfield, *The Role of Corporate Personality Theory in Hobby Lobby*, *supra* note 89 (noting that while Justice Alito’s majority opinion equated the closely held corporation with its controlling shareholders, and thus granted the corporation standing to claim interference with its free exercise rights, Justice Ginsburg argued in dissent that the corporation could not, as an artificial entity, exercise religion).

<sup>122</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 971 n.72 (2010) (Stevens, J., dissenting in part and concurring in part) (“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.” (internal citations omitted)).

<sup>123</sup> See Stephen Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html>.

<sup>124</sup> 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.”). Cf. Blair & Stout, *supra* note 13, at 303 n.13

In particular, David Yosifon has argued that even if one did not favor some type of mandatory CSR pre-*Citizens United*, that case should cause some reconsideration of that position:

[I]f we cannot as a matter of constitutional law keep corporations out of our democracy, then we must as a matter of corporate law have more democracy in our corporations. After *Citizens United*, we must begin to restructure corporate law to require boards of directors to actively attend to the interests of multiple stakeholders at the level of firm governance.<sup>125</sup>

This is so, according to Yosifon, because combining a shareholder wealth maximization norm with unfettered political speech rights virtually guarantees maximizing the negative externalities created by corporations. Yosifon describes the relevant process as follows:

[C]onventional corporate theory does recognize that because of their relative power, firms can sometimes overreach with respect to non-shareholders by manipulating wages, prices, and perceptions. Even where such problems emerge, however, the standard account insists that the solution does not reside in altering the shareholder primacy norm at the heart of firm governance. Instead, firms should be restrained from engaging in such exploitative conduct by external governmental regulation, such as labor laws, consumer protection statutes, and environmental codes.... But corporations, in general, enjoy competitive advantages over consumers and workers in the competition for regulatory favor.... Therefore, it is illogical to expect that “regulation” will be able to contain the excesses of the shareholder primacy corporation. Defenders of shareholder primacy in firm governance rarely address the public choice problem directly, but when they do, they voice a position similar to that of liberal critics of corporations—they claim that the proper response to the problem is to insulate the political and regulatory realms from corporate influence. But conservative and critical corporate scholars have failed to bring corporate theory together with free speech analysis and have failed to recognize that the First Amendment, and the values it represents, forecloses the kind of regulation that would be necessary to insulate politics from corporate influence and vindicate shareholder primacy.<sup>126</sup>

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(“[P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function.”) (quoting E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146–48 (1932)); *id.* at 325, n.202 (“[U]nder a mediating hierarchy system, team members’ rewards from team production will be in part determined by political power.”).

<sup>125</sup> David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1197 (2010).

<sup>126</sup> *Id.* at 1200–04. Shortly before this Essay went to print, a series of papers were published advancing these arguments further. See Leo E. Strine & Nicholas Walter, *Conservative*

Thus, to whatever extent concession theory may have been marginalized pre-*Citizens United*, it is now once again arguably relevant due to it being the best suited among the corporate governance and personality theories to support a movement to rein in the negative externalities flowing from *Citizens United* as described by Yosifon, either directly via legislative attempts to overturn at least some portion of the opinion, or indirectly via legislative mandates for increased corporate accountability to stakeholders.

## V. CRITICISMS

There should be no doubt that imposing mandatory consideration of stakeholders on directors in carrying out their oversight responsibilities carries meaningful risk of undermining the wealth creation and innovation benefits of the corporate form as currently constituted.<sup>127</sup> This general

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*Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United* (Harv. Law Sch. John M. Olin Ctr. Discussion Paper No. 788, Aug. 2014), available at <http://ssrn.com/abstract=2481061> (“*Citizens United* ... undercuts conservative corporate theory’s reliance upon regulation as an answer to corporate externality risk, and strengthens the argument of its rival theory that corporate managers must consider the best interests of employees, consumers, communities, the environment, and society—and not just stockholders—when making business decisions.”); Stephen M. Bainbridge, *Corporate Social Responsibility in the Night Watchman State: A Comment on Strine & Walker* (UCLA Sch. of Law, Law-Econ Research Paper No. 14-12, Sept. 2014), available at <http://ssrn.com/abstract=2494003> (“This essay argues that Strine and Walker’s analysis is flawed in three major respects.”); David G. Yosifon, *The Citizens United Gambit in Corporate Theory: A Reply to Bainbridge on Strine and Walter* (Santa Clara Univ. Legal Studies Research Paper No. 4-14, Oct. 2014), available at <http://ssrn.com/abstract=2510967> (“In this brief essay, I criticize Bainbridge’s critique, and argue that the *Citizens United* gambit in corporate theory is indeed a compelling challenge to shareholder primacy theory.”).

<sup>127</sup> See D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1008 (2008) (“The inevitable result would be an increase in the cost of public equity capital that, in turn, might prompt many companies to search for a more hospitable host for incorporation.”). *But cf.* Robert Ashford, *A Socio-Economic Perspective on the Theory of the Corporation, the Duties of Corporate Fiduciaries, and the Power of the State* [working title], 11 (draft of July 4, 2014, on file with author) (noting that “[w]hen engaging in corporate planning, corporate fiduciaries must generally delineate time horizons in connection with particular corporate plans” but arguing that when they do so “their obligation is to maximize corporate wealth, not shareholder wealth (which generally is dependent on factors distinct from the perpetual corporate interests)”).

Even shareholders who have no present intention of selling their shares (and who may therefore be said to have a time horizon identical to the corporation) may at any time come across a better investment opportunity. Selecting a time horizon for corporate wealth-maximization with the intent of maximizing the particular wealth of any group of shareholders would risk failing to maximize wealth for (and therefore do

criticism has been well vetted elsewhere, and I will not rehash the debate here, though my declining to do so should not be construed as my being dismissive of relevant concerns regarding statism.<sup>128</sup> However, I would like to address a more recent criticism, which is that to the extent something like mandatory CSR is desirable, it is far better to experiment with such a mandate using alternative entities where the potential costs are minimized. Specifically, I am talking here about benefit corporations.<sup>129</sup>

At the very least, one response to this claim is that it effectively amounts to yet another marginalization of CSR.<sup>130</sup> While perhaps more facially impressive than permissive constituency statutes, relegating CSR to specifically designated “social enterprise” forms leaves the vast majority

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economic injustice to) others. There is no stable, unchanging aggregate of shareholders with a discernible, homogenous time horizon for which wealth can be maximized at every point in time ... no stable group of shareholders to which corporate wealth-maximizing fiduciary duties can be held to run.

*Id.*

<sup>128</sup> See, e.g., Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 438 (2010) (“[P]rivate decision making ... typically results in better outcomes than ... public/regulatory decision making ... [and] effort[s] to diminish respect for choice and liberty of contract correlates with paternalistic efforts to enlarge the power of government ... [which] risks government failure as well as the sub-ordination of more citizens.”).

<sup>129</sup> See generally J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 23 (2011) (“Many social entrepreneurs believe that their fourth-sector enterprises need to be seen as entirely unique charitable and capitalistic entities, to be differentiated from nonprofits, which are perceived to be less efficient than for-profits, and to be differentiated from for-profits, which are fixated primarily on financial value.”). Cf. Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863 (2013).

Critics, however, question the substantive enforcement mechanism of the benefit corporation, a third-party auditing standard that they self-apply to evaluate whether they are effectively providing for the public good. This Note concurs, but proposes a statutory construction and litigation strategy that courts and plaintiffs can apply to ensure that benefit corporations do not shirk their duty to the public. Through the express private right of action known as the “benefit enforcement proceeding,” this Note contends that shareholders and dissenting directors can and should seek injunctive relief for breaches of the procedural “duty of consideration of non-shareholder interests” by the corporation and its board of directors.

*Id.*

<sup>130</sup> Cf. Amelia Young, *CSR is being marginalized*, FINANCIAL POST (last updated Jan. 5, 2009, 2:03 PM), [http://www.financialpost.com/being+marginalized/1096752/story.html?\\_\\_federated=1](http://www.financialpost.com/being+marginalized/1096752/story.html?__federated=1) (“CSR is here to stay; however, the face of it needs to evolve from being a niche discipline to a core element of sound business practice.”).

of the most important entities free to continue placing shareholder wealth ahead of social responsibility. Thus, accepting a benefit corporation limitation on mandatory CSR could amount to creating CSR “ghettos” in the vast economic landscape.<sup>131</sup>

#### CONCLUSION

The three primary models of corporate governance are director primacy, shareholder primacy, and team production theory. While successful to varying degrees in accurately describing some portion of the current state of actual affairs, as well as advancing at least defensible normative positions, none of them respond to the needs of those who would advocate for corporate social responsibility in the form of mandatory provisions such as constituency statutes that are enforceable by stakeholders. Rather, such advocates must look elsewhere, and this Essay has argued that corporate personality theory, particularly concession theory, may provide a strong foundation from which to advance the goal of more socially responsible corporations. In addition, David Yosifon has noted that challenges to the shareholder wealth maximization norm have been absent from what otherwise were significant corporate governance reforms in the forms of Sarbanes-Oxley and Dodd-Frank, at least in part because of the lack of any compelling narrative to support a shift away from shareholder wealth maximization.<sup>132</sup> Concession theory may well provide the needed narrative to overcome the hegemony of shareholder wealth maximization and the theories of corporate governance that dominate the current debate to the exclusion of enforceable corporate social responsibility norms.

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<sup>131</sup> Cf. Brian Walker, *Don't Bother with the "Green" Consumer*, HARV. BUS. REV. (Jan. 23, 2008, 9:00 AM), [http://www.hbrgreen.org/2008/01/dont\\_bother\\_with\\_the\\_green\\_con.html](http://www.hbrgreen.org/2008/01/dont_bother_with_the_green_con.html) (“Small, streamlined green brands that truly appeal to the environmentalist consumer can’t reach the mainstream. Those companies get stuck in a green ghetto—virtuous, but limited in scope.”).

<sup>132</sup> DAVID YOSIFON, *The Corporate Paradox*, THE CORPORATE SOCIAL RESPONSIBILITY PODCAST (Jan. 28, 2014) (downloaded using iTunes).