

## NOTE

### IMPERSONAL PERSONHOOD: CRAFTING A COHERENT THEORY OF THE CORPORATE ENTITY

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*Corporate legal personhood is a baffling and elusive concept. Are corporations persons and, if so, what does this mean? Ascribing the moniker of “person” to a corporation can conjure up the idea that a corporate entity is entitled to all the natural and legal rights that natural “personhood” entails. This, however, ignores that there are different kinds of “legal person” and that the scope of their respective rights differs based on the purpose of the personhood they are given. This Note posits that the law grants corporations entity-hood primarily to centralize contractual rights and obligations. This purpose, this Note contends, is the root of the “nexus of contracts” theory—a theory which suggests that corporations are not persons, but webs of contracts between their stakeholders. However, as David Gindis has noted, the nexus does not replace the corporate entity—it is the corporate entity. Further, nexus of contracts can and should be repurposed as a theory of corporate entity-hood, as it offers a theoretical framework for defining and limiting the scope of this ambiguous concept. Corporations should only be granted the rights necessary to fulfill this particular kind of personhood’s contractarian purpose—and this fits within the Bill of Rights’ individual-rights framework. Such an understanding meshes Gindis’s interpretation with David Ciepley’s proposal for a separate category of “corporate person” in a way that preserves Ronald Coase’s purposing of the firm in defining corporate rights. This Note looks at the right to freedom of speech as an example of the nexus for contracts theory’s application and concludes that this right is not strictly necessary to fulfill the contractarian purpose of corporate entity-hood. This new theory can and should be*

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*applied to other rights as well, by courts and policymakers alike.*

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INTRODUCTION

On a sweltering summer afternoon in 2011 at the Iowa State Fair in Des Moines, as patrons indulged in such delicacies as pork ribs, corn on the cob, funnel cakes, and lemonade, former Massachusetts governor and then-presidential candidate Mitt Romney made his now-infamous characterization of the ill-understood legal status of corporations: “Corporations are people, my friend.”<sup>1</sup> Romney was referring to who ultimately benefits from corporate activities: the natural persons

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<sup>1</sup> Philip Rucker, *Mitt Romney Says ‘Corporations are People,’* WASH. POST (Aug. 11, 2011), [https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html) [https://perma.cc/U6JF-3PRE]. Romney was responding to a member of the audience who suggested raising taxes on corporations as an alternative to raising taxes on “real” people. *Id.* Romney is technically right, though for the wrong reason (the profits a corporation makes belong to the corporation, not the people “behind” it), and this mischaracterization of corporate personhood highlights the need for a coherent theory of corporate entity-hood. See *infra* Part II.

behind them.<sup>2</sup> Clearly, though, Romney's characterization touched a nerve. Some in attendance, unsurprisingly, were rather dissatisfied with the comment: "No, they're not!"<sup>3</sup> The personification of corporations receives much ridicule, sometimes with little thought given to its utility, because the unqualified suggestion that corporations are "persons" leads to wild inferences, not the least of which is that society should grant corporations all the rights of living humans.<sup>4</sup> The Supreme Court has notably treated corporations as persons (while also bizarrely ignoring this status when convenient, as discussed in subpart II.B., *infra*),<sup>5</sup> but the real problem is that, while corporations are apparently "persons" in some sense, it is not immediately clear *what* that means. What rights do corporations get? This Note suggests that a coherent answer is hidden within a theory that is widely understood to cut against corporate personhood entirely: nexus of contracts.

Nexus of contracts has particular theoretical appeal because it captures a central tenet of corporate purpose: people form corporations as a means of consolidating contractual rights and obligations—and to minimize the costs of doing business, whatever that business might be.<sup>6</sup> The nexus theory, while really a theory of the firm, still has application as a theory of the corporation; the contractarian purpose can form the basis of a tenable theory of corporate personhood and the rights that come with it.

Critics have attacked the nexus theory on the grounds that it is not consistent with legal personhood because it does not acknowledge the corporation as a separate entity, and the boundaries of the nexus are not clear.<sup>7</sup> However, the nexus

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Romney's comment was met with equal vitriol on the internet. See, e.g., Jedke Mekt, Comment to *Romney: Corporations Are People Too*, YOUTUBE (Aug. 12, 2011), <https://www.youtube.com/watch?v=FXUsRedO4UY&lc=ugxJikyv5EMPnCn1iBV4AaABAg> [<https://perma.cc/23MT-P9LT>] ("If corporations are people, when will Romney be pushing for [investment banking corporation] Goldman Sachs to go to prison?"). But see Jonathan Chait, *Romney is Right: Corporations are People*, NEW REPUBLIC (Aug. 11, 2011), <https://newrepublic.com/article/93518/romney-right-corporations-are-people> [<https://perma.cc/JD9J-NVRZ>], for a defense of the comment and an explanation of what Romney may have been referring to.

<sup>4</sup> See, e.g., *Why Corporations Are Not People*, MOVE TO AMEND, <https://move.toamend.org/why-corporations-are-not-people-0> [<https://perma.cc/76WL-AMR5>] (making a general argument against a blanket grant of personhood to corporations, without discussing whether specific aspects of personhood are necessary for corporations to function).

<sup>5</sup> See *infra* section I.B.1.

<sup>6</sup> See *infra* section I.C.2.

<sup>7</sup> See *infra* subpart I.B.

theory can be reconciled with corporate legal personhood—a reconciliation David Gindis at the University of Hertfordshire has already suggested.<sup>8</sup> This Note goes a step further by suggesting that this reconciliation has important ramifications for the purpose and scope of corporate personhood. To that end, this Note's thesis is that corporate personhood is a means to an end—centralizing contractual obligation—and, most importantly, the scope of a corporation's rights should be defined and limited accordingly. This examination of purpose and scope builds on David Ciepley's suggestion for a distinct and separately developed breed of corporate person.<sup>9</sup> This Note takes one infamous example of the debate over corporate rights—freedom of speech—and applies the nexus *for* contracts theory.

A revised understanding of the nexus of contracts theory that is consistent with corporate legal personhood is a step toward demystifying the concept of corporate personhood and, most importantly, creating a framework that defines and limits this elusive concept. Noting that corporations are people must come with some qualification (which Ciepley has indicated),<sup>10</sup> and this qualification must be backed by a coherent theoretical framework. By applying this retooled theory in the context of corporate rights, this Note aims squarely at that goal.

## I

### BACKGROUND: NEXUS OF CONTRACTS AND LEGAL PERSONHOOD

#### A. Brief History of the Contractarian Corporation

In this subpart, I provide the history, background, and an explanation of the nexus of contracts theory. Such background, as well as the theoretical hurdles the nexus theory faces, is crucial to understanding the theory as a framework for corporate entity-hood. The theory itself finds its origins in Michael C. Jensen and William H. Meckling's 1976 article, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, in which they suggested the nexus framework

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<sup>8</sup> See David Gindis, *The Nexus Paradox: Legal Personality and the Theory of the Firm* (May 1, 2013) (published Ph.D. thesis, University of Hertfordshire), at 170–85, <http://uhra.herts.ac.uk/bitstream/handle/2299/11351/12005578%20Gindis%20David%20final%20PhD%20submission.pdf?sequence=1> [<https://perma.cc/WK6H-8JM3>] (reconciling the nexus theory with corporate entity-hood).

<sup>9</sup> See David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 152 (2013) (“[Corporations] are neither public nor private, but should be placed in a separate theoretical, legal, and policy category—the category of the corporate.”).

<sup>10</sup> See *id.* at 154–55.

as a means of understanding the corporation as a vehicle for minimizing agency costs via contract.<sup>11</sup> Even before this, however, many of the nexus theory's proponents consider Ronald Coase to have been the progenitor of the contractarian theory of the corporation.<sup>12</sup>

### 1. *From Ronald Coase to Jensen and Meckling*

The nexus theory posits that the corporation is not a separate entity but rather a web (or a nexus) of contracts between the corporation's stakeholders.<sup>13</sup> Jensen and Meckling, in their 1976 article, argue that the corporation, because it is not an individual, does not itself have a purpose and cannot have duties and responsibilities independent of its stakeholders.<sup>14</sup> They liken the corporation to a market, arguing that it is not common—and would be odd—to refer to the market as an individual in describing its behavior, and that to describe the corporation as an individual is a mischaracterization.<sup>15</sup>

For a number of years, many prominent legal scholars considered nexus of contracts to be the predominant theory of the corporation.<sup>16</sup> This, I suggest, is because of its inherent appeal: it captures the essence of corporate purpose as a vehicle for contracts (this is why corporate legal personhood is a practical necessity, contrary to Jensen and Meckling's thesis).<sup>17</sup> However, as previously stated, the nexus theory is opposed to the idea that the corporation is a separate entity;<sup>18</sup> why is this so? The nexus theory clings to what its proponents view as a Coasean ideal, where fiduciary duties and other "default rules" are subject to the establishment and modification of contract.<sup>19</sup>

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<sup>11</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–11 (1976) (suggesting that the corporation is a nexus of contracts and that the utility of the corporation is as a vehicle to minimize agency costs).

<sup>12</sup> See Charles R.T. O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE U. L. REV. 1247, 1247 (2012). See generally R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–98 (1937) (outlining reasons people form firms).

<sup>13</sup> Jensen & Meckling, *supra* note 11, at 311.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> O'Kelley, *supra* note 12, at 1247 ("This account, which has dominated legal scholarship for four decades, describes a corporation as a nexus of contracts . . .").

<sup>17</sup> See *infra* section I.C.2.

<sup>18</sup> Jensen & Meckling, *supra* note 11, at 311.

<sup>19</sup> Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1268 (1999).

One can trace the line of scholarship that advocates for a contractarian understanding of the corporation to Ronald Coase's seminal paper *The Nature of the Firm*, published in 1937.<sup>20</sup> In that paper, Coase sought to answer the question of why and under what circumstances individuals choose to form firms (not just corporations involving multiple individuals, but also partnerships and other business organizations) instead of contracting through the market on their own to achieve their goals; indeed, Coase begins the paper by lamenting that law and economics scholars appropriate the concept of the "firm" without a clear definition of the term.<sup>21</sup> Coase ultimately concludes that, although one would expect that it would always be more efficient to do business via individual contract instead of forming a firm,<sup>22</sup> there must be some cost of this individualistic approach that creates the incentive to organize a firm.<sup>23</sup> Significantly, Coase hints at the importance of the separate corporate entity in eliminating these "contract costs."<sup>24</sup> He writes that "[i]t is true that contracts are not eliminated when there is a firm *but they are greatly reduced.*"<sup>25</sup> Instead of forming individual contracts with others, to use their specialized and necessary know-how, parties form one agreement with and through the firm that grants authority to the entrepreneur (or agent of the corporation) to "direct the other factors of production."<sup>26</sup> Coase, long before Jensen and Meckling, touched on contract as a key aspect of the purpose and function of the firm (and, specifically, the corporation involving multiple individuals). A reading of Jensen and Meckling suggests that they missed the underlying importance that Coase places on the

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<sup>20</sup> O'Kelley, *supra* note 12, at 1247–48, 1247 n.3. O'Kelley claims that Jensen and Meckling's nexus of contracts theory is really a misappropriation and misunderstanding of Coase's thesis; nevertheless, O'Kelley concedes, the Jensen and Meckling theory is part of a line of scholarship that can be traced back to Coase. *See id.*

<sup>21</sup> *See* Coase, *supra* note 12, at 390 ("Our task is to attempt to discover why a firm emerges at all in a specialised exchange economy."); *see also id.* at 386 ("For instance, it is suggested that the use of the word 'firm' in economics may be different from the use of the term by the 'plain man.' Since there is apparently a trend in economic theory towards starting analysis with the individual firm and not with the industry, it is all the more necessary not only that a clear definition of the word 'firm' should be given but that its difference from a firm in the 'real world,' if it exists, should be made clear." (footnotes omitted)).

<sup>22</sup> *See id.* at 390 (considering and dismissing reasons why individuals do not solely use the "price mechanism" in their economic affairs).

<sup>23</sup> *Id.* ("The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.")

<sup>24</sup> *See id.* at 391.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.*

firm as a separate entity—contracts formed through and with a separate entity vastly reduce the number of agreements that would otherwise have to be formed between Coase’s “factors of production”<sup>27</sup> and each of the individual stakeholders.

## 2. *The Firm v. the Corporation: A Crucial Distinction*

An important disjuncture to note in the development of the contractarian theory of the corporation (as opposed to a conception of the firm) is the obfuscation of the corporation and the firm. Coase’s theory is one of the firm,<sup>28</sup> and Jensen and Meckling present theirs as a theory of the firm as well.<sup>29</sup> However, the two concepts—the corporation and the firm—are not the same. As Lynn Stout notes, a firm, broadly defined, is an organized business enterprise between multiple persons.<sup>30</sup> A corporation is a creature of law structured according to certain legal specifications; not all corporations are firms (i.e., closely held corporations with single shareholders) and not all firms are corporations (i.e., partnerships, etc.).<sup>31</sup> As Stout goes on to note, “[a] theory of the firm is not a theory of the corporation.”<sup>32</sup> While Jensen and Meckling (and Coase before them) might be on to something regarding corporate purpose, they describe economic theories of the *firm*, not legal theories of the *corporation*.<sup>33</sup>

Such obfuscation—between concepts of the firm and the corporation—could have precipitated the nexus of contracts theory’s divergence from the legal personality of the corporation.<sup>34</sup> The conception of the corporation as (and always as) a firm lends itself nicely to a focus on agency costs in the corporate form<sup>35</sup>—and this is precisely what Jensen and Meckling set out to address.<sup>36</sup> In turn, the misguided notion that a corporation’s shareholders are principals and its directors and

<sup>27</sup> *Id.*

<sup>28</sup> See Coase, *supra* note 12, at 386.

<sup>29</sup> See Jensen & Meckling, *supra* note 11, at 305 (outlining a theory of the ownership structure of the firm).

<sup>30</sup> Lynn Stout, *The Economic Nature of the Corporation*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 337, 337–38 (Francesco Parisi ed., 2017) [hereinafter Stout, *Economic Nature*].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 338.

<sup>33</sup> See Coase, *supra* note 12, at 386. See generally Jensen & Meckling, *supra* note 11 (integrating elements of agency, property rights, and finance to develop a theory of the ownership structure of the firm).

<sup>34</sup> See Stout, *Economic Nature*, *supra* note 30, at 338.

<sup>35</sup> *Id.*

<sup>36</sup> See Jensen & Meckling, *supra* note 11, at 357 (suggesting that the utility of the corporation is as a vehicle to minimize agency costs).

officers are agents of the shareholders fits well within the agency cost paradigm of corporate theorization.<sup>37</sup> One can touch on some overarching purpose for business entities in describing a theory of the firm, but such a theory's descriptive qualities as applied to specific legal forms are dubious at best. The difficulties this divergence presents for the nexus theory, as well as the criticisms of the theory that stem from them, are outlined in subpart I.B, *infra*.

## B. Contractarianism *v.* the Corporate Entity

The nexus of contracts theory faces theoretical hurdles. I discuss two that are particularly relevant to this Note's thesis: legal personhood and boundaries of the nexus. These two are interconnected (the second stems from the first) and are predominantly why the relevance of the nexus of contracts theory is threatened in many circles. These issues provide the background for the nexus theory's paths forward and those alternatives' implications in formulating a coherent theory of corporate legal personhood.

### 1. Legal Personhood

Perhaps the most significant theoretical hurdle that the nexus of contracts theory faces is the reality that the corporation is a state-sanctioned entity that enjoys rights appurtenant to its status as a legal "person": signing contracts (through a human agent), owning property, and suing in its own name, among others.<sup>38</sup> Jensen and Meckling's theory, in its unaltered form, refuses to acknowledge this reality; it contends that the corporation is not an entity at all, and it is most certainly not a person in the legal meaning of the term (which is the former's logical corollary).<sup>39</sup> With the U.S. Supreme Court's decision in *Citizens United v. FEC*,<sup>40</sup> as well as *Burwell v. Hobby Lobby*,<sup>41</sup> these hurdles have become all the more significant; Supreme Court jurisprudence seems to be moving in the direction of treating corporations as persons in the legal sense (even if not being explicit or logically consistent in this regard),

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<sup>37</sup> See Stout, *Economic Nature*, *supra* note 30, at 338.

<sup>38</sup> Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 MICH. L. REV. 1127, 1127 (2011) ("A corporation is not a contract. It is a state-created entity. It has legal personhood with the right to form contracts, suffer liability for torts, and . . . make campaign contributions.").

<sup>39</sup> Jensen & Meckling, *supra* note 11, at 311.

<sup>40</sup> 558 U.S. 310 (2010).

<sup>41</sup> 134 S. Ct. 2751 (2014).

not away from it as the traditional nexus theory's proponents would have.<sup>42</sup>

Legal personhood is a status sanctioned and granted by the state.<sup>43</sup> A major criticism of the nexus of contracts theory is that it neglects to acknowledge the role of the state in chartering the corporation.<sup>44</sup> While the corporation may functionally appear to be a "nexus" of contracts, it cannot be created through contract alone.<sup>45</sup> Most importantly, at least as far as the state is concerned, the corporation does actually exist as an entity separate from its stakeholders and the contracts between those stakeholders.<sup>46</sup> If, in the world Jensen and Meckling describe, the corporation was not a separate entity, state-sanctioned default rules would not exist (or, at least, would exist in a very different form).<sup>47</sup> One example is the fiduciary duties that directors owe the corporation; in the nexus of contracts world as posed by Jensen and Meckling, such fiduciary duties would not exist outside of what the stakeholders contracted for (and would not be owed to a "corporation" in any case, since the corporation is not a person, and indeed is not anything other than that ever-elusive, intangible nexus).<sup>48</sup> Instead, if such duties existed, they would be contractual in nature and presumably owed to stockholders directly (or whichever other party contracted for them).<sup>49</sup> This notion has contributed to the pervasiveness of the shareholder value (or supremacy) theory, which lends itself nicely to the nexus of contracts framework.<sup>50</sup> As corporate theorists have

<sup>42</sup> The ruling in *Citizens United*, in particular, builds on previous case law, presuming the corporation's status as a speaker for First Amendment purposes as an individual apart from its stakeholders. See *Citizens United*, 558 U.S. at 365.

<sup>43</sup> Legal personhood, after all, is a designation conferred by the law entitling its holder to certain rights, such as holding property and standing to sue. See Alexis Dyschkant, Note, *Legal Personhood: How We Are Getting It Wrong*, 2015 U. ILL. L. REV. 2075, 2076 (2015).

<sup>44</sup> Hayden & Bodie, *supra* note 38, at 1127 (noting that the corporation is a state-created entity, in direct conflict with the nexus of contracts theory).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (noting that the corporation is an entity).

<sup>47</sup> Macey, *supra* note 19, at 1268 (noting that adherents to the nexus of contracts theory argue that fiduciary duties must be contracted for in the corporate context and that they are subject to contractual modification, even if they are "default" rules).

<sup>48</sup> See *id.*

<sup>49</sup> *Id.*

<sup>50</sup> This refers to the idea that shareholders are the owners and residual claimants of the corporation; absent a separate corporate entity (as posited by the nexus theory), this becomes easier to imagine. See LYNN STOUT, THE SHAREHOLDER VALUE MYTH 2-3 (2012) [hereinafter STOUT, VALUE MYTH]; see also William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L.

moved away from the shareholder value theory (or “myth,” to borrow terminology from Lynn Stout), the nexus theory’s relevance has diminished.<sup>51</sup>

## 2. *Boundaries of the Nexus*

This second challenge is a corollary of the first: if the corporation is not a separate entity with clearly delineated boundaries, but is rather a web of interconnected contracts among its various stakeholders, then how far does this web extend?<sup>52</sup> The nexus of contracts theory provides no clear answer,<sup>53</sup> and any possible answer depends on the way the question is asked.

One way to illustrate the theoretical challenge this issue presents is via hypothetical. If Person A buys a shiny new Great American Car from the local Great American Car dealership, A has formed a contract with the dealership, which in turn has a contract with Great American Car Company (a corporation).<sup>54</sup> This suggests a question: Given A’s connection via contract to Great American Car Company, is A now part of the nexus that is the corporation? What if A sells her Great American Car to Person B? Is B now part of the nexus? Who is and is not part of the nexus of contracts that is “Great American Car Company”? Another way to consider these questions is to think about who is potentially going to be held liable when Person C sues Great American Car Company. The answer to this last question, of course, is that none of these parties (except Great American Car Company itself, whatever that might mean) generally will be.<sup>55</sup> As a practical matter, the corporation exists as a separate legal entity regardless of what Jensen and Meckling’s theory might suggest; at least, the law treats it as such.<sup>56</sup> Without this reality, as the hypothetical demonstrates, the corporation’s boundaries are unclear at best and nonexistent at worst.

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REV. 407, 420 (1989) (“The separation of ownership and control . . . disappears in the new economic picture.”).

<sup>51</sup> See *id.*

<sup>52</sup> See Bratton, *supra* note 50, at 420; 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, 827–30 (1998).

<sup>53</sup> See *id.*

<sup>54</sup> This discussion is drawn from a hypothetical suggested by Professor Lynn Stout. For Stout’s own discussion of the car company hypothetical, see Stout, *Economic Nature*, *supra* note 30, at 346–47.

<sup>55</sup> Great American Car Company, as a separate legal entity in reality, has standing to sue and can be sued in its own name. See Hayden & Bodie, *supra* note 38, at 1127.

<sup>56</sup> See *id.*

### C. Nexus at a Crossroads

There are two primary paths forward for the nexus of contracts theory. These two alternatives are (1) maintaining the divide and using the nexus idea to argue against the treatment of the corporation as a separate entity and (2) reconciling the theory with reality to acknowledge the corporation's separate entity status. This Note advocates for the second alternative.

#### 1. *Division: The Contractarian Ideal?*

One potential response for the nexus of contracts theory's proponents is to simply stay the course and maintain that the corporation, despite its treatment by courts and the state, is nothing more than a nexus of contracts. After all, one of the motivating factors of Jensen and Meckling's original thesis was the corporate responsibility movement of the 1970s; Jensen and Meckling were providing the theoretical framework for an ideological argument against corporate regulation.<sup>57</sup> Visualizing the corporation as a legal entity separate from its stakeholders arguably gave proponents of enhanced corporate regulation the framework they needed to ascribe obligations and liabilities to these entities themselves.<sup>58</sup> Within Jensen and Meckling's framework, it makes little sense to regulate the corporation as an entity because, of course, there exists nothing other than the contracts between the relevant stakeholders.<sup>59</sup> Thus, government regulation of the monolithic corporate entity is little more than state infringement on these private agreements and their respective parties.<sup>60</sup>

However, it is not clear that the contractarian theory of the corporation even supports less regulation of corporations.<sup>61</sup> Instead, Professor Joseph F. Morrissey argues that if striving for a contractarian ideal in which the sanctity of private contract is to be protected, policy-makers should understand and accept the post-*Lochner* notion that *ex ante* regulation is crucial to structuring a system of corporate law and governance

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<sup>57</sup> See Jensen & Meckling, *supra* note 11, at 311 ("Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as . . . 'does the firm have a social responsibility' is seriously misleading.").

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* (arguing that such treatment and regulation of the corporation wrongfully characterizes it as a separate individual).

<sup>61</sup> See Joseph F. Morrissey, *A Contractarian Defense of Corporate Regulation*, 11 TRANSACTIONS: TENN. J. BUS. L. 135, 136 (2009).

where this is so.<sup>62</sup> Later in this Note, I discuss why state-sanctioned legal personhood and the regulation that comes with it still further support the contractarian ideal.<sup>63</sup>

Another aspect of this approach is the idea that shareholders are the center of the corporation and are thus its owners and controlling stakeholders.<sup>64</sup> Without the corporate entity at the center, it is easy to visualize shareholders as being at the center of the nexus of contracts.<sup>65</sup> Part of the nexus of contracts theory's staying power, I and others suggest, has been its complementariness with the shareholder value or shareholder primacy theory, which suggests that the primary function and purpose of a business corporation is to maximize the return on investment of its shareholders.<sup>66</sup> However, as Lynn Stout suggests, this relies on a simple amalgamation of shareholder interests and encourages short-sighted profit maximization, potentially at the expense of long-term investment and growth.<sup>67</sup>

This approach presents the unusual political dilemma of using what is essentially a classically liberal theory of the corporation<sup>68</sup> to argue against legal personhood for corporations and any rights appurtenant to that status. The nexus theory could be used as a tool to argue against considering corporations as legal persons, and therefore against granting them rights as such.<sup>69</sup> However, a dilemma arises because those who are ideologically disposed to arguing against corporations holding constitutional rights<sup>70</sup> are likely not of the ideological

<sup>62</sup> *Id.*

<sup>63</sup> *See infra* section I.C.1.

<sup>64</sup> *See* Jensen & Meckling, *supra* note 11, at 333 (referring to the shareholders as "absentee owner[s]" of the corporation).

<sup>65</sup> *See* Bratton, *supra* note 50, at 420.

<sup>66</sup> Absent the reality that the corporation is a separate entity, it is easier to envision shareholders as the "owners" of the corporation, its assets, and its profits. *See* STOUT, VALUE MYTH, *supra* note 50, at 15–16.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> Again, it is worth noting that some commentators see the contractarian theory of the corporation as cutting against corporate regulation generally. *See* Morrissey, *supra* note 61, at 136.

<sup>69</sup> This is the natural corollary of Jensen and Meckling's argument that asking questions about corporate responsibility incorrectly reifies the corporate entity; thinking about the rights of such an entity would similarly reify it by acknowledging that it is, in fact, a separate entity. *See* Jensen & Meckling, *supra* note 11, at 311.

<sup>70</sup> Arguments against corporate rights have a decidedly liberal tilt, contrasted with the anti-corporate regulation stance of many conservatives. *See, e.g.,* Chris Good, *Citizens United Decision: Republicans Like It, Liberals Don't*, ATLANTIC (Jan. 21, 2010), <https://www.theatlantic.com/politics/archive/2010/01/citizens->

conviction to argue for a contractarian theory of the firm.<sup>71</sup> For this reason, a more suitable and logically consistent theory is probably available to opponents of corporate personhood; delineating such a theory is outside the scope of this Note.

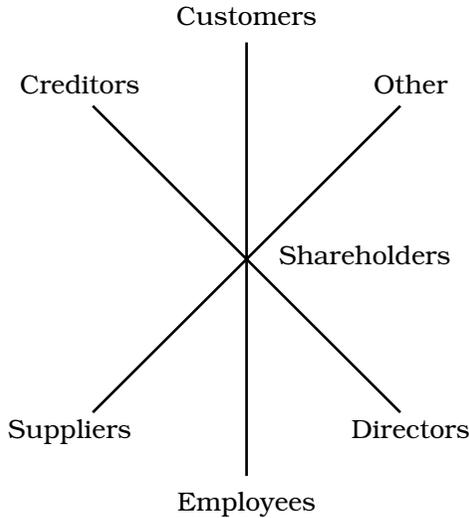


FIGURE 1:

Visualization of the corporation as a nexus of contracts in lieu of an entity. Note that shareholders are conceptually easy to place in the middle as the residual claimants in this model, absent a property-owning entity.

## 2. Reconciliation: The Gindis Solution

In 2013, David Gindis proposed a reconciliation of legal personhood and the nexus of contracts theory at the University of Hertfordshire in England, United Kingdom.<sup>72</sup> The crux of Gindis's argument is that the corporation as a separate entity is not an entire fiction but rather the separate entity that is the corporation *itself* serves as the nexus of contracts.<sup>73</sup> In essence, the corporate entity is a means of consolidating contractual rights and obligations into a single "person" separate from the corporation's stakeholders—and this "person" forms the hub of a wheel of contracts, which extend out as spokes from

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united-decision-republicans-like-it-liberals-dont/33935/ [https://perma.cc/9H2U-SNEJ] (outlining the basic arguments for and against corporate rights).

<sup>71</sup> See *supra* note 68.

<sup>72</sup> See generally Gindis, *supra* note 8 (reconciling the nexus theory with personhood's general value to the corporate form).

<sup>73</sup> *Id.* at 10.

the center.<sup>74</sup> The Gindis solution is intellectually satisfying on multiple levels and I briefly outline in this section why this is so—and how it provides a framework through which to understand the theoretical purpose of corporations and the personhood status conferred on them, the latter of which I flesh out in Part II, *infra*.

Reconciling the nexus of contracts theory with legal personhood is intellectually satisfying because it injects new life into a theory that sounds right for good reason. Jensen and Meckling, although they may have been attempting to formulate a descriptive theory that describes the reality of corporations, capture the essence of corporate purpose—much like Coase did four decades before.<sup>75</sup> While Jensen and Meckling miss the mark in describing corporations as a practical matter,<sup>76</sup> inherent in their theory is the idea that people charter corporations to consolidate contractual rights and obligations in a manner that maximizes efficiency.

Crucial to the Coasean goal of corporations is the idea that this form of business organization aims to reduce transaction and agency costs as much as possible.<sup>77</sup> Indeed, it seems a logical argument can be made that the corporation as a separate entity (which serves as the nexus of contracts) itself achieves the Coasean goal of minimizing transaction costs, without having to pretend it does not exist.<sup>78</sup> Instead of negotiating and executing countless duplicative contracts among all stakeholders of the corporation, the corporation as legal entity serves as a separate contracting party to contracts which, presumably, each independent stakeholder would otherwise be individually party to.<sup>79</sup> This consolidation has the benefit of

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<sup>74</sup> *Id.*

<sup>75</sup> Both Coase and, together, Jensen and Meckling see the corporation very generally as a means of minimizing the costs of doing business; in some way, the corporation is a more efficient way to do business. See Coase, *supra* note 12, at 391; Jensen & Meckling, *supra* note 11, at 311 (“It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals . . . are brought into equilibrium within a framework of contractual relations.”).

<sup>76</sup> See *supra* subpart I.B.

<sup>77</sup> See *supra* note 75.

<sup>78</sup> CORPORATE PERSONALITY IN THE 20TH CENTURY 18 (Charles E.F. Rickett & Ross B. Grantham eds., 1998).

<sup>79</sup> *Id.* Additionally, altering the parties to such contracts would require novation; if all shareholders (for example) were party to a contract, to remove or add a shareholder from that contract or, if each shareholder was party to a separate contract, would require novation or negotiation of a new contract to remove or add shareholders, respectively. See *Novation*, WEX LEGAL DICTIONARY, <https://www.law.cornell.edu/wex/novation> [<https://perma.cc/A3PZ-APRX>] (describing the concept of novation to replace one party to a contract with another).

minimizing contract negotiation and enforcement costs—having one contracting entity in the center vastly simplifies doing business.

Going back even further to focus on this contractarian purpose of the corporation, one can look to Ancient Roman law in thinking about why the very idea of business organizations came about. While large, publicly-traded stock corporations with which modern students of corporate law are very much familiar were likely absent from the Ancient Roman economy, there is a plethora of evidence supporting the existence of smaller “capital associations”—the *societas*, the *societas publicanorum*, and the *peculium*.<sup>80</sup> These smaller associations tended to stay small—most examples of *societas* consisted of only two partners.<sup>81</sup> The small size of these associations in Ancient Rome suggests that these three ancient associations were more properly understood as a nexus of contracts—essentially a contract between two or a few partners to pool their resources. Perhaps this was really the root of the nexus of contracts theory, and this understanding of the general firm’s purpose stuck around until well after the development of much larger modern corporations and their more-developed aspects of entity-hood. Gindis’ reconciliation of the two ideas retains the importance of the pooling rationale for forming a capital association and suggests an understanding of corporate personhood that furthers this goal.<sup>82</sup>

In effect, the nexus of contracts theory is about purpose, while other, seemingly inconsistent theories, are about the nature of the corporation. While Jensen and Meckling focus very broadly on the concept of the *firm* in their discussion of agency costs,<sup>83</sup> suggested frameworks such as the entity theory (which describes the corporation as a legally distinct entity) and the franchise government theory (which suggests that state governments delegate limited government-like powers to corporate entities) attempt to describe the legal form of *corporations*.<sup>84</sup> The nexus of contracts theory’s ancestral lineage from Coase’s

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<sup>80</sup> See, e.g., Scott Hirst, *Corporate Law Lessons from Ancient Rome*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 19, 2011), <https://corpgov.law.harvard.edu/2011/06/19/corporate-law-lessons-from-ancient-rome/> [<https://perma.cc/5383-B4EZ>] (presenting evidence of smaller business entities in Ancient Rome).

<sup>81</sup> *Id.*

<sup>82</sup> See Gindis, *supra* note 8, at 175–78.

<sup>83</sup> See *supra* section I.A.2 for a discussion of the distinction between corporations and firms, the obfuscation of this distinction, and that obfuscation’s role in the theoretical backdrop of the nexus theory.

<sup>84</sup> See Stout, *Economic Nature*, *supra* note 30, at 343–47 (outlining different theories of the corporation and suggesting that those that acknowledge the entity-

work—which itself is about the broad purpose of *firms*<sup>85</sup>—suggests that what Jensen and Meckling are really concerned about is the *purpose* of the corporate form, rather than its *nature*. More specifically, Jensen and Meckling are concerned with corporations that involve multiple individuals (that fall under the umbrella of firms) because of their focus on agency costs.<sup>86</sup> Gindis' reconciliation preserves this aspect of purpose, while acknowledging the nexus theory's dubiousness as a theory of the *corporation* (rather than a broad theory of the *firm*) by letting other "rival" theories do the legally descriptive legwork.<sup>87</sup>

Gindis is right; legal personhood need not get in the way of an otherwise compelling economic theory of the firm as applied to the corporation. Gindis focuses on asset lock-in and entity shielding as elements of legal personhood that are valuable to the Coasean idea of minimizing transaction costs through the corporate form.<sup>88</sup> The even more important takeaway from Gindis' contribution, though, is that the corporation as a contracting entity furthers what I suggest is the purpose of creating a corporation, derived from the nexus of contracts theory (centralizing contractual rights and obligations, from which other aspects flow and which these other aspects seek to achieve), and provides perspective as to the purpose and scope of corporate legal personhood.<sup>89</sup>

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hood of the corporation are the most well-grounded as descriptive theories of the corporation).

<sup>85</sup> See generally Coase, *supra* note 12, at 390–405 (outlining Coase's theory of the firm).

<sup>86</sup> See Jensen & Meckling, *supra* note 11, at 308–10 (discussing agency costs among individuals in the context of corporations).

<sup>87</sup> See Gindis, *supra* note 8, at 97 (reconciling the nexus theory with corporate entity-hood).

<sup>88</sup> *Id.* at 170–99.

<sup>89</sup> See *infra* Part II.

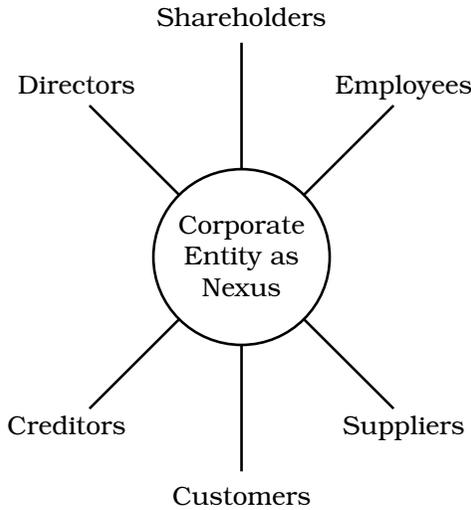


FIGURE 2:  
Gindis's interpretation visualized, showing the corporation  
as a separate legal entity that itself serves  
as a nexus of contracts

## II

### A NEXUS FOR CONTRACTS: A NEW THEORY OF CORPORATE PERSONHOOD (ENTITY-HOOD) AND RIGHTS

In this Part, I apply the Gindis retooling of the nexus of contracts theory to various issues regarding corporate legal personhood. I attempt to outline a coherent theory of corporate personhood, its purpose, and its boundaries. Gindis's suggestion goes a long way towards demystifying the concept of legal personhood as it pertains to corporations, but Gindis does not suggest a framework for examining the outer boundaries of legal personhood for corporations.<sup>90</sup> Pursuant to Gindis's work, I identify centralizing contractual rights and obligations (i.e., Coase's ideal of minimizing transaction costs, essentially the contractarian narrative meshed with the idea of legal personhood)<sup>91</sup> as the defining purpose of corporate personhood. I then suggest that this purpose ought to be the lens through which policy-makers and courts examine the outer boundaries of corporate personhood and, accordingly, what rights corpora-

<sup>90</sup> See Gindis, *supra* note 8, at 170–99 (outlining personhood's general value to the corporate form).

<sup>91</sup> See *id.*; see also Coase, *supra* note 12, at 391 (discussing how the structure of the firm reduces contract costs).

tions should have—particularly in the context of corporate involvement in politics.

Beginning here, I use the term “entity-hood” to describe the concept of corporate personhood to demystify the concept of corporate entity-hood; the concept should be separated from the flesh-and-blood incarnations of this legal status that are conjured up in the minds of many who happen upon the concept of corporations as persons in any sense, and the charged ideological instincts that come with them.<sup>92</sup>

#### A. Contract Is Central to the Purpose of Corporate Entity-hood

A corollary to Gindis’s thesis that the corporate entity serves as the nexus of contracts is that there are different breeds of legal person, of which the corporation is but one.<sup>93</sup> As applied to human beings, the status of legal person is a means for the law to ascribe certain rights and obligations to *natural* persons, thereby granting human beings agency to act in legally significant ways, many of which make little sense in the corporate context.<sup>94</sup> Legal personhood (or entity-hood, as I insist on calling the concept in the case of corporations), is not a status reserved just for natural persons and organizations. There are numerous examples of the law conferring personhood status on animals and even natural resources.<sup>95</sup> Surely, the reasons for conferring such status in each situation differ and certainly the outer boundaries of that status have much to do (or should have much to do) with those reasons.

The primary reason for granting entity-hood to corporations is to achieve the Coasean goal of minimizing transaction

<sup>92</sup> Referring to corporations as persons has a politically controversial history that I do not intend to evoke in this Part. See Rucker, *supra* note 1 (detailing then-U.S. presidential candidate Mitt Romney’s claim that corporations are people and the charged reaction thereto).

<sup>93</sup> See generally Gindis, *supra* note 8, at 170–99 (outlining personhood’s general value to the corporate form).

<sup>94</sup> For example, corporations cannot vote or run for office. Editorial, *The Rights of Corporations*, N.Y. TIMES (Sept. 21, 2009), <http://www.nytimes.com/2009/09/22/opinion/22tue1.html> [<https://perma.cc/KYD9-E322>].

<sup>95</sup> See, e.g., Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273, 280–88 (2011) (detailing the history of putting animals on trial as persons); Eleanor Ainge Roy, *New Zealand River Granted Same Legal Rights as Human Being*, GUARDIAN (Mar. 16, 2017, 12:50 AM), <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being> [<https://perma.cc/UJP2-DDCY>] (reporting on the legal person status of a river in New Zealand).

costs by centralizing contractual rights and obligations.<sup>96</sup> Most other aspects of corporate entity-hood flow centrally from this primary purpose. For instance, entity-shielding is a natural corollary of the corporation-as-vehicle-for-contract idea; to act as a central vehicle for contract, assets must be partitioned (or clearly separated) between the entity itself and its stakeholders.<sup>97</sup> In most circumstances, the entity itself is liable for the obligations it rightfully incurs and is entitled to its own rights acquired via contract as well. One example of the crossover between asset-partitioning and entity-shielding occurs in the context of debtor-creditor relations.<sup>98</sup> To continue its function as a business entity, the corporation often must secure credit to cover its operating costs.<sup>99</sup> To serve as a distinct nexus for the contracts that create and regulate these lines of credit, the corporation as a separate entity must be able to become a debtor in its own right<sup>100</sup>—and creditors ought to have the ability to be informed as to who exactly they are dealing with.<sup>101</sup>

Another example of an aspect of corporate entity-hood that flows naturally from the contractarian purpose, and one that is closely related to the above discussion of entity-shielding, is the often-discussed concept of limited liability. For the most part, corporations are separately liable for their legal obligations in both contract and tort, subject of course to the possibility of a court deciding to pierce the corporate veil.<sup>102</sup> To serve as an effective nexus for contracts as a separate legal entity, limited liability is a necessity for a couple reasons. From

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<sup>96</sup> See *supra* section I.C.2.

<sup>97</sup> See Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1337 (2006) (“Special legal rules, which we term rules of *asset partitioning*, are required to determine which entities bond which contracts . . . .” (footnote omitted)).

<sup>98</sup> *Id.* at 1336.

<sup>99</sup> *In the Mix: Corporate Funding Sources*, TREASURY TODAY (Jan. 2015), <http://treasurytoday.com/2015/01/in-the-mix-corporate-funding-sources-tcf> [<https://perma.cc/YL7B-4XM3>].

<sup>100</sup> See Hansmann et al., *supra* note 97, at 1336.

<sup>101</sup> Creditors, in dealing with corporations as entities, ought to be able to ascertain which assets are available to the entity and which assets belong to the stakeholders and are thus inaccessible to the creditor. Abuse of this key aspect of the corporate form is possible and inevitable; to curtail this, certain formalities must be followed to signal to creditors that they are dealing with a corporate entity and not the person behind it. *Piercing the Corporate Veil*, WEX LEGAL DICTIONARY, [https://www.law.cornell.edu/wex/piercing\\_the\\_corporate\\_veil](https://www.law.cornell.edu/wex/piercing_the_corporate_veil) [<https://perma.cc/G33K-YR94>]. When these formalities are not followed, a court can choose to bypass the entity and hold its stakeholder(s) liable; this is referred to as “piercing the corporate veil.” *Id.*

<sup>102</sup> See *supra* note 101.

the stakeholders' perspective in particular, centralizing contractual obligations in the corporate entity enables them to take calculated business risks in a manner that distributes risk proportionally to the stakes held by the stakeholders.<sup>103</sup> If the corporation fails, the typical shareholder loses only the cost of his or her share, assuming the corporation has lost all of its value (probably to its creditors).<sup>104</sup> Centralizing obligation in this way encourages efficient decision-making on the part of managers<sup>105</sup> and easier access to capital markets for the enterprise as a whole.<sup>106</sup> Therefore, limited liability both serves the contractarian purpose and is a necessary component thereof.

Limited liability, viewed through the lens of the contractarian idea of the purpose of corporate entity-hood, is more difficult to justify in the tort context. Does allowing corporate stakeholders to evade liability for the torts for which the entity is held responsible further the goal of centralizing contractual rights and obligations? One might argue that it does, for the same reason limited liability is justified in the contract context—it is a means of spreading risk among the stakeholders.<sup>107</sup> However, I suggest this is only really justifiable when the tort in question is the unavoidable result of a lawful contract entered into by the corporation;<sup>108</sup> corporations should be vehicles for encouraging calculated and rational risk-taking behavior, but not without regard to the rights of others. Indeed, courts seem to be more amenable to piercing the corporate veil in the tort context because of the lack of bargaining between the tort victim (an involuntary creditor) and the entity.<sup>109</sup> Limited liability and asset partitioning, key elements of corporate entity-hood, flow naturally from the nexus-for-contracts purpose that I suggest for the reasons I have just outlined.

The purpose of corporate entity-hood of non-profit corporations should not be viewed as substantially different from that of the concept as applied in the context of for-profit business corporations. One might argue that since the profit motive is

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<sup>103</sup> See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 90 (1985) ("No one risks more than he invests.").

<sup>104</sup> See *id.*

<sup>105</sup> *Id.* at 95.

<sup>106</sup> See *id.* at 93–97 (detailing how limited liability shifts risk from shareholders to creditors, making investment appealing).

<sup>107</sup> See *id.* (discussing risk-shifting as a result of limited liability).

<sup>108</sup> This is not to suggest that the tort victim is, or should be, without remedy; in the absence of veil-piercing, he or she will still be able to recover from the corporate entity itself.

<sup>109</sup> Easterbrook & Fischel, *supra* note 103, at 112.

ostensibly absent in the non-profit corporation (it is a non-profit, after all), its central purpose is not to centralize contractual rights and obligations. Therefore, the purpose of conferring entity-hood on such a non-profit corporation is not to achieve the contractarian goal. However, centralizing contractual rights and obligations is still critical to the purpose of non-profit corporations. Rather than viewing the contracting function as a corollary of profit-seeking behavior, it ought to be viewed as a corollary of the overarching purpose uniting all kinds of corporations that first arose in Ancient Rome: pooling resources to achieve an individually unattainable goal or purpose.<sup>110</sup> This goal can be either production of profit or philanthropy (or something else). In other words, Coase's transaction costs do not disappear just because the corporation in question is not for-profit—philanthropic corporations will presumably want to reduce the transaction costs involved in their non-profit purpose<sup>111</sup> to maximize the resources directly expended on the corporation's main activities.

The focus on contract in conferring entity-hood on corporations is distinct from the considerations in conferring personhood in other contexts. For example, few would deny that conferring legal personhood on human beings is a *pro forma* recognition of the natural rights of humans; doing so gives human beings the standing to sue in their own right for violations of their own *human* rights—rights which are not created by, but are recognized by, the state—whether by the state, entities, or other human beings.<sup>112</sup> The right to assume contractual rights and obligations is but one piece of this much broader purpose. Similarly, arguments that natural resources should be granted legal personhood often focus on the issue of standing in suing polluters for violating environmental protection laws, for instance.<sup>113</sup> However, I would suggest, this purpose would not be served by viewing a river or a tree as a nexus

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<sup>110</sup> Hirst, *supra* note 80.

<sup>111</sup> These costs arise from the duplicity necessitated by not having a central entity to serve as an independent contracting party. See CORPORATE PERSONALITY IN THE 20TH CENTURY, *supra* note 78, at 18.

<sup>112</sup> See Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. FOR JUST. (Apr. 7, 2014), <https://www.brennancenter.org/blog/hobby-lobby-argument> [<https://perma.cc/9BH6-AX8Y>] (noting that the 14th Amendment, adopted after the American Civil War and abolition of slavery, prominently hinges on the term “person”).

<sup>113</sup> See James D K Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?*, 14 AILR 49, 53–55 (2010) (outlining basic arguments in favor of legal personhood for natural resources).

of contracts in the same way I and others suggest viewing the separate corporate entity.<sup>114</sup> The purpose of conferring legal personhood (or entity-hood) on human beings, natural resources, and corporations surely differ. The purpose and functions of such personhood, although encompassed by the same term and concept across the board, are therefore different as well. The practical reasons for conferring personhood delineate its context-specific purpose—and this is crucial to understanding that there are different breeds of legal person. Not all legal persons are created equal. In the case of corporations, the purpose of conferring entity-hood is to centralize contractual rights and obligations, thereby reducing transaction costs.

### B. Purpose Is a Lens with Which to View Scope: Revisiting Corporate “Speech”

In this subpart, I argue that the central purpose of corporate entity-hood—as distinguished from the reasons for, and purposes of, personhood in other cases—should be used as a lens through which to view the scope of corporations’ rights. I argue that corporate rights should be only those which further the contractarian purpose of corporate entity-hood. To illustrate the practical implications of these assertions, I examine one prominent United States Supreme Court case in particular: *Citizens United v. FEC*,<sup>115</sup> a case often affiliated with the corporate entity-hood debate. I argue first that the Court mischaracterized the First Amendment’s scope; second, that the Court wrongly blurred the distinction between the corporate entity and the natural persons behind it; and, third, that the utilitarian, contractarian purpose of the corporate entity itself cuts against corporate speech rights.<sup>116</sup>

#### 1. *Citizens United v. FEC*

In 2010, the United States Supreme Court handed down its decision in *Citizens United v. FEC*.<sup>117</sup> At its heart, the issue in the case was one of campaign finance: did certain restrictions imposed on corporate political spending by the Bipartisan Campaign Reform Act of 2002 (BCRA) violate the First Amendment’s protection of the freedom of speech?<sup>118</sup> In particular,

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<sup>114</sup> Granting a river personhood is a way to protect it, as some scholars suggest, not turn it into an entity to centralize contract rights appurtenant to a business or some other organizational function. See *id.* at 54, 57.

<sup>115</sup> 558 U.S. 310 (2010).

<sup>116</sup> See *infra* section II.B.2.

<sup>117</sup> 558 U.S. 310 (2010).

<sup>118</sup> *Id.* at 365.

these restrictions disallowed corporate entities from funding “electioneering communications” with their general treasury funds within thirty days of a primary election and within sixty days of a general election.<sup>119</sup> The Court ultimately found the restrictions to be in violation of the First Amendment’s protections.<sup>120</sup> To begin the discussion, I will first flesh out the Court’s reasoning in the context of the corporate entity-hood debate and then discuss the flaws in that reasoning.

Rather than discussing whether corporations (both for-profit and non-profit) enjoyed First Amendment speech protections as part of their personhood “package,” the Court presumed corporations to be speakers for this purpose.<sup>121</sup> The Court considered the issue as a restriction on corporations’ assumed protections as First Amendment speakers and held that Congress could not restrict speech based on the speaker’s corporate identity.<sup>122</sup> The Supreme Court had ruled on multiple occasions prior to *Citizens United* that First Amendment protections extended to corporations and that these protections include the freedom of speech.<sup>123</sup> These rulings, the Court noted, are based on the idea that the First Amendment generally protects the dissemination of ideas, regardless of whether the particular speaker or disseminator of ideas is a natural person.<sup>124</sup> This reasoning is premised on the idea that the First Amendment protects some general concept of “dissemination of information and ideas,”<sup>125</sup> rather than some individual right to freely express them.

However, the notion that the First Amendment’s protection of “freedom of speech” applies to a general dialogue rather than an individual right cannot be correct. First, the First Amendment makes a distinction between the freedom of speech and the freedom of the press.<sup>126</sup> If the freedom of speech protected such a general concept, protecting the freedom of the press would be redundant. Second, it is possible to construe many behaviors—human or non-human—as speech generally (under

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<sup>119</sup> 2 U.S.C. § 441(b) (2007), *repealed by Citizens United*, 558 U.S. at 365.

<sup>120</sup> *See Citizens United*, 558 U.S. at 365.

<sup>121</sup> Leo Coleman, *The Relevance of Personhood in Citizens United and Hobby Lobby*, POL. & LEGAL ANTHROPOLOGY REV. ONLINE (Oct. 27, 2014), <https://polarjournal.org/2014/10/27/the-relevance-of-personhood-in-citizens-united-and-hobby-lobby/> [<https://perma.cc/S8G4-69A7>].

<sup>122</sup> *See Citizens United*, 558 U.S. at 365.

<sup>123</sup> *Id.* at 342.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 343.

<sup>126</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

the Court's broad definition), but what is the First Amendment's protection of free speech actually designed to protect? Inherently, the rights protected under the First Amendment must be those of persons—however defined. It is exceedingly difficult to imagine a non-person—natural or juridical—acting as a disseminator of ideas within the meaning of the First Amendment.<sup>127</sup> Third, the rights within the Bill of Rights are inherently individual because they are what provide the status of legal personhood (or entity-hood) with its legal force.<sup>128</sup> If the Bill of Rights' protections were as broad as the Supreme Court assumes in *Citizens United*, the status of legal person (or entity) would be limited in its significance. Really, then, speech rights under the First Amendment are one of the rights that can be assigned to legal persons. This is the structure within which the Bill of Rights operates.

Thus, the fundamental flaw in the Supreme Court's logic in its line of cases ascribing First Amendment speech rights to corporations is that it obfuscates the distinction between a general dialogue of ideas on one hand and individual rights, which are protected under the First Amendment as part of the Bill of Rights, on the other.<sup>129</sup> The Court seems to presuppose the existence of rights for juridical persons under the guise of protecting a free exchange of ideas.<sup>130</sup> While protecting this free exchange is a noble goal, how does it suggest that corporations have protected speech under the First Amendment any more than it suggests that parrots repeating the political views

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<sup>127</sup> Ideas and the dissemination thereof, I argue, is an inherently person-centric concept, particularly as it pertains to natural persons.

<sup>128</sup> "Let me add that a bill of rights is what *the people* are entitled to against every government on earth . . ." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787) (emphasis added) (admonishing Madison for not including a bill of rights in the Constitution). A bill of *rights* is exactly that: a collection of *rights* that "the people"—in their capacity as legal individuals (or persons)—are entitled to. The "rights" are meaningless absent some legal recognition of the parties that hold them (i.e., persons or some other legal entity, such as a state). For instance, a stone is entitled to no protection under the Bill of Rights by virtue of it not being a legal person.

<sup>129</sup> Congress has promulgated, and the Court has allowed, certain restrictions on First Amendment speech rights that seem to hinder the goal of fostering free dialogue but are necessary for the enforcement of other laws. See generally KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 7-5700, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014) (discussing exceptions to First Amendment protections). Framing the goal of the First Amendment in the Court-suggested general and vague terms makes most restrictions on the rights it confers, or non-application of its protections altogether, difficult to argue in favor of.

<sup>130</sup> The Court discusses this general concept in its *Citizens United* ruling. See *Citizens United*, 558 U.S. at 343 ("Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.").

of their masters are protected as well? After all, a parrot has about as much agency in what it “says” as does a corporation.<sup>131</sup> If parrots were granted legal personhood, would their repetitions then be protected by the First Amendment? If this were to be so, I suggest that the justification would be protecting the master’s free speech rights expressed through the bird, not the bird’s unique speech rights. Whatever purpose we might think of to grant legal personhood to parrots, I suspect, would not include protection of their speech—and protecting the speech of the masters through the parrots as separate legal persons blurs the distinction between the two *distinct* persons. The Supreme Court got it wrong in *Citizens United* because it failed to recognize that the Bill of Rights operates under the framework of legal entity-hood and that the array of rights included within it are broken up and granted to different kinds of entities according to their purpose (with natural persons being the most broadly encompassing of these).<sup>132</sup>

## 2. *Applying the Nexus for Contracts Theory*

The primary means a corporation uses to “speak” is spending money—under the direction of its human agents.<sup>133</sup> While it sounds noble that protecting such spending serves to encourage an active exchange of ideas, we should be *separating* our conceptions of the corporation and its human agents (rather than confusing human speech with corporate activity), thinking about the corporation as an entity unto itself, and—most importantly—why this is so. Cutting to the heart of the issue, corporations are granted entity-hood with the pragmatic and *limiting* goal in mind of serving as a nexus for contracts;<sup>134</sup> protecting their free speech “rights” falls outside of

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<sup>131</sup> Corporations can only act through their agents; likewise, parrots can only repeat what someone says. See, e.g., Andrew P. Donovan, *Liability of Corporations Where Statute Requires Agent’s Authority to Be in Writing*, 23 ST. JOHN’S L. REV. 101, 102 (1948) (“[B]y their very nature, corporations can act only through the agency of human beings.”); Michael Schindlinger, *Why Do Parrots Have the Ability to Mimic?*, SCI. AM. (Dec. 5, 2007), <https://www.scientificamerican.com/article/experts-parrots-mimic/> [<https://perma.cc/L6S5-SXTD>] (“When parrots are kept as pets, they learn their calls from their adoptive human social partners.”).

<sup>132</sup> See Ciepley, *supra* note 9, for a discussion of the idea that there ought to be different kinds of legal persons with different rights, of which the corporation is but one kind.

<sup>133</sup> See Adam Winkler, *Corporate Speech is Not “Free,”* HUFFINGTON POST (Apr. 5, 2010, 5:12 AM), [https://www.huffingtonpost.com/adam-winkler/corporate-speech-is-not-f\\_b\\_448854.html](https://www.huffingtonpost.com/adam-winkler/corporate-speech-is-not-f_b_448854.html) [<https://perma.cc/95AS-MWTD>] (arguing that corporate speech is largely limited to the money it spends, which is subject to the fiduciary duties the corporation’s human agents owe to the entity itself).

<sup>134</sup> See *supra* subpart II.A.

this practical directive and blurs the distinction between corporations and their human agents. The distinction is blurred because of the reality noted above: a corporation cannot spend money or “speak” except through the actions of the humans controlling *its* actions.<sup>135</sup> Protecting corporate speech rights, then, looks an awful lot like protecting the speech rights of its human agents<sup>136</sup>—but this would practically ignore the reality that a corporation is a separate legal entity from its agents in a way reminiscent of Jensen and Meckling’s original argument that there is not a separate legal entity in the corporation.<sup>137</sup> As in the case of Jensen and Meckling, such an argument is really an ideological reaction to corporate regulation generally and should be mistrusted as a descriptive legal theory of corporations.<sup>138</sup>

Instead, courts and policymakers ought to consider the issue of corporate speech from the perspective of protecting the rights of the corporate *entity* itself—independent of its human agents. In so doing, the nexus of contracts theory, retooled as a theory of corporate entity-hood, is useful.<sup>139</sup> This is because the theory provides a more coherent framework for legal entity-hood<sup>140</sup> than the temptation, absent a clearly delineated purpose, for corporate entity-hood: implicitly passing through the corporate entity to protect the rights of its stakeholders indirectly.<sup>141</sup> Not all legal persons (or entities, as the case may be)

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<sup>135</sup> See *supra* note 131.

<sup>136</sup> This, of course, is a laudable goal on its own—but protecting the speech “rights” of something entirely separate from its stakeholders risks obfuscating the purpose, function, and treatment of corporations in the ways I have suggested.

<sup>137</sup> Such spending, or “speech,” would not be attributed to the corporate entity but rather to the actions of its stakeholders that make up the original conception of the nexus of contracts. See Jensen & Meckling, *supra* note 11, at 311 (arguing against reifying the corporate entity).

<sup>138</sup> See Eisenberg, *supra* note 52, at 822–23 (suggesting normative motivations behind the nexus theory); see also *supra* section I.C.1 (discussing the ideological components of an argument favoring the original nexus theory). Corporate regulation is a very broad concept and this Note does not comment on the benefits and disadvantages of its various *specific* forms, but merely points out the ideological underpinnings of the nexus of contracts theory.

<sup>139</sup> See *supra* subpart II.A for a logical explanation of how the nexus of contracts theory can be refocused to act as a theory of corporate entity-hood in light of Gindis’s suggested reconciliation of legal entity-hood and the nexus theory, as outlined and advocated for *supra* section I.C.2.

<sup>140</sup> This coherent framework is that of a limiting purpose for corporate entity-hood: consolidating contracts through a separate entity of limited agency to achieve the Coasean goal of minimizing the costs of doing business. Such a limited conception avoids mystification of the concept of corporate entity-hood, as I describe in this Note.

<sup>141</sup> As discussed previously, passing through the corporate entity—or denying its existence altogether—is arguably an ideological response to corporate regula-

have speech rights that are protected under the First Amendment,<sup>142</sup> and ascribing these rights need not be an automatic corollary of granting person or entity status.<sup>143</sup> In the context of *Citizens United* and its ancestor cases,<sup>144</sup> assigning speech rights to the corporate entity should mean asking whether it falls within the nexus of contracts purpose of corporate entityhood. I suggest that it does not. This is because the idea of the corporation as a separate entity fulfills a practical legal need—the functions outlined in subpart II.A, *supra*—and such need does not encompass creating a separate legal entity to serve the practical purpose of a corporation and granting it protection as a First Amendment speaker.<sup>145</sup> Simply put, corporations do not need speech rights to enter into contracts.

Corporations, both for-profit and non-profit, are predominantly vehicles for consolidating contracts—any other purpose is secondary, or a corollary, of this overarching goal.<sup>146</sup> This is the case even in a corporation created for the express purpose of supporting a particular political viewpoint. The views of

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tion and responsibility. See Eisenberg, *supra* note 52, at 822–23. To treat the corporation and its stakeholders as separate entities or persons, as the case may be, is to fulfill anti-regulation contractarians' fear that the fictitious corporate entity will be "reified" in order to treat its rights and obligations separately from that of its stakeholders. See Gindis, *supra* note 8, at 128–43 (detailing the "reification illusion" and the original nexus theory's ideological underpinnings).

<sup>142</sup> See *supra* subpart II.A for a brief discussion of different types of legal persons and the differences that can arise in the rights that they have; in particular, see the discussion of natural resources and their lack of protected speech rights, despite their personhood, in some foreign jurisdictions. In theory, the logic of *Citizens United* and its predecessor cases could be extended to natural resources to protect their speech rights (as they "speak" through their human agents), but doing so would be an obfuscation, just as it is for corporations; such protection really just protects the agents' rights to impose their will upon, and speak through, a separate entity—when focusing on the separate entity, it gives that entity something it never had: a voice and mind of its own. See Gindis, *supra* note 8, at 141–42.

<sup>143</sup> See Ciepley, *supra* note 9, at 139.

<sup>144</sup> See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784–85 (1978) (striking down a state-law prohibition on corporate independent expenditures based on the speakers' corporate identity); *Buckley v. Valeo*, 424 U.S. 1, 21–23, 39 n.45 (1976) (invalidating the limitations on campaign expenditures of the Federal Election Campaign Act of 1971 that applied to corporations and unions).

<sup>145</sup> In the context of media corporations (e.g., Time Warner, Inc. or Twenty-First Century Fox, Inc.), the question arises whether or not the corporate entities' speech rights are protected; however, the information and views they disseminate are surely protected by the freedom of the press, which is separate from the freedom of speech. See U.S. CONST. amend. I. Furthermore, in thinking about the question of media corporations in particular, one should consider what is actually being protected—while a publication or other media is being disseminated by the corporate entity itself, what is contained therein are the views and work of its contributors (whose rights to free speech are, of course, protected). See *id.*

<sup>146</sup> See *supra* subpart II.A.

such a corporation's individual stakeholders are protected by the First Amendment, but what about the views "expressed" by the entity itself? One might argue that the First Amendment protects such "speech" because the stakeholders have merely chosen this manner of expressing their viewpoints. However, the corporation as separate entity is a major snag for this argument—when making a decision on behalf of a corporation to "speak," the agent stakeholders (often directors) are not free to impose their own viewpoints but are instead beholden by their fiduciary duties to act in the best interest of the corporate entity.<sup>147</sup> But, is "speaking" in support of the stakeholders' viewpoint—the *raison d'être* of this hypothetical corporation—by definition in the best interests of such a corporation? No, because the corporation's speech is no longer even speech—it is a business expenditure by the corporation itself.<sup>148</sup> The corporate entity as a nexus for contracts *does not have* viewpoints, and the money it spends is a cost of doing business—the business for which the corporation was created to consolidate contractual rights and obligations (and its secondary purposes and functions as described in subpart II.A, *supra*), not to create an independent First Amendment speaker. In other words, the stakeholders can impute a purpose on the corporation, but that purpose does not itself become "speech" just because they say it does.<sup>149</sup>

But, how can we be sure that the freedom of speech is outside the scope of the contractarian purpose of corporate entity-hood? While legal personhood is conferred on humans to protect natural rights to an extent, including some individual right of free expression, entity-hood is not conferred on corporations in legal recognition of some set of natural rights of corporations.<sup>150</sup> Corporate speech has nothing to do with the

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<sup>147</sup> See Winkler, *supra* note 133 (arguing that corporate speech is not "free" because its agents are beholden to the interests of the entity). This is especially the case in a public corporation with shareholders of disparate political beliefs. *Id.* But in a private corporation, it just amounts to abuse of the corporate form. See *supra* section II.B.1 (discussing the parrot analogy).

<sup>148</sup> See *supra* note 147.

<sup>149</sup> See discussion of a suggested contractarian conception of corporate entity-hood in subpart II.A, *supra*. The distinction between stakeholder and entity becomes much blurrier in cases, such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), which involve non-corporation entities and individual small business-owners. Such cases deserve separate analysis and fall outside the scope of this Note.

<sup>150</sup> As discussed in subpart II.A, *supra*, legal personhood (or entity-hood, as the case may be) is a legally created status, distinct from natural personhood, that is created by the state and conferred by it to achieve different goals in different situations; neglecting to question why the status is conferred in a particular case

corporation as a contracting, property-owning, suing, debtor-creditor entity. If anything, such protection condones abuse of the corporate form.<sup>151</sup> Further, a *right* to speak does nothing to reduce transaction costs in the way corporate entity-hood is designed to do; while individuals might (and certainly do) find it more cost-effective to pool resources in an entity and influence campaigns that way, this does not justify the conferral of a fundamental right on the corporation at the expense of obfuscating the limited utilitarian purpose of corporate entity-hood.<sup>152</sup>

Others, such as David Ciepley, have also reached the conclusion that speech rights fall outside the scope of corporations' rights, though while focusing on corporate entities as "franchise governments," neither public nor private.<sup>153</sup> Ciepley is right to suggest that corporate entities ought to be treated as their own category of "person" for purposes of the granting of rights.<sup>154</sup> What the Gindis-inspired nexus-for-contracts idea offers is a theoretical underpinning for why that separate category should exist at all. It is not merely that corporations are *different*—different from other categories of person though they may be. Ciepley focuses on the corporate entity as a governing body<sup>155</sup>—but the addition of the nexus for contracts framework allows for even more focus in defining corporate rights by creating a litmus test ("Is this right necessary for the corporate entity to function as a nexus for contracts?") for any and all rights which corporations might seek at some point in the future. Nexus for contracts is a forward-looking addition to, and theoretical justification of, Ciepley's initial core corporate-rights idea, and one that preserves the Coasean, contractual, liberal ideal of the corporation.<sup>156</sup>

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is unhelpful. See generally Dyschkant, *supra* note 43 (outlining the basic differences between legal and natural personhood).

<sup>151</sup> As I discussed earlier, in the context of private corporations that are closely held, ascribing shareholder speech rights to the corporation obfuscates the boundary between two separate legal entities, something doctrines, such as piercing the corporate veil, seek to avoid. See *supra* note 101 and accompanying text.

<sup>152</sup> See *id.* and accompanying text (outlining some policy justifications for maintaining a clear divide between legal entities and the natural persons behind them).

<sup>153</sup> See Ciepley, *supra* note 9, at 140, 155–56 (describing corporations as franchise governments and suggesting they ought not have speech rights).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Ciepley suggests corporations hold three "core" rights as franchise governments, and his suggestion is a good one that goes a long way toward road-blocking the slippery slope of corporate "personhood" rights. See *id.*

All this is to say that understanding the corporate entity to be principally a nexus for contracts can justify limiting the contents of its rights accordingly. This Note does not attempt to delineate each and every right the corporate entity should and should not hold to achieve this utilitarian end—such a question I will leave to future scholarship—but speech rights protected by the First Amendment, I assert, is not one of them. This becomes evident through an understanding that the First Amendment protection of speech protects an individual right of some types of person—not some general right or an even more general conception of free dialogue (although this is undoubtedly a policy justification for the individual rights the First Amendment does protect)—in addition to a more coherent and limited understanding of the purpose of corporate entity-hood.

#### CONCLUSION

So, corporations are “people,”<sup>157</sup> but this Note ends where it began: what does that mean? As this Note argues, the answer lies in an unexpected place. The nexus of contracts theory is customarily understood to cut against the corporation as a separate legal entity—it is nothing more than a web of agreements between its stakeholders. This need not be so. As David Gindis has suggested, the entity-hood of the corporation is crucial to the contractarian role of this business form: the entity serves as a separate juridical “person” through which contractual rights and obligations can be centralized.<sup>158</sup> The nexus of contracts does not take the place of the entity, it is the entity.

The understanding of the corporate entity as a nexus for contracts captures both Ancient Roman and Coasean aspects of corporate purpose—pooling capital and mitigating transaction costs. The corporate nexus offers asset partitioning and limited liability, among other features, that serve the contractarian goal. It is simply more efficient to have a corporate entity contracting and dealing, rather than each of its stakeholders contracting and dealing severally. This understanding provides a much-needed framework for corporate entity-hood—one which ought to define the scope of corporations’ rights. This framework is one that helps to justify and further refine David Ciepley’s and others’ suggestion that corporate entities ought to be their own category of legal “person” and, as such, have their rights separately determined. The nexus of

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<sup>157</sup> Though I refrained from using the “person” characterization in Part II, this reference serves the rhetorical purpose of attempting to demystify that concept.

<sup>158</sup> See Gindis, *supra* note 8, at 125.

contracts theory, reconciled with corporate entity-hood, is a lens through which to examine the content of corporate rights—if a right is not within the scope of the utilitarian, contractarian purpose of corporate entity-hood, it should not be granted. Corporate speech falls outside of that limited scope. The nexus *for* contracts framework outlined in this Note builds on previous work—from Coase to Jensen and Meckling to Gindis to Ciepley—in taking the next step toward crafting a logically consistent, practical, and—above all else—coherent theory of corporate entity-hood.

