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# Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*

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FLAWED ASSUMPTIONS:  
A CORPORATE LAW ANALYSIS OF  
FREE SPEECH AND CORPORATE  
PERSONHOOD IN *CITIZENS UNITED*

Anne Tucker<sup>†</sup>

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I. INTRODUCTION: UNVEILING THE CORPORATE LAW MYTHS EMBEDDED IN *CITIZENS UNITED*

From derivative suits to the derivative speech rights of corporations recognized in *Citizens United v. FEC*,<sup>1</sup> the watershed 2010 Supreme Court opinion that overturned restrictions on corporate political speech in the form of independent expenditures, our law takes inconsistent stances on how, for whose benefit, on whose behalf corporations speak. The *Citizens United* opinion, which wrestled with the boundaries of fundamental First Amendment rights and the extent to which free speech protections should be extended to corporations, is riddled with assumptions about corporations that are often divorced from the economic and legal realities in which these entities exist. This Article employs traditional corporate law principles (e.g. fiduciary duties, corporate governance and securities regulations) to challenge the foundational assumptions regarding corporate entities that the Court relied on in concluding that corporate speech should be treated the same as individual speech.

Corporate personhood is central to the determination of corporations' claim to First Amendment free speech rights. Courts struggle to appropriately define, or, more accurately, conceptualize corporations for the purpose of extending or denying constitutional rights. The evolution of corporate personhood, culminating in *Citizens United*, can be juxtaposed with the development of corporate law in areas such as derivative suits, the proxy process, and SEC regulations, which recognize the complexity of corporate speech.<sup>2</sup>

<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> See Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive*

The conceptualization of corporate speech in *Citizens United*—how it is created, the ends that it serves, and the protection it should receive—is inconsistent with conceptualizations of the corporate form and a corporate “voice” in other areas of the law.

Examining the Supreme Court’s conceptualization of corporate political speech in *Citizens United* reveals flaws in the Court’s assumptions about how corporations speak that do not comport with traditional corporate law principles. These flaws highlight the differences between corporate and individual speech. A conceptualization of corporate political speech that is grounded in traditional corporate law principles challenges the assumptions underlying the Court’s conclusion that corporate political speech cannot be distinguished from individual speech and therefore may not be regulated by Congress.<sup>3</sup>

The *Citizens United* Court ignored the following five realities of corporate political speech: (1) corporate speech, even when political, has an economic motivation; (2) there is no singular corporate voice; (3) unrestricted corporate political speech poses a risk of compelled speech; (4) corporate speech is already regulated based solely on the identity of the corporate speaker; and (5) corporate law, in the form of securities regulations, employs the equalization rationale.

This Article juxtaposes corporate law’s conceptualization and regulation of corporate speech with the approach advanced in *Citizens United*, and asks whether corporate law can help inform the fundamental First Amendment debate regarding corporate political speech. The answer appears to be yes because viewing the *Citizens United* opinion through a corporate law lens reveals the five fundamentally flawed assumptions listed above. The second Part of this Article explores the historical development of corporate constitutional rights, including the constitutional conceptualization of

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*Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169, 181–83 (2004) (analyzing the different entity theories used by legal scholars and the courts to conceptualize the corporation as a single entity); see also Anne Tucker Nees, *Who’s the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 202 n.7 (2010) (describing the different pieces of a corporation that, when put together, form a cohesive picture).

<sup>3</sup> In addition to invalidating 2 U.S.C. § 441b, *Citizens United* also reversed the prohibition on unions from making independent campaign expenditures. This Article focuses exclusively on the corporate law issues raised in the case and does not address the separate, but related, issue of labor unions.

Additionally, qualifying nonprofit corporations organized under 26 U.S.C. §§ 501(c)(3) and 527, as well as corporations qualifying for the MCFL exemption, were exempted from the prohibitions on corporate campaign expenditures under § 441b and are therefore outside of the scope of the *Citizens United* holding and the issues addressed in this Article. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (establishing the MCFL exemption).

corporations and the fundamental assumptions shaping the Court's view of corporate speech in *Citizens United*. The third Part analyzes the majority opinion, identifying the conceptualization of corporations it employs and the assumptions upon which it relies. Finally, the fourth Part of this Article debunks the flawed corporate law assumptions buttressing the Court's conclusion that corporate political speech is indistinguishable from individual speech.

## II. CORPORATE CONSTITUTIONAL RIGHTS: THE ROAD TO *CITIZENS UNITED*

*Citizens United v. FEC* overturned the long legal history of regulating corporate political speech—from the Tillman Act of 1907<sup>4</sup> to the Bipartisan Campaign Reform Act of 2002.<sup>5</sup> Initially unable to reach a majority decision, the Supreme Court requested a rare reargument of the case and revived a facial challenge to 2 U.S.C. § 441b.<sup>6</sup> In the five-to-four opinion, the Court overturned § 441b's restriction on corporate independent expenditures and thus overruled *Austin v. Michigan State Chamber of Commerce*,<sup>7</sup> a major decision

<sup>4</sup> Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)) (banning “any corporation whatever” from making “a money contribution in connection with” federal elections).

<sup>5</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.) (addressing the increased role of so-called “soft money” in campaign financing and the proliferation of issue-advocacy advertisements); see also Ciara Torres-Spelliscy, Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach 32-34 (Feb. 28, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1474421> (discussing the evolution of campaign finance laws from the Tillman Act and through the Bipartisan Campaign Reform Act). See generally Kimberly Demarchi, *Election Campaign Funding After Citizens United*, 46 ARIZ. ATT'Y 20, 20 (2010) (providing a historical background of election contributions).

The Tillman Act was passed in response to President Theodore Roosevelt's first State of the Union Address calling for an absolute ban on contributions by corporations for any political purpose, 40 CONG. REC. 96 (1905), after allegations arose that his campaign for election had accepted substantial corporate contributions. MARK GROSSMAN, *POLITICAL CORRUPTION IN AMERICA: AN ENCYCLOPEDIA OF SCANDALS, POWER, AND GREED* 271 (2003).

<sup>6</sup> Adam Liptak, *Case Could Overhaul Rules on Campaign Spending*, N.Y. TIMES, June 30, 2009, at A12. Justice Stevens' dissent highlights that *Citizens United* expressly abandoned its facial challenge in its motion for summary judgment in the district court. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part); see also Brief for Plaintiff, *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (No. 07-2240) (opposing FEC's motion for summary judgment and supporting its own motion for summary judgment). See generally 2 U.S.C. § 441b(a) (prohibiting national banks, corporations, and labor organizations from making contributions or expenditures in connection with certain elections); 2 U.S.C. § 434(f)(3)(a)(i) (defining the term “electioneering communication”); *Citizens United*, 130 S. Ct. at 897 (“Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.”).

<sup>7</sup> 494 U.S. 652 (1990), overruled by *Citizens United*, 130 S. Ct. 876.

upholding corporate campaign expenditure restrictions.<sup>8</sup> The thrust of the Court's argument was that independent expenditures—those made by corporations and labor unions that are not coordinated with a candidate or the candidate's committee or party—do not raise corruption concerns and therefore do not meet the strict scrutiny threshold necessary to restrict speech otherwise protected by the First Amendment.<sup>9</sup>

#### A. *Evolving Constitutional Conceptualizations of Corporations*

The Court's evolving treatment of corporations has depended in part on its view of them—the sources of their rights and their role in society—and certain assumptions regarding how corporations function. As those views have evolved, so too have the constitutional protections afforded to corporations, including rights under the First Amendment. In *Citizens United* and other corporate political speech cases, the Court's conceptualization of and assumptions about corporations shape the outcomes. This Article identifies the conceptualizations relied upon by the Court and deconstructs their underlying assumptions.

The Supreme Court in *Trustees of Dartmouth College v. Woodward*<sup>10</sup> articulated the artificial entity theory—the original constitutional conceptualization of corporations—by stating, “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.”<sup>11</sup> Under this view, corporations were routinely denied constitutional protections.<sup>12</sup>

This rigid artificial entity theory softened into a second approach that focused on corporations as possessing the aggregate rights of

<sup>8</sup> *Citizens United* also overruled parts of *McConnell v. FEC*, 540 U.S. 93 (2003), which extended § 441b's restrictions on corporate election expenditures.

<sup>9</sup> See *Citizens United*, 130 S. Ct. at 909 (“[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”). Earlier, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court had reasoned that uncoordinated expenditures undermine the value of such speech to the candidate and therefore decrease the threat of quid pro quo reciprocation from the candidate or elected official. *Citizens United*, 130 S. Ct. at 908.

<sup>10</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>11</sup> *Id.* at 636.

<sup>12</sup> See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 99 (1872) (Field, J., dissenting) (“But the court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed . . .”).

their shareholder-owners. “Viewed as a group of individuals or as a real and discrete entity with attributes similar to those of a person, a corporation gains First Amendment rights that are indistinguishable from those of individuals.”<sup>13</sup> This approach is often used in connection with the argument that corporate political speech should receive full First Amendment protection because it protects the rights of the citizen-shareholders<sup>14</sup> to speak through the corporation.<sup>15</sup>

This second, “aggregation approach” gave way to a third, more aggressive and individualistic conceptualization of corporations, which declared them autonomous and separate from both their originating states’ laws and their shareholders.<sup>16</sup> The evolving

<sup>13</sup> Berger, *supra* note 2, at 182.

<sup>14</sup> This article uses the phrase “citizen-shareholder” to discuss the questions of corporate political participation raised in *Citizens United* because the case implicates the participatory rights of citizens as well as their economic interests as shareholders. The comprehensive category of shareholders of publically traded companies in the United States certainly includes other groups such as non-citizen shareholders (i.e., those living and working here with a visa or a green card) as well as foreign nationals who neither live nor work in this country.

<sup>15</sup> See, e.g., Reply Brief for Appellant at 13–17, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 693638 (arguing that nonprofit corporation speech is funded mostly by individuals); Brief of the American Civil Rights Union as Amicus Curiae Supporting Petitioner *Citizens United* at 12–14, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 132718 (arguing that *Citizens United* is comprised of individual donors); Brief of American Justice Partnership and Let Freedom Ring as Amici Curiae Supporting Petitioner at 11–12, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2359479 (“To be heard effectively, individuals with less financial wherewithal must pool their resources. If they seek to do so by forming a corporation, *Austin* permits them to be silenced rather than heard.”); Brief of Fidelis Center for Law and Policy and CatholicVote.Com as Amici Curiae Supporting Petitioner on Supplemental Question at 9, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2365209 (“*Austin* endorsed what must be seen as an unconstitutional condition because the benefits of incorporating now come at a price, i.e., shareholders are not free to use their corporate treasury to fund political speech about candidates.”); Brief of National Rifle Ass’n as Amicus Curiae Supporting Petitioner at 15, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 147861 (arguing that First Amendment protects actions of individual donors acting in concert); Brief of Pacific Legal Foundation as Amicus Curiae Supporting Petitioner on Supplemental Question at 16, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2349017 (“[C]orporations provide ‘individuals the ability to organize in a form that would allow them to engage efficiently in collective action.’” (quoting Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1111 (2002))); see also Larry Ribstein, *Corporate Speech Is About Real People Speech*, IDEOBLOG (Mar. 13, 2010, 3:26 PM), <http://busmovie.typepad.com/ideoblog/citizens-united> (“*Citizens United* is about the speech rights of real people acting through associations. If you take away the speech rights of people acting through associations, you have to decide which other types of associations you want to apply that to. Unincorporated firms? The ACLU?”); cf. Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1009 (1998) (“Several theories of the corporation have been used to support the classification of the corporation on the private, nongovernmental, individual side of the great liberal divide between state and civil society. The oldest theory—conventionally referred to as the ‘aggregate’ theory—deemed the corporation to be ‘really’ just its ‘members’ and, accordingly, entitled to the same protection the ‘members’ would have.”).

<sup>16</sup> Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580–81 (1990) (“[T]he ‘natural entity’ or person theory . . . regards the corporation not as artificial, but as real, with a separate existence and independent rights. It is

conceptualization of corporations has facilitated, in part, the trend to extend constitutional protections to such entities.<sup>17</sup> Today, corporations enjoy the protection of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.<sup>18</sup>

The *Citizens United* opinion affirmed, in part, that corporations enjoy First Amendment protections. Corporations, however, are not mentioned in the Constitution; thus, the extension of such rights depends on case law. Corporations, originally viewed as mere creatures of state law with limited rights and powers (the artificial entity theory), were routinely denied constitutional rights early in the nineteenth century.<sup>19</sup> For example, in the *Slaughter-House Cases*,<sup>20</sup> the Supreme Court differentiated the rights of “naturalized” citizens from those of corporations, which were state-created entities and outside of the intended scope of the Fourteenth Amendment’s Privileges and Immunities Clause.<sup>21</sup> The court held

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associated with continental theorists who, at the turn of the century, wrote about ‘group’ or ‘corporate’ personality in an effort to challenge individualism and to come to terms with institutions of modern society such as corporations, trade unions, universities, and professional associations. This understanding of the corporation most favors corporate constitutional rights.” (footnote omitted).

<sup>17</sup> See LEE DRUTMAN & CHARLIE CRAY, *THE PEOPLE’S BUSINESS: CONTROLLING CORPORATIONS AND RESTORING DEMOCRACY* 44–45 (2004) (discussing a corporation’s legal status and constitutional protections).

<sup>18</sup> See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (applying the Fifth Amendment protection from double jeopardy to corporations); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (“[T]he act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press . . . .”); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“We are also of opinion that an order for the production of books and papers [of a corporation] may constitute an unreasonable search and seizure within the Fourth Amendment.”); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (“It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 28 (1889) (extending Fourteenth Amendment procedural due process to corporations); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91–92 (1809) (establishing the right for a corporation to bring an action in its own name); *United States v. Kilpatrick*, 594 F. Supp. 1324, 1350 (D. Colo. 1984) (“The guarantees of the Sixth Amendment apply to corporate defendants with the same force as to individual defendants.” (citing *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979))), *rev’d on other grounds*, 821 F.2d 1456 (10th Cir. 1987).

<sup>19</sup> Mayer, *supra* note 16, at 579–80.

<sup>20</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>21</sup> [T]he court held, that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.

. . . The common privileges and immunities which of right belong to all citizens, stand on a very different footing [from that of a corporation].



that corporations were not citizens within the meaning of [the Fourteenth Amendment]; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed . . . .<sup>22</sup>

The expanded conceptualization of a corporation as a legal person that enjoys a nearly full panoply of rights began in 1886 with *Santa Clara County v. Southern Pacific Railroad Co.*<sup>23</sup> In retrospect the extension of constitutional rights to corporations was a sea-change moment. It was accomplished, however, through a preargument statement of Chief Justice Waite that was included in the court reporter's footnote to the oral-argument transcript.<sup>24</sup> Since the *Santa Clara* decision, the constitutional rights of corporations have been recognized in several areas, particularly under the Bill of Rights.<sup>25</sup> Corporations are entitled to freedom of speech under the First Amendment, protection from unreasonable searches under the Fourth Amendment, freedom from double jeopardy under the Fifth Amendment, counsel under the Sixth Amendment, and jury trials in civil cases under the Seventh Amendment.<sup>26</sup>

*Id.* at 100 (Field, J., dissenting); *see also id.* at 80.

<sup>22</sup> *Id.* at 99.

<sup>23</sup> 118 U.S. 394 (1886). At issue in *Santa Clara County* was whether California was prohibited under the Due Process Clause from taxing a railroad company's property differently from that of an individual.

<sup>24</sup> One of the points made and discussed at length in the brief of counsel for defendants in error was that "Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." Before argument

MR. CHIEF JUSTICE WAITE said: 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.

*Id.* at 396.

<sup>25</sup> *See* Mayer, *supra* note 16, at 582 ("As late as 1960 the corporation arguably enjoyed only the protection of the fifth amendment's due process clause. Today, the corporation boasts a panoply of Bill of Rights protections . . . ." (footnote omitted)). Corporations first received Bill of Rights guarantees in 1893. In *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165 (1893), a railroad corporation invoked the Fifth Amendment's Due Process Clause to challenge the Secretary of the Interior's revocation of an approval for a right-of-way over federal public lands. The Court invalidated this action, viewing it as an attempt to deprive the railroad corporation of its property without due process. *Id.* at 176. "Although the Court in *Noble* did not explain why the fifth amendment due process clause—as opposed to the fourteenth amendment clause—should apply to corporations, no other interpretation is possible, because the defendant was the federal government." Mayer, *supra* note 16, at 591.

<sup>26</sup> Berger, *supra* note 2, at 182 ("Corporations count as persons for the Fourth

The initial denial of constitutional protections to corporations, as well as the later extension of such protections, depended on the Court's conceptualization of corporations under corporate personhood theories. In the 125 years since *Santa Clara*, the law's view of corporations in terms of legal philosophy has evolved so that corporations are now considered either an aggregation of their members, entitled to the aggregate rights of those members, or as an entirely separate, free-standing entity entitled to constitutional and other rights as legal persons.<sup>27</sup> The majority in *Citizens United* employed both the aggregation-of-rights and entity theory of corporations to reach its conclusion that corporate political speech is to be treated the same as individual political speech.

Even though the law has reached a tentative consensus that corporations, as legal persons, have some rights, the law still deals with corporations in a cumbersome and often inconsistent way. In some areas, the law makes no distinction between the individual and

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Amendment's protection against unreasonable searches, the Fifth Amendment's protection against double jeopardy, and the Seventh Amendment's right to trial by jury in civil cases."); Mayer, *supra* note 16, at 578 ("The corporation's invocation of the first ten amendments symbolizes the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives."). Corporations, however, are not entitled to the Fifth Amendment's protection from self-incrimination. "[C]orporations, unlike individuals, can be required to testify against themselves and have no right of privacy." KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 288 (8th ed. 2011) (footnote omitted); *see also* *Andresen v. Maryland*, 427 U.S. 463 (1976) (holding that search of petitioner's offices for business records did not offend Fifth Amendment); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) (holding that record-keeping and reporting requirements imposed on bank by Bank Secrecy Act did not deprive bank of due process); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (holding that due process is not violated if inquiry is not too indefinite and information sought is relevant).

For a discussion of Fifth Amendment protections (life, liberty, property) claimed by corporations for regulatory takings, such as the recent case in which the Second Circuit held that a Massachusetts law requiring the disclosure of tobacco ingredients constituted a regulatory taking of the trade secret, *see DRUTMAN & CRAY, supra* note 17, at 58–61.

For a discussion of the applicability of the Sixth Amendment to corporations, *see U.S. v. Unimex, Inc.*, 991 F.2d 546, 549–50 (9th Cir. 1993) (holding that corporations have a right to counsel but no right to appointed counsel should they be unable to afford to cost of retaining counsel) and *U.S. v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (holding that corporations cannot be subject to interrogation outside the presence of counsel after initiation of criminal proceedings).

<sup>27</sup> *See, e.g., Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring) ("The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'"). *But cf. id.* at 930 (Stevens, J., concurring in part and dissenting in part) ("In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it."); Transcript of Oral Argument at 53–60, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 6325467 (discussing the interests of the corporate shareholder versus the corporation's individual interests).

the corporation; yet in other circumstances, different treatment is warranted by their apparent differences in structure, function, and role in society. For example, tax treatment including the deduction of expenses and the levels of taxation (“double” for corporations), issues of criminal punishment, and the application of the commercial speech doctrine primarily to corporate speech are but a few examples of the unique treatment that corporations receive under the law.<sup>28</sup> In delineating the legal distinctions between corporate and individual actors, the issue of speech from the corporate entity has long occupied the Supreme Court and tested the rational limits of First Amendment doctrines.

### *B. Constitutional Recognition of Corporate Political Voices*

Before *Citizens United*, corporations were prohibited from making direct candidate contributions and, for a certain time period before primary and general elections, independent expenditures.<sup>29</sup> Section 441b, which was struck down in part in *Citizens United*,<sup>30</sup> made it “unlawful for any . . . corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office.”<sup>31</sup> Contributions and expenditures include electioneering communications<sup>32</sup> or their functional equivalent.<sup>33</sup>

<sup>28</sup> See, e.g., 10 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4946 (perm ed., rev. vol. 2010) (“Even if it is accepted that a corporation has the capacity to commit a particular crime, it cannot be indicted if the punishment prescribed for the crime cannot be imposed upon a corporation. A corporation, therefore, cannot be indicted for a felony where the only punishment provided is death or imprisonment, since a corporation cannot be subject to either penalty.”); Herwig J. Schlunk, *A Minimalist Approach to Corporate Income Taxation*, 59 SMU L. REV. 785 (2006) (discussing the double-taxation method applied to corporations).

<sup>29</sup> 2 U.S.C. § 441b(a) (2006), *invalidated by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>30</sup> The ban on direct contributions by corporations in § 441b was not a part of the constitutional challenge in *Citizens United* and remains good law. See *Citizens United*, 130 S. Ct. at 901 (discussing *Buckley v. Valeo*, which upheld limits on direct contributions to candidates).

<sup>31</sup> 2 U.S.C. § 441b(a).

<sup>32</sup> 2 U.S.C. § 441b(b)(2). This provision reads:

For purposes of this section and section 79l(h) of title 15, the term “contribution or expenditure” includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this

Electioneering communications means communications that are publicly distributed and the term includes “any broadcast, cable, or satellite communication”<sup>34</sup> that clearly identifies a federal election candidate within sixty days of a general or thirty days of a primary election.<sup>35</sup>

Even though corporations were restricted from making independent expenditures before *Citizens United*,<sup>36</sup> corporations still had avenues available to them through which they could participate in political speech. These avenues included: (1) contributions to political action committees (PACs), (2) expenditures on direct lobbying efforts, and (3) utilizing corporate funds to encourage employees to support or oppose a particular candidate or issue.<sup>37</sup> Additionally,

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section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

*Id.*

<sup>33</sup> *McConnell v. FEC*, 540 U.S. 93, 206 (2003).

<sup>34</sup> 11 C.F.R. § 100.29(a) (2010).

<sup>35</sup> See 2 U.S.C. § 434(f)(3)(A)(i) (2006) (“The term ‘electioneering communication’ means any broadcast, cable, or satellite communication which—(I) refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special or runoff election for the office sought by the candidate or (bb) 30 days before a primary . . . to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.”); see also *Citizens United*, 130 S. Ct. at 897 (“Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech.”).

<sup>36</sup> See Bipartisan Campaign Reform Act of 2002 (McCain-Feingold), Pub. L. 107–155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.) (addressing the increased role of soft money in campaign financing and the proliferation of issue-advocacy advertisements).

Under § 441b, corporations were prohibited from “using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.” *Citizens United*, 130 S. Ct. at 887.

<sup>37</sup> See MIDDLETON & LEE, *supra* note 26, at 302 (“Profit-making corporations . . . may support PACs and engage in partisan communication—including advocating the election of specific candidates—provided the communications are directed only to the corporate . . . ‘family.’ A corporation may use corporate funds to urge management, shareholders, and their

§ 441b contained exemptions for media corporations<sup>38</sup> and for communications “by a section 501(c)(4) organization or a political organization . . . if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence.”<sup>39</sup> Thus, corporations had access to the political marketplace and a voice in the debate, although that voice was restricted.

In applying the First Amendment to corporations, four cases are essential to understand the constitutional trajectory of the corporate political speech doctrine prior to *Citizens United*:<sup>40</sup> *Buckley v. Valeo*,<sup>41</sup> *First National Bank of Boston v. Bellotti*,<sup>42</sup> *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>43</sup> and *Austin v. Michigan Chamber of Commerce*.<sup>44</sup> Emerging from these cases, are the key

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families to vote for a specific candidate . . .”).

<sup>38</sup> See 2 U.S.C. § 431(9)(B) (“The term ‘expenditure’ does not include—(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate . . .”).

<sup>39</sup> *Id.* § 441b(c)(2). Nonprofit corporations that were formed solely to promote political ideas, that did not collect funds from for-profit corporations, and that did not engage in business activities were also exempted from the restrictions on corporate expenditures under § 441b. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986).

<sup>40</sup> A great deal of constitutional scholarship has been devoted to these cases and is not the intended focus of this Article. Please note that there are several key First Amendment decisions that are not included in this discussion. This Article is an attempt to infuse the First Amendment debate with corporate law principles, not to conduct a survey of free speech cases. For a more detailed discussion of the First Amendment case law leading up to *Citizens United*, see Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243 (2010).

<sup>41</sup> 424 U.S. 1 (1976). *Buckley* established the distinction between restricting direct contributions and indirect expenditures. The Court concluded that regulation was justified because direct contributions could create quid pro quo relationships between donors and recipient; the Court was also worried about the mere appearance of such corruption. *Id.* at 26–27. Restrictions on expenditures, on the other hand, failed to survive strict scrutiny and were struck down. *Id.* at 54.

<sup>42</sup> 435 U.S. 765 (1978). In *Bellotti*, the Court again confronted campaign restrictions, this time in the context of a Massachusetts criminal statute that prohibited corporations from making expenditures for ballot measures not related to their interests. *Id.* at 768. The statute contained a presumption that income-tax measures were not related to the interests of corporations and therefore corporations were prohibited from making expenditures related to tax issues on the ballot. *Id.* The Court addressed whether speech by corporations had any less First Amendment protection than the speech of natural persons and determined, at least with respect to direct ballot issues, that there was no constitutional provision to support the distinction. *Id.* at 784–86.

<sup>43</sup> 479 U.S. 238 (1986).

<sup>44</sup> 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010). *Austin* upheld § 441b’s restrictions on independent corporate campaign expenditures, finding that the regulation was narrowly tailored because it was not an outright ban on expenditures by corporations, but merely a regulation on how they might be used. *Id.* at 659–60.

*McCormell v. FEC*, 540 U.S. 93 (2003), *overruled in part by* *Citizens United*, 130 S. Ct. 876, was an extension of *Austin*. The Court upheld restrictions preventing corporations and labor unions from using their general treasuries to make electioneering communications. *Id.* at 203–09.

First Amendment metaphors and arguments regarding the constitutional role of corporate political speech that framed the debate in *Citizens United*.

In *Buckley* and *Bellotti*, the Court thwarted attempts to restrict corporate political speech on the grounds that (1) speech is money; (2) corporations contribute to the political marketplace of ideas; (3) there is no special threat of distortion or need to equalize individual and corporate voices; (4) corporate political speech implicates freedom of association rights; and (5) concerns of compelled shareholder speech do not justify restricting corporate political speech. In subsequent cases such as *Massachusetts Citizens for Life* (“*MCFL*”) and *Austin*, however, the Court utilized some of these same arguments to explain or validate certain restrictions on corporate political speech. Later, in *Citizens United*, however, the Court employed the same lines of reasoning advanced in the cases discussed below, to equalize corporate and individual speech thus expanding corporate First Amendment rights. The Court’s application of these common arguments—as either an attack against or support for corporate political speech restrictions—depends on both the Court’s constitutional conceptualization of corporations and its assumptions about the roles, rights, and responsibilities of corporations in our economic and legal society.

### *1. The Foundation: Spending Money Is a Protected Form of Speech*

The determination that spending money in campaigns—through either contributions or expenditures—is a form of constitutionally protected speech or expression is a cornerstone in the First Amendment debate regarding corporate political speech rights.<sup>45</sup> In *Buckley*, which upheld direct-campaign-contribution caps but struck down similar restrictions on expenditures, the Court found for the appellants, who argued that “limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money.”<sup>46</sup> Because corporations can speak only through a conduit—either a representative of the corporation or, even more indirectly, through spending money—the recognition that money is a form of speech is an essential element in recognizing First Amendment protection of corporate political speech.<sup>47</sup>

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<sup>45</sup> *Buckley*, 424 U.S. at 14.

<sup>46</sup> *Id.* at 11.

<sup>47</sup> See Berger, *supra* note 2. That a corporation cannot speak directly but must speak

## 2. *The Marketplace of Ideas: A Shifting Metaphor to Both Extend and Restrict Corporate Political Speech Rights*

Second, in debating the political speech rights of corporations, the Court has frequently employed the metaphor that the First Amendment protects a marketplace of ideas.<sup>48</sup> In *Bellotti*, the Court struck down a Massachusetts law prohibiting corporate political speech regarding ballot measures not related to the corporation's interests.<sup>49</sup> Rather than making a determination about the independent right of corporations to engage in political speech, the Court utilized a marketplace-of-ideas justification to overturn the prohibition in question. The Court reasoned that the First Amendment protects the "stock of information from which members of the public may draw,"<sup>50</sup> and concluded that all speech benefits the citizen-recipients. The Court refused to discount the contributions of speech from corporations, asserting:

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.<sup>51</sup>

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through a representative or use an indirect form of speech is represented by the ventriloquist metaphor. This imagery is not entirely accurate, however, because a corporation is even further removed from the speech than the ventriloquist speaking through a dummy. The corporation as an entity does not control its own speech. Rather, the board of directors of the corporation controls the speech. To be even more accurate, the board of directors would be the ultimate puppet master pulling the strings of the ventriloquist who is speaking through the dummy. A possible exception may be single-shareholder corporations, where the voice of the corporation is the voice of the sole shareholder.

<sup>48</sup> *MCFL*, 479 U.S. at 257; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>49</sup> See *supra* note 42 (discussing *Belotti*).

<sup>50</sup> *Bellotti*, 435 U.S. at 783. The Court analogized corporate political speech to corporate commercial speech. *Id.* at 766. Commercial speech—speech related to a commercial transaction—is protected under the Constitution but receives only intermediate scrutiny. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770–73 (1976) (discussing how commercial speech can be regulated).

<sup>51</sup> *Bellotti*, 435 U.S. at 776–77 (second alteration in original) (footnotes omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

In *MCFL*, the Court once again employed the marketplace-of-ideas metaphor in analyzing the constitutional protections afforded to corporate political speech when it exempted a nonprofit, nonstock corporation from complying with the restrictions on corporate expenditures contained in § 441b.<sup>52</sup> The *MCFL* Court, however, used the marketplace-of-ideas metaphor as a general justification to restrict corporate speech, not as a means to strike down the regulation for the benefit of the citizen-listeners as it had in past cases.<sup>53</sup> The Court described the rationale of § 441b as

the need to restrict “the influence of political war chests funneled through the corporate form” . . . .

This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes’ observation that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”<sup>54</sup>

In exempting *MCFL*, the Court concluded that restricting the political speech of this particular type of corporation did not serve the goals of § 441b, such as preserving the representative capacity of the marketplace of political ideas as a barometer of public support for a particular candidate or idea.<sup>55</sup> In *MCFL*, the Court implied that citizen-listeners have an interest not only in accessing different ideas within the political marketplace, but also in preserving the representative capacity of the marketplace so that the volume of such speech bears some relationship to public support for it.<sup>56</sup>

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<sup>52</sup> In this case, the Court declined to extend the restrictions in § 441b to *MCFL*. The Court concluded that the restrictions in § 441b were too “burdensome” where the rationales for the restrictions were found to be largely inapplicable to a nonprofit, nonstock corporation that was engaged in issue advocacy and received no corporate donations. *MCFL*, 479 U.S. at 241–42.

<sup>53</sup> *Id.* at 257.

<sup>54</sup> *Id.* (second omission in original) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); see also *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 416 (1972) (discussing how Congress sought to prevent union treasuries from influencing federal elections); *United States v. Int’l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 585 (1957) (discussing how Congress sought to reduce the political influence of those with a large amount of capital).

<sup>55</sup> *MCFL*, 479 U.S. at 258.

<sup>56</sup> See *id.* at 257 (concluding that corporate spending would not let the marketplace of ideas function as an accurate indicator of public opinion).



### 3. Limited Expenditures as a Means to Equalize Voices and Prevent Overamplification of Corporate Voices

Related to the marketplace-of-ideas metaphor are the equalization-of-voices and antidistortion rationales alluded to by the Court in *MCFL*. The equalization-of-voices and antidistortion rationales are also key components of the Court's analysis of corporate political speech rights. The Court in *Austin* upheld restrictions on corporate independent campaign expenditures,<sup>57</sup> allowing a different standard to be applied to corporate—as opposed to individual—political speech because the corporate structure provided unique advantages that might allow corporations to overpower the political voice of the individual. The Court thus validated the antidistortion rationale in *Austin*.<sup>58</sup>

Decades before *Austin* and *MCFL*, however, the *Buckley* Court considered and rejected the equalization rationale—which advocates limiting expenditures to level the political playing field. The Court stated that the expenditure limits served “to mute the voices of affluent persons and groups in the election process . . . to equalize the relative ability of all citizens to affect the outcome of elections.”<sup>59</sup> The Court concluded that restricting “the quantity of campaign speech by individuals, groups, and candidates” struck “at the core of our electoral process and of the First Amendment freedoms.”<sup>60</sup> Following *Buckley*, the Court in *Bellotti* similarly rejected the equalization and antidistortion rationales as being unsupported by the record.<sup>61</sup> Instead

<sup>57</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>58</sup> *Id.* at 660 (“[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”).

<sup>59</sup> *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976).

<sup>60</sup> *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

<sup>61</sup> In *Bellotti*, next in the progression of corporate political-speech cases, the Court followed *Buckley*'s reasoning, stating:

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view.

*First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789 (1978); *see also id.* at 789–90 (rejecting the equalization and antidistortion rationales on the ground that there was “no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in

of rejecting the rationales wholesale, the Court emphasized the lack of a record justifying the restriction. Alerted to the need to develop a record regarding distortion harms to support expenditure limits, Congress did so in passing the Bipartisan Campaign Reform Act.<sup>62</sup> Those restrictions were subsequently recognized as valid in *MCFL* and *Austin*.<sup>63</sup>

Thus, the equalization-of-voices and antidistortion rationales, initially rejected in *Buckley* and *Bellotti*, were subsequently recognized as valid justifications for restricting corporate political speech in *MCFL* and *Austin*. *Citizens United*, discussed further in Part III, abandoned the reasoning of *MCFL* and *Austin* and returned to the Court's original position in *Buckley* and *Bellotti* by rejecting these rationales. Freedom of association, the right of an individual to speak through a voluntary association, is a key element of later arguments such as those made in *Citizens United* to protect corporate political speech as a means to give full voice their citizen-shareholders. Corporate political speech rights are thus viewed as a means to fulfill the mandate of the freedom of association clause of the First Amendment and is based on the aggregate-rights theory of corporations discussed above.

#### *4. Freedom to Associate as a Justification for Collective Corporate Political Speech: An Aggregate Theory View of Corporate Speech*

A fourth theme in the Court's historical analysis of corporate political speech rights is the interplay between freedom of association and freedom of speech when citizens speak through their organizations, including for-profit corporations.

In *Buckley*, the Court raised the notion that spending money in a political campaign, whether through a direct contribution or an expenditure, also implicates the associational rights of individuals.<sup>64</sup> The Court asserted that capping independent expenditures in campaigns burdens freedom of speech because it "precludes most associations from effectively amplifying the voice of their adherents,

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government" (footnote omitted).

<sup>62</sup> See, e.g., *Citizens United*, 130 S. Ct. at 902 ("Congress recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. Section 441b is the independent expenditure restriction challenged here." (citation omitted)); H.R. REP. 107-131, at 4 (2001) (identifying the disclosure of sponsors of communications as the only government interest that the Bipartisan Campaign Reform Act serves).

<sup>63</sup> *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

<sup>64</sup> *Buckley*, 424 U.S. at 22-23.

the original basis for the recognition of First Amendment protection of the freedom of association.<sup>65</sup> Utilizing an aggregate theory of politically active organizations, the Court concluded that restricting independent associations' expenditures of money in political campaigns unjustifiably interfered with the constitutional rights of the members of those associations.<sup>66</sup>

*5. The Threat of Compelled Speech: The Shareholder Protection Rationale*

The fifth important element in the Court's constitutional analysis of corporate political speech rights is the shareholder protection rationale, which argues that corporate political speech should be restricted to prevent the threat of compelled speech among a heterogeneous group of shareholders. In *Bellotti*, the Court rejected Massachusetts's justification for its law prohibiting corporate participation in ballot measures. Massachusetts had argued that the law was justified because it prevented shareholders from being forced by economic concerns to give voice to opinions they themselves did not hold.<sup>67</sup> The Court reasoned that mechanisms of corporate democracy, such as shareholder election of the board of directors, provided adequate protection against such concerns.<sup>68</sup> Ultimately, however, the Court rejected the shareholder protection rationale because it was both over- and underinclusive—including speech that could comport with citizen-shareholder views and excluding other types of potentially politically incongruent activity, such as lobbying or making independent expenditures on behalf of campaigns.<sup>69</sup>

The Court returned to compelled shareholder speech in *Austin*, where it reversed its earlier position on the shareholder protection rationale. The *Austin* Court prohibited general corporate treasuries

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<sup>65</sup> *Id.* at 22. The *Buckley* Court, however, upheld limits on direct campaign contributions because even though they limited the amount of financial support an individual could lend to a candidate or committee, they left "the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.*

<sup>66</sup> *Id.* ("The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'" (alternation in original) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion))).

<sup>67</sup> *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792–93 (1978).

<sup>68</sup> *Id.* at 794–95 ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests." (footnote omitted)).

<sup>69</sup> *Id.* at 793–95. It bears noting that in *Citizens United* Justice Kennedy rejected the shareholder protection rationale, relying on the same over- and underinclusive reasoning employed by the Court in *Bellotti*. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010).

from funding political speech that could be inconsistent with the views of their citizen-shareholders, recognizing (in dicta) concerns regarding compelled speech of shareholders.<sup>70</sup>

These five elements of the Court's historical First Amendment analysis of corporate political speech rights—spending money is speech; corporate speech influences the marketplace of ideas; corporate and individual voices compete; corporate political speech implicates the freedom to associate; and corporate political speech threatens to compel speech—were all revived in the *Citizens United* opinion and shaped by the Court's conceptualization of and assumptions regarding corporations.

### III. IDENTIFYING THE CORPORATE POLITICAL VOICE IN *CITIZENS UNITED*

Having examined the different theoretical conceptualizations of corporations employed in First Amendment cases leading up to *Citizens United* and the Court's history of analyzing corporate political speech, the next step is to examine the Court's conceptualization of corporations and the theory of a corporate political voice employed by the majority in *Citizens United*. Justice Kennedy utilized both the artificial-entity and aggregate-rights theories to conceptualize corporations and strike down corporate independent expenditure bans.<sup>71</sup> The majority ultimately based its ruling on the findings that: independent expenditures are uncoordinated with the candidate; they pose no threat of corruption or the appearance of corruption; and they therefore do not serve the government's purported compelling interest in restricting such

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<sup>70</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 673 (1990) (Brennan, J., concurring), *overruled by Citizens United*, 130 S. Ct. 876 (“[T]he Michigan law protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders oppose the use of their money, paid as dues to the Chamber out of general corporate treasury funds, for political campaigns.” (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 260–61 (1986))); *cf. id.* at 686–87 (Scalia, J., dissenting) (arguing that a shareholder of a for-profit corporation should expect the management to take any action that the majority wants—as long as it is designed to make a profit—regardless of whether the shareholder himself finds it “politically or ideologically uncongenial”).

Note that there were no shareholders in the Michigan Chamber of Commerce, the group challenging the Bipartisan Campaign Reform Act's restriction on corporate independent campaign expenditures. Nonetheless, the Court concluded that the members of the Chamber of Commerce were more like shareholders in a corporation than members in a traditional organization. “Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community.” *Id.* at 663 (majority opinion).

<sup>71</sup> *Citizens United*, 130 S. Ct. at 904.

speech.<sup>72</sup> In reaching its decision, the Court overturned *Austin*, which had found that the unique threat of corporate political speech warranted certain governmental restrictions.<sup>73</sup> The holding of *Citizens United*, therefore, was not limited to the issue of direct contributions versus indirect expenditures. It extended to the much broader question of the proper constitutional treatment of corporate political speech. In reaching its decision, the Court drew on the First Amendment metaphors and arguments developed in the rich line of corporate political speech cases discussed above, and it adopted conflicting conceptualizations of corporations in order to craft its conclusion.

In concluding that the government cannot restrict corporate independent expenditures based solely on the corporate identity of the speaker, Justice Kennedy relied on the following two conceptualizations of the corporation: (1) the voice of a corporation is just as valuable to a voter as the voice of an individual which reflects the entity theory approach; and (2) corporations are protected “associations” of individuals under the First Amendment’s Freedom of Association Clause which reflects the aggregation-of-rights theory.

The Court questioned the distinction between corporate political speech and individual political speech, noting, “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>74</sup> This conclusion was framed using the marketplace-of-political-ideas metaphor. Citing *Buckley* and *Bellotti*, Justice Kennedy concluded that the speech of a corporation is no less valuable to the voter than the speech of an individual, and that it therefore cannot be subject to restrictions.<sup>75</sup> “The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”<sup>76</sup> This reasoning returned the corporate political speech

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<sup>72</sup> *Id.* at 910 (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” (citing *Buckley v. Valeo*, 424 U.S. 1, 46 (1976))).

<sup>73</sup> *Id.* at 913.

<sup>74</sup> *Id.* at 899.

Personhood has been ‘a conclusion, not a question.’ Referring metaphorically to the corporation as a person allows the decision-maker to treat the corporation as if it were identical for all purposes to individual human beings. Referring metaphorically to the marketplace of ideas suggests that the corporation needs protection from government regulation because its voice is necessary to the debate from which truth will emerge.

Berger, *supra* note 2, at 186 (footnote omitted).

<sup>75</sup> *Citizens United*, 130 S. Ct. at 912.

<sup>76</sup> *Id.* at 913.

doctrine to its original place by framing the issues in terms of *Bellotti*'s marketplace of political ideas, where the potential value of any speech to the citizen-listener prevents restrictions—even on corporate speakers.<sup>77</sup> Additionally, the *Citizens United* Court rejected the equalization-of-voices and antidistortion rationales—that regulation is justified by the risk that corporate voices will drown out individual voices—adopted in *MCFL* and *Austin*.

Arguing that “[o]n certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials,”<sup>78</sup> the Court disavowed any discount of corporate political speech in the marketplace of ideas.<sup>79</sup> In reaching its conclusion, the Court conceptualized corporations as artificial entities that have a right to speak in the political arena independent of their members’ right.<sup>80</sup> Thus, the Court’s application of the entity theory advanced its argument that corporate political speech is constitutionally protected.

The Court concluded, “[t]he purpose and effect of [§ 441b] is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public.”<sup>81</sup> The Court viewed the expenditure restrictions in § 441b as eroding the marketplace of political ideas. The Court opined that *Austin* and its progeny, including the language adopted in the Bipartisan Campaign

<sup>77</sup> See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776–77 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”). But see *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (“This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”). The marketplace-of-political-ideas metaphor has also been criticized for protecting speech that serves no democratic function but harms the social fabric, and for having an “inevitable bias” that supports the entrenched power structures of ideologies. Berger, *supra* note 2, at 188.

<sup>78</sup> *Citizens United*, 130 S. Ct. at 912.

<sup>79</sup> *Cf. Bellotti*, 435 U.S. at 784 (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The “materially affecting requirement . . . amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesman may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.”).

<sup>80</sup> See, e.g., Greenwood, *supra* note 15, at 1000 (arguing that in collapsing the corporate form into the individuals standing behind it, the courts gloss over the important organizational distinctions between corporations and individuals in terms of evaluating First Amendment rights). For the argument that there should not be First Amendment protections for commercially motivated speech because it does not serve the goal of self-expression, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

<sup>81</sup> *Citizens United*, 130 S. Ct. at 907.

Reform Act, “interfere[] with the ‘open marketplace’ of ideas protected by the First Amendment. [They] permit[] the Government to ban the political speech of millions of associations of citizens. Most of these are small corporations without large amounts of wealth.”<sup>82</sup> In this line of reasoning the Court appeared to adopt some of the equalization-of-voices concern underpinning the antidistortion argument. But instead of employing it in the context of the individual versus a corporation, the Court employed it in the context of large versus small corporations. The Court combined historical corporate political speech arguments—the marketplace-of-political-ideas and equalization rationales—with an entity-theory conceptualization of corporations in order to reach its conclusion that corporate political expenditures could not be restricted under the First Amendment.

Demonstrating the Court’s inconsistent view of corporations is its simultaneous adoption of the aggregation-of-rights-theory conceptualization of corporations in *Citizens United*. Under this theory, corporations possess the aggregate rights of their citizen-shareholder.<sup>83</sup> The Court thus conceptualized corporations as *associations* of citizens, who are unquestionably protected under the First Amendment.<sup>84</sup> The Court rejected the idea that citizen “membership” through stock ownership in a publicly held corporation should be treated differently from citizen membership in any other type of organization.<sup>85</sup>

The constitutional scope of the first amendment includes a protection of the right to free association. The government cannot prevent free people from joining private organizations.

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<sup>82</sup> *Id.* at 906–07 (citations omitted).

<sup>83</sup> Instead of thinking about corporate functioning, corporate sociology, or corporate law, and then considering how constitutional norms designed to protect citizens from the power of the state should apply to powerful nonstate organizations, the Court often has seen its task as determining whether corporations are “persons” entitled to protection from the state. In general, the Court has concluded that they are. *See Greenwood, supra* note 15, at 1006, 1009 (“Several theories of the corporation have been used to support the classification of the corporation on the private, nongovernmental, individual side of the great liberal divide between state and civil society. The oldest theory—conventionally referred to as the ‘aggregate’ theory—deemed the corporation to be ‘really’ just its ‘members’ and, accordingly, entitled to the same protection the ‘members’ would have.”).

<sup>84</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>85</sup> *Cf. Nicholas Wolfson, The First Amendment and the SEC*, 20 CONN. L. REV. 265, 288 (1988) (“Membership in a publicly-held corporation should rest on the same constitutional plateau as membership in other organizations.”).

Neither can the government enjoin the speech individuals use in connection with their right to free association.<sup>86</sup>

By categorizing corporations under the same headings as any other organization—artistic, political, community based, etc.—the Court set the stage to fully protect corporate speech as an extension of the rights of the citizen-shareholders standing behind the corporation.<sup>87</sup> “The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”<sup>88</sup> By framing the right of corporations to engage in political speech as an extension of the association and free speech rights of their citizen-shareholders, the Court returned to the aggregate theory of corporations and the line of reasoning first employed in *Buckley* and *Bellotti*.

Additionally, the Court refused to discount the constitutional status of corporations as First Amendment protected associations merely because corporations are organized for commercial purposes.<sup>89</sup> The Court reasoned that corporate “speech cannot be distinguished based upon the presence or lack of economic motive. That would eliminate most speech from first amendment coverage. Likewise, if one eliminates the right to association from economically interested groups, one would eliminate most groups, with the possible exception of the purest religious groups.”<sup>90</sup>

The majority opinion in *Citizens United* highlighted the Court’s inconsistent conceptualization of corporations under the First Amendment drawing upon both entity and aggregate views of the corporate form. In reaching its conclusion to overturn § 441b’s ban on

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<sup>86</sup> *Id.* at 286–87 (footnotes omitted).

<sup>87</sup> In this imaginary marketplace of ideas, as in *Lochner*’s imaginary market, all is necessarily for the best in this best of all possible worlds, provided only that legislatures are barred from interfering on behalf of market losers. Those who win deserve to win. Any attempt to legislate different rules that might generate different winners is a violation of secularly sacred rules of the game. In short—and particularly since markets operate by the ancient principle that to those who have much, much will be given—might makes right. See Greenwood, *supra* note 15, at 1017 (describing the shift in First Amendment theory that resulted in understanding it as a “Lochnerian enactment of a free market of information”).

<sup>88</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

<sup>89</sup> It is important to note that there are nonprofit corporations, single-shareholder corporations, and corporations formed solely to serve political ends, which are all excluded from the arguments made herein. These subsets of corporations can be dealt with through exemptions or exceptions to any campaign-finance law and are therefore largely outside of the scope of this Article.

<sup>90</sup> Wolfson, *supra* note 85, at 287. “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” *Citizens United*, 130 S. Ct. at 904.



independent corporate campaign expenditures, the Court employed both the entity theory, reasoning that corporate political speech has the same value as individual speech in the marketplace of ideas,<sup>91</sup> and the aggregate-rights theory, reasoning that corporations are protected associations.<sup>92</sup> The Court's shifting conceptualization of corporations and its flexible application of historical First Amendment arguments create an inconsistent doctrine of corporate political speech rights. The malleability of the Court's views of corporations stems from its flawed assumptions about the economic, political, and legal realities of corporations.

#### IV. FLAWED ASSUMPTIONS: INSERTING CORPORATE LAW INTO THE FIRST AMENDMENT DEBATE IN *CITIZENS UNITED*

*Citizens United* held that independent expenditures that are not coordinated with the candidate pose no threat, or the appearance of a threat, of corruption; and therefore there is no constitutionally sufficient justification for restricting such expenditures.<sup>93</sup> The Court discarded any First Amendment distinction based on the corporate identity of the speaker reasoning that corporations enjoy the same First Amendment protections and rights to participate as individuals. The thrust of the majority opinion, however, was built upon flawed assumptions regarding the constitutional rights of corporations and their role within society and the marketplace of political ideas.

In evaluating the fundamental First Amendment arguments for and against the constitutional protection of corporate political speech, the Court engaged in a discussion about corporations and their role in our political system without reference to principles of corporate law or their ensuing realities. Introducing these fundamental principles into the Court's First Amendment debate reveals the flawed assumptions underlying its shifting conceptualization of corporations, which led it to conclude that corporate political speech is indistinguishable from individual political speech.<sup>94</sup> Applying a corporate law perspective to

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<sup>91</sup> *Id.* at 912–13.

<sup>92</sup> *Id.* at 913.

<sup>93</sup> *Id.* at 910.

<sup>94</sup> The Court's assumptions regarding corporations are foundational elements to its ruling because

nonlegal factors, far more than legal ones, determine which opportunistic claims to First Amendment attention will succeed and which will not. Legal doctrine and free speech theory may explain what is protected within the First Amendment's boundaries, but the location of the boundaries themselves—the threshold determination of what is a First Amendment case and what is not—is less a doctrinal matter than a political, economic, social, and cultural one.

the *Citizens United* debate, five points for discussion emerge: (1) the economic motivation of corporate speech, (2) the lack of a single corporate voice, (3) the threat of compelled speech, (4) the prevalence of existing regulation of corporate speech, and (5) the applicability of the equalization rationale to corporate speech.

*A. Economic Motivation of Corporate Speech*

The Court in *Citizens United* refused to discount corporate political speech from individual speech because of the economic motivation present in corporate speech. Justice Kennedy wrote, “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.”<sup>95</sup> A traditional corporate law analysis of corporate political speech, however, reveals that when corporations “speak” in any arena, commercial or political, they do so with an economic motivation. Pursuant to *Dodge v. Ford Motor Co.*,<sup>96</sup> corporations owe their shareholders a singular fidelity to maximizing shareholder wealth in the form of corporate returns.<sup>97</sup>

Corporations have an additional and significantly different set of problems: they are legally required to represent not a group of people but a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation.<sup>98</sup>

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Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004).

<sup>95</sup> *Citizens United*, 130 S. Ct. at 905 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting)).

<sup>96</sup> 170 N.W. 668 (Mich. 1919).

<sup>97</sup> *Id.* at 682; see also Wolfson, *supra* note 85, at 288 (discussing the stock corporation’s duty to make a profit for its shareholders). Shareholder wealth maximization as a principle of corporate law is a mechanism to align the interests of corporate managers (directors and officers) with the interests of the shareholder owners. *E.g.*, Hector Rocha, *People, Firms and Society: Three Proposals for Aligning Personal Motives, Firm’s Goals and Societal Needs* (Nov. 4, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1295193>; cf. M. Todd Henderson, *Everything Old Is New Again: Lessons from Dodge v. Ford Motor Company* (The Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper Series, Paper No. 373, 2007), available at <http://ssrn.com/abstract=1070284> (arguing that the shareholder-wealth-maximization rationale of *Dodge v. Ford Motor Co.* is overemphasized and mistaught).

<sup>98</sup> Greenwood, *supra* note 15, at 1033.

The economic nature of corporate speech, however, was largely ignored in the Court's analysis of corporate political speech in *Citizens United*. Corporate speech is given no discount for its economic motivation and is treated as equal to the speech of an individual.<sup>99</sup>

The Court discussed the economic influence on corporate speech only in the context of the antidistortion rationale of *Austin*, which the Court overturned.<sup>100</sup> Relying on *Buckley*, which "rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections,'" the Court abandoned the antidistortion rationale.<sup>101</sup> The Court reasoned that all speakers, whether corporations or individuals, amass within the economic marketplace the wealth necessary to fund political speech. The Court found the unique economic structure of a corporation to be irrelevant in determining the scope of First Amendment protection for its speech.<sup>102</sup>

*Citizens United* left unexamined questions such as whether the economic speech of corporations should be discounted within the marketplace of political ideas. How should we reconcile the marketplace of commodities within the context of the marketplace of the mind? By treating individual and corporate speech equally because both "persons" must obtain the necessary funds through economic endeavors, the Court glosses over important distinctions between the economic nature of corporations as legal persons and that of individuals.

Certainly, from a marketplace-of-ideas perspective, listeners benefit from all viewpoints expressed in the marketplace regardless of the source.<sup>103</sup> Additionally, the line between economic and political

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<sup>99</sup> *Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978))).

Utilizing the personhood metaphor simplifies the analysis of corporate speech rights because it "diverts attention away from the differences among forms of organization and from the different treatments that should result." Berger, *supra* note 2, at 186–87.

<sup>100</sup> *Citizens United*, 130 S. Ct. at 903–06.

<sup>101</sup> *Id.* at 904 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)). "*Austin* found a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 903 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>102</sup> *Id.* at 905.

<sup>103</sup> *Buckley*, 424 U.S. at 14 ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (alteration in original) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("This concern over the corrosive influence of concentrated corporate

speech is easily blurred. For example, one can imagine an activist writing a politically inspired book; that speech would be considered political in nature. Once the book begins earning royalties, or once the author begins giving paid talks or readings, however, the speech takes on an economic element.<sup>104</sup> There is no way to completely eradicate the economic speech elements from political speech or vice versa.

The economic motivations of individual political speech can be distinguished from that of a corporation, however, in several structural respects. First, corporations have a greater ability to accumulate wealth beyond capacities of an individual due to their (1) perpetual life span of a corporation, (2) resource-pooling abilities of corporations, and (3) special tax rates and tax breaks.<sup>105</sup> The majority in *Citizens United*, however, rejected the argument that these structural differences warranted different treatment under the First Amendment.<sup>106</sup> “All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.”<sup>107</sup>

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wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”); cf. Berger, *supra* note 2, at 188 (arguing that the marketplace-of-ideas metaphor includes a bias for existing power and ideological structures within society); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984) (asserting that the theoretical underpinnings of the marketplace-of-ideas model of the First Amendment are based on assumptions of rational decision making that are implausible in modern society).

<sup>104</sup> Wolfson, *supra* note 85, at 270–73.

<sup>105</sup> “The term ‘perpetual succession’ is not generally construed to imply corporate immortality, but rather a continuity of existence, irrespective of that of its component members, limited in duration to the period stated in its charter or the act authorizing the granting of it.” 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6 (perm. ed., rev. vol. 2010) (footnote omitted); see also Erik Devos et al., *How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies*, 22 REV. FIN. STUD. 1179 (2009) (discussing the sources of merger gains); Scott D. Dyreng et al., *Long-Run Corporate Tax Avoidance*, 83 ACCT. REV. 61 (2008) (describing a new measure of long term corporate tax avoidance).

<sup>106</sup> Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that

[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” This does not suffice, however, to allow laws prohibiting speech. “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.

*Citizens United*, 130 S. Ct. at 905 (alteration in original) (citation omitted) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990) and *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

<sup>107</sup> *Id.* (citing *Austin*, 494 U.S. at 707 (Kennedy, J., dissenting)).

Second, the structural advantages of corporations to amass wealth are exacerbated by the mandate of for-profit corporations to maximize profits.<sup>108</sup> While economic interests may also primarily motivate an individual, an individual will never face potential liability for failing to singularly advance economic interests, even in the context of political speech.<sup>109</sup> A corporation faces this threat in the form of derivative suits alleging a breach of fiduciary duty. Corporate speech, even in the political realm, is motivated primarily by an economics incentive.<sup>110</sup> Failure to adhere to this mandate exposes the corporate entity to liability that an individual would never face for political expression. The constant, mandated fidelity to economic motivation, even in the context of political expression, distinguishes corporate speech from that of an individual.

Third, the economic motivation of corporate political speech is similar to the economic motivation recognized in commercial speech. As discussed above, in *Citizens United*, Justice Kennedy conceptualized corporations as “associations” of individuals, equating the right to form a predominantly economic entity with the First Amendment right to associate in political, artistic, or pleasure-oriented organizations. This debate mirrors some of the issues presented in the debate over the scope of constitutional protection afforded commercial speech, the predominant form of corporate speech.<sup>111</sup> Commercial speech, first recognized in *Virginia State*

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<sup>108</sup> See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”); see also *Kroese v. Gen. Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1950) (noting that courts have the power to order a corporation’s board of directors to pay dividends if it is shown that they are in violation of the business judgment rule); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders . . .”). But see Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) (challenging the idea that corporations exist only to make money for shareholders).

<sup>109</sup> See *Hill v. State Farm Mut. Auto. Ins. Co.*, 83 Cal. Rptr. 3d 651 (Cal. Ct. App. 2008) (upholding State Farm’s policy not to issue dividends over a fifteen-year period as within the penumbra of the business judgment rule despite being challenged in a class-action lawsuit by policyholders alleging that failure to pay such dividends violated the company’s duty to maximize profits for the policyholders); *Dodge*, 170 N.W. at 682 (stating that courts will not interfere with the decisions of corporate directors unless they commit fraud or misappropriation of corporate funds, or, under limited circumstances, refuse to declare dividends); see also *Churella v. Pioneer State Mut. Ins. Co.*, 671 N.W.2d 125 (Mich. Ct. App. 2003) (finding that policyholders failed to sufficiently plead facts to overcome the business judgment rule in connection with directors’ failure to distribute surplus because they did not establish that a failure to declare a dividend was an abuse of business discretion).

<sup>110</sup> *Greenwood*, *supra* note 15, at 1004 (“[C]orporate speech is better understood as the expenditure of money in accordance with dictates of the law and the market on behalf of the imaginary interests of a legal fiction: the fictional shareholder.”).

<sup>111</sup> Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding a conviction for the distribution of a double-faced handbill that contained a political protest on one side and an advertisement on the other), *overruled by* *Va. State Bd. of Pharm. v. Va. Citizens Consumer*

*Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>112</sup> receives limited constitutional protection. It is defined as expression that proposes a commercial transaction that is related solely to the economic interests of the speaker and his or her audience, or which is likely to influence consumers in their commercial decisions.<sup>113</sup> It usually involves, but is not limited to advertising products for sale. For example, communication regarding the price and attributes of a consumer production and speech directed solely to the collection of a debt are both purely commercial.<sup>114</sup> Commercial speech, while protected under the Constitution, is not treated the same as noncommercial speech. “[T]he distinctions between the two categories of speech justify subjecting governmental regulations of commercial speech to a review less strict than that applied to regulations of political speech.”<sup>115</sup>

The commercial speech doctrine is relevant to the current debate because unlike the analysis undertaken in *Citizens United*, it recognizes the distorting nature of economically motivated speech (often from corporations), which it uses as a basis to treat such speech

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Council, Inc., 425 U.S. 748 (1976), with *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (holding unconstitutional a Virginia statute penalizing an advertisement for abortion services in another state), and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that the First Amendment is applicable to an advertisement in a corporation’s newspapers).

<sup>112</sup> 425 U.S. 748.

<sup>113</sup> See Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional?*, 39 U.C. DAVIS L. REV. 1, 47–60 (2005) (examining the different standards of review applied to commercial and noncommercial speech). Prior to *Virginia Pharmacy*, commercial speech was thought to be outside of the protections of the First Amendment. See, e.g., *Valentine*, 316 U.S. at 54 (“We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”). Now, it is commonly accepted that commercial speech falls within the ambit of the First Amendment. See, e.g., 16 AM. JUR. 2D *Constitutional Law* § 499 (2009) (“For First Amendment purposes, commercial speech is an expression related solely to the economic interests of the speaker and its audience, generally in the form of commercial advertisement for the sale of goods and services, or speech proposing a commercial transaction.” (footnotes omitted)).

<sup>114</sup> See 16B C.J.S. *Constitutional Law* § 812 (2005) (“Speech is not rendered commercial by the mere fact that it relates to advertisement, that the speaker is a corporation, or that it criticizes a product.” (footnotes omitted)); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566–68 (1980) (holding that the fact that an electrical utility held a monopoly on the sale of electricity in its service area did not establish that its advertising was not protected by the First Amendment). Under the *Central Hudson* test, speech that is false, misleading, or that concerns an unlawful activity receives no First Amendment protection because the listeners do not have an interest in such speech. For speech that concerns a lawful activity and is not misleading, then the restriction must pass intermediate scrutiny. The test is whether the regulation directly advances a substantial government interest and is not more extensive than necessary to advance that interest. *Id.* at 566.

<sup>115</sup> Caren Schmulen Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 471–72 (1998).

differently.<sup>116</sup> That distinction, or discount, for economic motivations is largely abandoned—without justification—in the context of corporate political speech.<sup>117</sup>

Not only is the economic motivation of commercial speech a distinguishing factor that warrants a lesser degree of constitutional protection, but such speech may not fully serve the ends intended by the First Amendment (e.g., expression, participation, accountability of government, etc.).<sup>118</sup> Edwin Baker and others have advanced the argument that profit-oriented speech warrants differential treatment under the First Amendment on the ground that it does not advance the goals of liberty and self-realization served by “pure” forms of free speech.<sup>119</sup>

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<sup>116</sup> Commercial speech regulations mirror election law in distinguishing between disclosure requirements (presumptively valid) and prohibitions of speech (presumptively invalid). See *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985) (striking down a state law prohibiting advertisements by attorneys, but upholding disclosure requirements). *But see* Wolfson, *supra* note 85, at 277–78 (discussing *Zauderer* and arguing that the Court’s “attempted distinction between mandatory disclosure and outright prohibition cannot survive analysis”).

<sup>117</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (“The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.” (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting))).

<sup>118</sup> *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.”); *see also* Sweetland, *supra* note 115, at 474 (“Political speech was deemed the sole embodiment of the free speech doctrine, and it was given a preferred position among all constitutional rights because of the essential role it plays in the operation of a constitutional democracy.” (footnote and internal quotations omitted)); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327–33 (1997) (discussing the preferred position enjoyed by political speech, as opposed to commercial speech, because of its role in advancing democratic ideals).

<sup>119</sup> In our present historical setting, however, commercial speech is not a manifestation of individual freedom or choice; unlike the broad categories of protected speech, commercial speech does not represent an attempt to create or affect the world in a way that can be expected to represent anyone’s private or personal wishes. Therefore, profit-motivated commercial speech lacks the crucial connections with individual liberty and self-realization, which exist for speech generally and which are central to justifications for the constitutional protection of speech—justifications which in turn define the proper scope of protection under the First Amendment. Baker, *supra* note 80, at 3; *see also* *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 804–05 (1978) (White, J., dissenting), *quoted in* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 986 (2009) (“[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice.” (footnote omitted)); Wolfson, *supra* note 85, at 269 (“A suggested rationale for the difference between the limited protection of commercial speech and the greater protection of political-artistic speech is the crucial role political-artistic speech plays in free democratic society. Political speech is essential for the workings of a free democratic society.” (footnote omitted)).

Additionally, harkening back to the marketplace-of-ideas imagery utilized by the majority in *Citizens United* (and throughout prior corporate political speech cases), the rights of the citizen-listener justify granting the corporation free speech protection under the assumption that such expression serves the democratic ends of the listener.<sup>120</sup> However, borrowing from the commercial speech perspective, speech that is essentially economic in nature should be subject to additional regulations because of its potential to mislead the listener.<sup>121</sup> The distortion potential of an economic message masquerading as a political message may warrant differential First Amendment treatment. At a minimum, the distinction deserved consideration by the Court in *Citizens United*, although it received none.<sup>122</sup>

An analysis of corporate law principles leads to the conclusion that when corporations speak, it is speech of an economic—not a political—nature, due to corporations’ singular fidelity to profit maximization.<sup>123</sup> The Court should not have ignored this key distinction between corporate and individual speech in *Citizens United*. The Court left unexamined questions such as how economic speech should be discounted in the marketplace of political speech. Because economic motivation is inherent in all corporate political speech, it has the potential to mislead consumers (i.e., voters) and it may not advance the goals of a participatory democracy. Therefore, the protection afforded such speech should be carefully examined. The discount applied to economically motivated speech in other arenas, such as commercial speech, should be similarly applied to corporate political speech.

### *B. Fallacy of One Corporate Voice*

Friedrich Hayek, the legal theorist, asserted that although an individual can act unjustly, a society cannot; theoretically, some individual must have acted unjustly *on behalf of* the society.<sup>124</sup>

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<sup>120</sup> See, e.g., *Citizens United*, 130 S. Ct. at 896 (concluding that “society . . . is deprived of an ‘uninhibited marketplace of ideas’” when people choose to abstain from protected speech rather than vindicate their rights through litigation (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003))).

<sup>121</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566–68 (1980).

<sup>122</sup> Transcript of Oral Argument, *supra* note 27, at 47–48.

<sup>123</sup> See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (holding that the primary goal of a corporation is profit maximization).

<sup>124</sup> See C.R. McCann, Jr., *F.A. Hayek: The Liberal as Communitarian*, 15 REV. AUSTRIAN ECON. 5, 20 (2002) (“To Hayek, ‘only situations which have been created by human will can be called just or unjust,’ and so justice ‘always implies that some person or persons ought, or ought not, to have performed some action.’”); see also EAMONN BUTLER, HAYEK: HIS CONTRIBUTION TO THE POLITICAL AND ECONOMIC THOUGHT OF OUR TIME (1983) (describing Hayek’s ideas



Identifying *who* acted on behalf of society is the same type of existential question applicable to the analysis in *Citizens United*. That case raised dualistic questions—for whom does a corporation speak and how does a corporation speak?

Consider first Justice Stevens, whose *Citizens United* dissent challenged the basic idea that corporations should be protected as political speakers:

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. . . . It is entirely possible that the corporation’s electoral message will *conflict* with their personal convictions.<sup>125</sup>

Corporations must speak through money or through a representative, creating a type of ventriloquist speech.<sup>126</sup> “Corporations speak by spending money: they hire others to speak for them. Corporate speech is thus an agency problem.”<sup>127</sup> Because a corporation can engage in only indirect speech—funding the speech of others, or speaking through hired corporate representatives, such as a member of the board of directors or an officer—the inherent problems of agency are present, including delegation and alignment of interests between principal and agent.<sup>128</sup>

Corporate political speech raises additional issues that strike at the fundamental participatory and democratic ideals served by the First Amendment, which is meant to protect and serve the ends of

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and their significance); THE ESSENCE OF HAYEK (Chiaki Nishiyama & Kurt R. Leube eds., 1984) (providing examples of Hayek’s contributions).

<sup>125</sup> *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part).

<sup>126</sup> Greenwood, *supra* note 15, at 1002.

<sup>127</sup> *Id.*

<sup>128</sup> See STEPHEN M. BAINBRIDGE, CORPORATE LAW 90–95 (2d ed. 2009) (discussing the authority of corporate executives as agents of the corporation).

democratic self-government.<sup>129</sup> “Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.”<sup>130</sup>

In *Citizens United*, the majority’s opinion was premised on the idea that corporations can speak, have a voice, and have a viewpoint—including a political viewpoint. Justice Kennedy wrote that through the independent-expenditure bans, “[t]he Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’”<sup>131</sup> This same imagery of a corporate voice within the political arena was continued throughout the opinion with language such as: “[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents *their voices and viewpoints* from reaching the public and advising voters on which persons or entities are hostile to their interests.”<sup>132</sup> An important assumption that corporations can speak with a singular voice, have a singular intent, and can engage in the same type of self-fulfillment and self-expression activities as an individual underlies the Court’s analysis.

Certainly from a literal perspective, a corporation can amass and spend money, and spending money is a recognized form of protected speech under the First Amendment.<sup>133</sup> Therefore, it logically follows that a corporation can speak. While a corporation can speak by spending money, the assumption that a corporation can speak with a singular voice is flawed. Except for single-shareholder corporations, the idea that corporations can speak with a singular voice is subject to same collective-intent criticisms levied against legislative history.<sup>134</sup>

<sup>129</sup> See *supra* note 119 (discussing the argument that profit-oriented speech warrants differential treatment under the First Amendment on the ground that it does not advance the goals of liberty and self-realization served by “pure” forms of free speech)

<sup>130</sup> *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

<sup>131</sup> *Id.* at 907 (majority opinion) (second alternation in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

<sup>132</sup> *Id.* (emphasis added).

<sup>133</sup> See *id.* at 898 (applying the same strict scrutiny framework for restrictions on corporate speech as individual citizens’ speech); see also *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (holding that while governmental restrictions on individual contributions to political campaigns and contributions did not violate the First Amendment, similar restrictions on individual expenditures in campaigns did).

<sup>134</sup> See Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1462 (2007) (describing how, starting in the 1980s, “textualist” interpretation of statutes criticized traditional canons of statutory interpretation as creating new legal fictions); see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (outlining propositions in support of statutory text and structure as the proper foundation for statutory interpretation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM.

In the corporate context, the problems of group speech can be summarized using three main group phenomena: boundaries, aggregation, and leadership.<sup>135</sup> Focusing on boundaries, the collective intent of a group decision can be challenged because

the boundaries of a group can profoundly affect the legitimacy of speech or other actions on “its” behalf. A group defined too broadly may have permanent minorities within it that have needs or wills that are never met; one defined too narrowly will tend to ignore the interests and desires of those outside it.<sup>136</sup>

Aggregation is also a problem because the decision of the group may be different from the decision of the individuals comprising the group. Finally, the problem with leadership is that those driving an organization may have a disparate, more powerful voice than the individual members. This concern certainly reflects the reality of corporate governance where the voice of the board of directors (and even institutional shareholders in publically-held companies) can easily overpower the voice of any single shareholder.

Corporate law principles recognize that group decision making has limitations and that corporations contain multiple, and often disparate, voices. As a threshold matter, political expenditures and contributions are management decisions decided by a vote of the board of directors or delegated to management, but are not subject to shareholder votes.<sup>137</sup> Political expenditure decisions—as directors currently

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L. REV. 673, 684–85 (1997) (discussing the textualist critique of legislative intent in statutory interpretation); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (discussing the difficulty of ascertaining legislative intent because of the impossibility of knowing the intent of each individual legislator); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (arguing that legislative intent will be better determined not by the judicial system, but by legislative agencies); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as an Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (arguing that legislative intent is an unsound and unpredictable approach to statutory interpretation).

<sup>135</sup> See Greenwood, *supra* note 15, at 1021 (“[C]onstitutional law largely ignores the special character of corporate speech. At most, it treats corporate speech as an instance of ordinary group speech . . . [But] many of the problems of group speech are well known. . . . [They include] the boundary problem, the aggregate problem, and the leadership problem.” (footnote omitted)).

<sup>136</sup> *Id.* at 1022.

<sup>137</sup> See, e.g., DEL. CODE ANN. tit. 8, § 141(a), 151–153, 157, 161, 166 (2001 & Supp. 2008) (delineating the general powers of the board of directors with respect to issuance of stock and shareholder rights); *Grimes v. Alton Inc.*, 804 A.2d 256, 260 (Del. 2002) (“One must read in *pari materia* the relevant statutory provisions of the Corporation Law. First there is the fundamental corporate governance principle set forth in 8 *Del. C.* § 141(a) that the ‘business and affairs of every corporation . . . shall be managed by and under the direction of’ the board of

implement them—therefore lack the approval or dissent of the citizen-shareholders,<sup>138</sup> and there is no mechanism for shareholders to obtain detailed information regarding corporate political expenditures absent voluntary disclosures. Nonetheless, the Court in *Citizens United* specifically rejected the government’s argument that protecting dissenting shareholders warranted the ban on independent campaign expenditures.<sup>139</sup> The Court reasoned that the “procedures of corporate democracy” were sufficient to protect any dissenting shareholder from supporting incongruent political speech.<sup>140</sup>

Without engaging in a discussion of the efficacy of shareholder democracy or shareholder protection mechanisms,<sup>141</sup> it is worth

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directors. One then turns to the board’s role in stock issuance set forth in the relevant sections of Subchapter V of Title 8. The provisions in this Subchapter relate to the issuance of capital stock, subscriptions for additional shares, options and rights agreements. Taken together, they are calculated to advance two fundamental policies of the Corporation Law: (1) to consolidate in its board of directors the exclusive authority to govern and regulate a corporation’s capital structure; and (2) to ensure certainty in the instruments upon which the corporation’s capital structure is based.” (omission in original); *Corporate Governance After Citizens United: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 66 (2010) [hereinafter *Hearings*] (statement of Michael Klausner, Nancy and Charles Munger Professor of Business and Professor of Law, Stanford Law School) (“What can shareholders do under the governance regime if they would like to influence management’s use of corporate funds for political activities? The answer is ‘not much.’ Management will control corporate speech just as it controls other expenditures.”).

<sup>138</sup>Recent legislative proposals suggest that this may change. *See, e.g.*, Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010) (proposing amendments to the Securities Exchange Act of 1934 that would require a budget for corporate political expenditures to be preapproved by a shareholder vote at the annual meeting and a subsequent report filed with the SEC detailing the political contributions and expenditures made); *see also* Susan M. Liss, Brennan Ctr. for Justice, *Forward to CIARA TORRES-SPELLISY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE* 3, 3 (2010), available at [http://www.brennancenter.org/content/resource/corporate\\_campaign\\_spending\\_giving\\_shareholders\\_a\\_voice/](http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/) (suggesting a series of reforms to the corporate campaign-finance regulations that would require a shareholder vote to approve corporate political spending and increased disclosure of actual expenditures and contributions made).

<sup>139</sup>*See Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (comparing the limitations on corporate political expenditures to a limitation on political speech of media corporations, which would be inconsistent with the First Amendment).

<sup>140</sup>*Id.* (internal quotation marks omitted) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 794 (1978)). By “corporate democracy procedures,” the Court was referring to the powers of shareholders to elect the board of directors who then make the decision about political expenditures and contributions. The idea is that unpopular expenditures could result in removal of the director(s) from the board so that shareholders have an indirect voice or vote in the decisions regarding political expenditures. *See generally* BAINBRIDGE, *supra* note 128, at 232–40 (discussing shareholder voting and the election of directors).

For a discussion on the threat of compelled speech, see *infra* Part IV.C.

<sup>141</sup>*See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 835 (2005) (arguing that shareholders’ existing power to replace directors is insufficient to secure the adoption of value-increasing governance arrangements that management disfavors and suggesting an alternative regime that would allow shareholders to initiate and adopt rules-of-the-game decisions to change the company’s charter or state of incorporation); *see also Hearings, supra* note 137, at 66 (statement of Prof. Michael Klausner)

noting that corporate law has mechanisms outside of traditional shareholder elections that recognize the disparate and heterogeneous voices of shareholders. Two examples are shareholder derivative suits and, for publically traded corporations, shareholder proxy proposals.

Shareholder derivative suits demonstrate that corporate democratic procedures cannot address all shareholder concerns; they are, as noted above, an alternative avenue outside of the traditional voting rights designed to facilitate director accountability to shareholders. Through derivative suits, corporate law recognizes an exception to traditional standing requirements by allowing an aggrieved shareholder to bring an action not in her name, but on behalf of the corporation.<sup>142</sup> In derivative suits, the plaintiff-shareholder is allowed to usurp a power otherwise delegated exclusively to the board of directors—the power to decide whether to bring a lawsuit. And because the plaintiff-shareholders may allege mismanagement by the board, shareholder derivative suits act as another form of shareholder control over the board of directors in addition to traditional shareholder democracy rights (e.g., the right to vote at annual meetings).

Shareholder derivative suits inform the present debate on the fallacy of a singular corporate vote. Derivative suits recognize the voice of even a single dissenting shareholder within a large corporation and give that shareholder the right to challenge the directors about the management of the corporation (owned by the shareholders), although their challenges must still be plausible enough to survive a motion to dismiss brought by the corporation.<sup>143</sup>

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(“The only tool available to shareholders to influence management’s political expenditures is their right to vote annually for nominees to the company’s board of directors. That mechanism, however, is poorly designed for this purpose. It does not allow shareholders to exert any sort of advance approval power. Nor does it realistically allow shareholders to vote out of office directors whom they believe, after the fact, have allowed management to misallocate corporate funds for political activities.”).

<sup>142</sup> See BAINBRIDGE, *supra* note 128, at 191–202 (describing the procedural aspects of derivative litigation including standing, holding, and representation requirements for shareholders to usurp management power and bring litigation in the corporation’s name).

<sup>143</sup> See, e.g., *Sutherland v. Sutherland*, No. 2399-VCN, 2010 WL 1838968 (Del. Ch. May 3, 2010) (denying the defendant’s motion for summary judgment in a stockholder derivative and auditing action alleging that a billing scheme in a family company benefitted certain members of the board without benefitting other stockholders); *In re Dow Chem. Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769 (Del. Ch. Jan. 11, 2010) (granting the defendant’s motion to dismiss because the plaintiffs could not show conflicts of interest in the disputed transactions); *Case Fin., Inc. v. Alden*, No. 1184-VCP, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009) (holding that parent corporation had standing to bring derivative suit against director of subsidiary because director had a minimum duty to report certain transactions to the parent company); *In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009) (holding that directors were not entitled to a stay in favor of a simultaneously filed federal suit because the plaintiffs properly pleaded wasteful spending); *In re Affiliated Computer Serv., Inc. S’holders Litig.*, No.

Derivative suits are not one of the traditional mechanisms of corporate democracy; they are employed when that process has allegedly broken down. The Court's analysis in *Citizens United* did not acknowledge that disparate voices may exist within a corporation<sup>144</sup> or that corporate law mechanisms actually recognize these dissenting voices.

Derivative suits dispel the notion that corporations can speak with a singular voice—the fallacy that a corporation can have a political opinion or even a cohesive political agenda. The disparate voices of shareholders, or even a single shareholder, are given a platform in derivative proceedings, but the paradigm envisioned in *Citizens United* ignores these voices. While derivative suits exemplify the fallacy of a single corporate voice, they do not present a reasonable remedy for the dissenting shareholder with regard to corporate political expenditures. A derivative suit could prevent future corporate political speech only if the plaintiffs proved that such speech constituted a breach of fiduciary duty (i.e., failure to serve the profit-maximization principle) or waste of corporate assets. The high costs of such suits and their low success rate make them an unattractive and unrealistic remedy, even for claims that could survive the business judgment rule and the accompanying procedural roadblocks.<sup>145</sup>

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2821-VCL, 2009 WL 296078 (Del. Ch. Feb. 6, 2009) (dismissing the plaintiffs' claim for failure to show that the action demanded on behalf of the directors was futile, or that demand futility was excused); *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) (holding that although certain provisions of the defendant's certificate of incorporation limited directors from personal liability, the plaintiffs had stated claims for breach of fiduciary duty and unjust enrichment); *In re InfoUSA, Inc. S'holders Litig.*, No. 1956-CC, 2008 WL 762482 (Del. Ch. Mar. 17, 2008) (holding that it was appropriate to stay a shareholder derivative action to allow the defendant to investigate claims and issues and determine which action was in best interest of shareholders); *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch. 2007) (holding that the court had personal jurisdiction over corporation's outside counsel in an action against the board of directors and outside counsel for breach of fiduciary duty and wasteful spending); *Melzer v. CNET Networks, Inc.*, 934 A.2d 912 (Del. Ch. 2007) (granting shareholders access to documents that could establish a sustained or systematic failure of the board to establish oversight and thus establish demand futility); *Brandin v. Deason*, 941 A.2d 1020 (Del. Ch. 2007) (denying the defendant-officers' motion to stay in an action alleging breach of fiduciary duty by engaging in scheme to backdate stock options).

<sup>144</sup>The potential for disparate voices within a corporation occurs whenever there is more than one shareholder or entity holding shares. This situation occurs with both privately held and publically traded corporations.

<sup>145</sup>*See generally* Tucker Nees, *supra* note 2, at 205–06 (highlighting the obstacles to a successful shareholder derivative suit); *see also supra* note 143 (discussing the procedural and substantive barriers to bringing a successful shareholder derivative suit).

Simply because shareholder derivative suits are not a viable citizen-shareholder remedy for compelled speech, does not necessarily reduce the threat that they pose to a corporation in encouraging profit-maximizing policies, even in the context of political expenditures, because of the costs of these suits in terms of reputation harm, litigation defense expenses, and time.

Another corporate law mechanism that recognizes the diverse and disparate voices of a corporation's shareholders is the shareholder proxy proposal.<sup>146</sup> The proxy-proposal process, as outlined in Rule 14a-8, gives individual shareholders the right to propose resolutions independent from management, to have those resolutions included in the management's proxy statement, and to have the remaining shareholders vote on the resolution at the annual meeting.<sup>147</sup> The efficacy of shareholder proxy proposals as a mechanism of meaningful control over the board of directors is questionable.<sup>148</sup> For this Article's purpose, what is important is that shareholder proxy proposals are another example of corporate law recognizing the disparate voices of shareholders and acknowledging that the traditional corporate democracy mechanisms (i.e., voting at the annual meeting) have limitations.

Corporate law recognizes the disparate and heterogeneous voices of shareholders within a corporation through mechanisms such as shareholder derivative suits and shareholder proxy proposals. The Supreme Court's crucial assumption in *Citizens United* that corporations can speak with one voice and that management decisions (such as corporate expenditures) can represent the collective intent of the shareholders is inconsistent with the legal and regulatory realities of corporate law. In evaluating the constitutional role of corporate political speech in our electoral process, it seems disingenuous to engage in a discussion that is devoid of a corporate law context. By examining corporate political speech rights in a vacuum, the Court insulated the discussion from the complexities of how corporations are conceptualized and regulated in practice. And it is only in such a vacuum that broad, sweeping overgeneralizations—such as the Court's recognition of a singular corporate voice—can be made. Believing that there is a singular corporate voice was an important

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<sup>146</sup>For an overview of the rules governing—and litigation related to—the shareholder proxy-voting system, see LARRY D. SODERQUIST & THERESA A. GABALDON, *SECURITIES LAWS* 128–37 (3d ed. 2007).

<sup>147</sup>See 17 C.F.R. § 240.14a-8 (2010) (requiring management to include a shareholder-initiated proposal in the proxy statement anytime the proposal is a proper matter for consideration under the laws of the state of incorporation); see also THOMAS LEE HAZEN, *PRINCIPLES OF SECURITIES REGULATIONS* 214–18 (2d ed. 2006) (pointing out that a shareholder proposal may be excluded if it: (1) is improper under state law, (2) would violate any law to which it would be subject if implemented, (3) is materially false or misleading, (4) represents a personal grievance or special interest, (5) is not significantly related to the issuer's business, (6) is something the issuer lacks the power to implement, (7) deals exclusively with the issuer's ordinary business operations, (8) deals with election to the issuer's board of directors, (9) relates to specific amounts of cash dividends, (10) contradicts a proposal submitted by the issuer at the same meeting, (11) has already been substantially implemented, (12) substantially duplicates another submitted proposal, or (13) is a resubmission of a previously unsuccessful proposal).

<sup>148</sup>See HAZEN, *supra* note 147, at 212 (“[S]hareholder proposals typically fail miserably”).

stepping-stone on the Court's path to concluding that corporate political speech and individual political speech are indistinguishable.

### *C. Threat of Compelled Speech*

Corporate political speech is distinguishable from individual political speech because when a corporation engages in political speech, there is a threat of compelled speech. From a corporate law perspective, *Citizens United* leaves shareholders, particularly those of mutual funds,<sup>149</sup> without meaningful control over how their investments are utilized in the political arena. Investors are in the unhappy position of potentially choosing between political integrity and economic gain. Blurring the lines between the economic and political interests of both corporations and citizen-shareholders undermines the First Amendment principles supposedly advanced in *Citizens United*. Comingling citizens' economic and political interests also undermines the system of checks and balances on management control and accountability to shareholders that corporate law, like our political system, strives to maintain.<sup>150</sup>

The Court extended full First Amendment protection to corporate political speech by recognizing, in part, the freedom of association rights of the citizen-shareholders. The Court reasoned that restricting corporate speech would also restrict the voices of the individual shareholders, who simply chose to join a for-profit organization instead of another type of organization.<sup>151</sup> This reasoning reflects the Court's assumption that when corporations speak they communicate a cohesive message that reflects the interests of the individual shareholders. Freedom of association is protected only if the citizen-

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<sup>149</sup> The individual mutual fund investor finances the underlying corporations' political speech by providing the money with which the mutual fund purchases the corporations' stock. But because the mutual fund itself is the corporations' shareholder, it is the mutual fund that has the right to bring a derivative action or offer a proxy proposal, not the individual mutual fund investor.

<sup>150</sup> See Tucker Nees, *supra* note 2, at 203 ("Discerning this fine balancing point between the two competing interests of director accountability and director authority has been a long-standing, although elusive, goal of corporate law."); see also ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1934) (discussing the separation of ownership and control and the concentration of economic power in modern economies); Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 785–86 (2006) (advocating for the authority-versus-accountability balance established in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)); Ann M. Scarlett, *A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation*, 57 U. KAN. L. REV. 39, 43–44 (2008) (discussing accountability and the principal-agent relationship in the corporate context).

<sup>151</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 906–07 (2010) (stating that a ban on corporate expenditures "permits the Government to ban the political speech of millions of associations of citizens").



shareholder's political interests align with those of the corporation, as determined by the board of directors and dictated by profit-maximization principles.

A second, broader criticism of the Court's assumptions regarding the singular corporate voice and freedom of association is that corporate speech does not reflect the view of *any* citizen-shareholder:

The shareholders in whose interests corporations must speak are not the human beings who own (or, more often, on whose behalf other institutions own) the shares. Indeed, they are not citizens at all, but rather moments in the market, legal abstractions that have interests quite different from those of real citizens in their full complexity. Unlike real people, the fictional shareholder is an entirely one-sided abstraction; it seeks to increase the value of its shares without regard for any other value. Corporations, then, when they act as they are supposed to, pursue only one goal of the many that are important in a civilized society. Corporate agents, in short, work for a principle, not a principal.<sup>152</sup>

Under this view, the corporation is improperly given a voice independent from all of its citizen-shareholders; the artificial entity is allowed full participation rights separate from the input or influence of any of its citizen-shareholders.<sup>153</sup> Without the guarantee that the political speech of the corporation comports with its members' opinions, the potential for perversion of the message is evident. This distortion argument is distinguishable from *Austin's* antidistortion rationale, which Justice Kennedy rejected in *Citizens United*. Here, the potential distortion does not stem from the ability to amass wealth from the marketplace; rather, it stems from the fact that the aggregation of citizen-shareholder voices gives weight to a "body" that does not actually exist.

The majority in *Citizens United* brushed aside concerns over the dissenting shareholder as a justification for the corporate independent expenditure ban. The Court was confident that shareholder democracy and a ready-made secondary market would be sufficient remedies for an aggrieved shareholder who disagrees with a corporate political expenditure and who does not want her investment used to promote a political agenda inconsistent with her own.<sup>154</sup> But simply relying on

<sup>152</sup> Greenwood, *supra* note 15, at 1003.

<sup>153</sup> *Cf. supra* note 119 (arguing that profit-motivated speech lacks the crucial connections with individual liberty and self-realization that accompany personal speech).

<sup>154</sup> Therefore the Court felt that § 441b was both under- and overinclusive with respect to

the existing mechanisms of corporate democracy does not eliminate the threat of compelled speech to the dissenting shareholder, nor does it eliminate the risk of putting investors in a double bind. Additionally, the ability to sell one's shares presents a false choice for investors and exerts no shaping pressure on corporate political expenditures.

*Citizens United* is an influential decision that affects not only the democratic landscape of our society, but also directly impacts the rights of the nearly 150 million Americans that own stock.<sup>155</sup> Stock ownership is no longer a voluntary activity reserved for the upper class. With the reduction in pension plans and the proliferation of tax-deferred employer retirement accounts, nearly half of all Americans own stock; almost eighty percent of whom are invested in mutual funds, primarily through tax-deferred accounts.<sup>156</sup> The rapid rise in stock ownership has been fueled by the proliferation of defined-contribution retirement plans provided by employers.<sup>157</sup>

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the shareholder-protection rationale. *Citizens United*, 130 S. Ct. at 911.

As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms.

*Id.*

<sup>155</sup> For a discussion of the increase in bond and equities ownership in America, see INV. CO. INST. & THE SEC. INDUS. & FIN. MKTS. ASSOC., EQUITY AND BOND OWNERSHIP IN AMERICA (2008), available at [www.ici.org/pdf/rpt\\_08\\_equity\\_owners.pdf](http://www.ici.org/pdf/rpt_08_equity_owners.pdf). In 1989, when equity ownership in America was first calculated, thirty-two percent of American households owned stocks or bonds. As of the first quarter of 2008, forty-seven percent of households in America—approximately 54.5 million citizens—owned stocks or bonds, falling from a peak of fifty-three percent in 2001. *Id.* at 9; see also J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 2:30 (2009), available at Westlaw SECIDUSL (“There are four primary means by which individuals may own stock. Thirty-four million directly own shares in publicly traded companies. Twenty seven million own shares in equity mutual funds outside of retirement saving plans and pension accounts; some of these individuals also own stock directly. Nearly 34 million own equity through self-directed retirement plans such as Individual Retirement Accounts, Keogh plans or 401(k) plans, and 48 million own equity through defined contribution pension plans. There is substantial overlap among these four methods of shareownership. When this overlap is accounted for, a total of 84 million shareowners hold stock through at least one of these channels, and three million hold stock through all four channels.”).

<sup>156</sup> See INV. CO. INST. & THE SEC. INDUS. & FIN. MKTS. ASSOC., *supra* note 155, at 32 (explaining that forty-three percent of stockholding Americans with investments in mutual funds hold bond-based mutual funds and forty-five percent hold hybrid mutual funds).

<sup>157</sup> See *id.* at 15 (“Ownership inside tax-deferred accounts accounted for most of the increase in the 1989 to 2001 period and has since remained steady, which implies that most of

Consequently, a significant portion of the voting population is at risk of being put in a double bind as a result of the Court's sanctioning of corporate political speech. Citizen-shareholders may have to choose between fidelity to a political ideal and pursuit of economic advancement.

With mutual fund ownership, the additional distance between the investor and the first-tier<sup>158</sup> corporation's managers who make the political expenditures exacerbates the tenuous influence that shareholders exert over directors. The increased distance between shareholders and decision makers makes it less likely that shareholders would even be aware of the corporation's political expenditures. Additionally, the indirect ownership of first-tier corporate stock by mutual fund investors makes them ineligible to bring derivative suits or to suggest proxy proposals.<sup>159</sup>

The more immediate remedy would be for the dissenting shareholder, whether a direct shareholder or a mutual fund investor, to sell her shares and withdraw her financial support from the personally objectionable message.<sup>160</sup> As private stock ownership

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the decline since 2001 occurred outside tax-deferred accounts. Tax-deferred accounts include employer-sponsored retirement plans and Individual Retirement Accounts (IRAs)."); *see also* Mark Klock, *What Will It Take to Label Participation in a Deceptive Scheme to Defraud Buyers of Securities a Violation of Section 10(b)? The Disastrous Result and Reasoning of Stoneridge*, 58 U. KAN. L. REV. 309, 352 (2010) ("At one time, a relatively small segment of the public invested in publicly-traded securities. Now a significant proportion of the U.S. population owns publicly-traded stocks, either directly or indirectly. A major trend in the investment world has been the remarkable growth of stock ownership through defined-contribution retirement plans. Additionally, there has been even more remarkable growth in mutual funds." (footnotes omitted)).

<sup>158</sup> First tier manager refer to the board of directors for company X. Second tier refers to the management of the mutual fund that is invested in company X.

<sup>159</sup> *See* BAINBRIDGE, *supra* note 128, at 194–96 (discussing the contemporaneous ownership requirement to establish standing for a derivative suit which requires that the plaintiff in a derivative action be a shareholder of named company defendant at the time when the complained of act or omission occurred through the time of judgment); *see also* John A. Haslem, *Why Have Mutual Fund Independent Directors Failed as "Shareholder Watchdogs"?*, J. INVESTING, Spring 2010, at 7 (arguing that independent mutual-fund directors have failed shareholders in their role as "shareholder watchdogs" under the Investment Company Act of 1940); John A. Haslem, *What Mutual Fund Investors Should Have: Normative Transparency of Disclosure* (Oct. 20, 2008) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1287483> (arguing that increased mutual-fund disclosure requirements would help serve the shareholder-watchdog function of independent directors under the Investment Company Act of 1940); *cf.* Miguel A. Ferreira et al., *The Geography of Mutual Funds: The Advantage of Having Distant Investors* (Univ. of S. Cal. Marshall Sch. of Bus. Working Paper Series, Paper No. FBE 07-10, 2010), *available at* <http://ssrn.com/abstract=1571838> (arguing that mutual funds and other investment vehicles with increased owner/management distance create an environment that allows the fund to take more risk and enjoy higher performance).

<sup>160</sup> Justice Scalia described the dissenting shareholder's situation in his dissent in *Austin* in the following way:

becomes the primary vehicle for citizens to save for retirement, and as pension plans give way to the rise of 401(k) plans as the predominant employer-based retirement-plan vehicle, the “choice” of stock ownership is eroded by the realities of participation in widespread economic and social norms. Moreover, the investments available in these plans are often severely restricted. Employer plans are often limited to a list of approved stocks, and, even more commonly, a limited list of participating mutual funds.<sup>161</sup> Consequently, the choices available to the citizen investor are often severely restricted in this context. Even the simple decision to sell one’s stock may be complicated or restricted by the stocks and/or funds available within the employer’s plan.

The weakened exit remedy has as additional impact on corporate political speech because without the ability to exit, the shareholder cannot exert pressure on the board to align its political messages with the views of its shareholders. “[A]n organization that as its primary activity provides valuable and difficult-to-obtain services for its members may then find its political activities relatively unconstrained by the threat of exit.”<sup>162</sup> The exit threat is not meaningful in the context of employer-defined plans, nor does it persuade management to shape corporate political expenditures.

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[I]n joining [a for-profit corporation], the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial . . . . His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock.

Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 686–87 (1990) (Scalia, J., dissenting), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

<sup>161</sup> See Colleen M. Medill, *Stock Market Volatility and 401(k) Plans*, 34 U. MICH. J.L. REF. 469, 477–80 (describing the contours of most 401(k) plans).

<sup>162</sup> Greenwood, *supra* note 15, at 1029. The weakened exit threat does not present the same problem from other types of noncorporate associations where the organizations are constrained in their actions by the threat of member exit.

Organizations that depend on ongoing fund raising or membership for their support and that engage exclusively or almost exclusively in political, speech and lobbying activities fit this model best. Exit will assure that the organization continues to represent most members most of the time, even if it is not possible for any set of political activities to match the opinions of all members at any time.

*Id.* at 1028.

If, say, Republican shareholders disapprove of management's use of corporate funds to support a Democratic candidate, their sales of shares will have no effect on management. Indeed, management will not even know the sales occurred. The shares will be bought by other investors who do not know of, or are not bothered by, the expenditures.<sup>163</sup>

The obvious remedy then for incongruent personal/corporate political speech would be for the dissenting shareholder to use the channels of corporate democracy to elect a new board of directors. That path is flawed if for no other reason than the time delay between objectionable corporate political expenditures and the remedy of a replaced board. Not only must the shareholders wait for the annual meeting, but they must also wage a proxy contest to replace existing board members, and possibly repeat the process over the course of several years to change a staggered board.<sup>164</sup> Given the time-sensitive nature of political campaigns, this time delay and the costs associated with waging such a contest leave citizen-shareholders without a meaningful remedy.

The remedy of a ready-made secondary market for stock where a dissenting shareholder can sell her shares offers little meaningful relief, especially for the mutual fund investor. Nor do the channels of shareholder democracy provide a real vehicle to express dissent. Meanwhile, the threat of compelled speech is significant. Take for example a direct investor in an oil company who opposes off-shore drilling. If the oil company finances issue advertisements regarding off-shore drilling and endorsement ads for candidates supporting off-shore drilling, what recourse is available to the investor? As discussed, the channels of corporate democracy may potentially provide relief in the long term, after the shareholder's money has been used to finance personally objectionable political messages and after the shareholder invests the time and money necessary to successfully wage a contest. There is no immediate recourse, however, for the investor—except to sell her shares, causing a political/economic bifurcation of interests. Given the constraints of investing within a defined plan and the fungibility of investors, the exit solution provides neither a meaningful remedy for the investor nor a threat to management.

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<sup>163</sup> *Hearings*, *supra* note 137, at 67 (statement of Prof. Michael Klausner).

<sup>164</sup> See George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 146 (2010) (describing how staggered boards create obstacles to stockholder action).

If one looks at the flipside of this example, at an oil company direct investor who supports off-shore drilling, the issue of compelled speech becomes much more apparent. If the oil company endorsed a candidate who opposed off-shore drilling or ran issue advertisements against off-shore drilling, it could run afoul of the profit-maximization principle discussed above. The investor who supports off-shore drilling has the same attenuated channels of corporate democracy as the investor in the first example—she can try to replace the board of directors at the next election, and she can initiate proxy proposals related to the company's stance on off-shore drilling. The investor can also sell her shares, creating an economic/political bifurcation. If this investor owns her shares directly, she has an additional remedy; she may have grounds to challenge the company's political expenditures under *Dodge v. Ford Motor Co.*, arguing that they violate the profit-maximization principle and the business judgment rule.<sup>165</sup> Even though the directors would have the protection of the business judgment rule, which would likely prevent this challenge from succeeding,<sup>166</sup> the dissenting shareholder would still have a mechanism to voice disagreement and perhaps influence the corporate political speech. The mere threat of such a suit could influence how the company makes political expenditures, thereby giving the dissenting shareholder a voice. When one compares the sway of a shareholder whose political pursuits are in line with profit maximization and to the sway of a shareholder whose political pursuits are not, it is clear that the former wields much more influence than the latter. Individual political agendas that align with profit maximization will be favored. This disparity illustrates that the threat

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<sup>165</sup> As Bainbridge notes:

[S]ome courts and commentators argue that the business judgment rule shields directors from liability so long as they act in good faith. Others contend that the rule simply raises the liability bar from mere negligence to, say, gross negligence or recklessness.

The other conception one sees in the case law treats the rule as an abstention doctrine that creates a presumption against judicial review of duty of care claims. The court will abstain from reviewing the substantive merits of the directors' conduct unless the plaintiff can rebut the business judgment rule by showing that one or more of its preconditions are lacking.

BAINBRIDGE, *supra* note 128, at 96; *see also* Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) (“[D]irectors’ decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all materials facts reasonably available.”).

<sup>166</sup> *See* Tucker Nees, *supra* note 2, at 225–28 (2010) (highlighting the procedural and substantive barriers to shareholder success in derivative proceedings).

of compelled individual speech increases when corporate political speech also promotes profit maximization.

The threat of compelled speech is also higher for mutual fund investors whose portfolio contains an indirect investment in the same oil company. The mutual fund investor has even fewer remedies available to her because of the increased distance between her and the oil company's board of directors. She lacks participation rights in the channels of corporate democracy. In fact, she may not even know that the fund is invested in the oil company or that the company is engaged in this behavior. It is also a difficult decision to sell shares in the entire fund due to political disagreement with one fund holding.

One might argue that the diluted remedy for the mutual fund investor indicates a diluted harm to the investor. How harmful can the incongruent speech be when it is only from one firm out of one hundred composite firms comprising an index? When a significant portion of the voting population is invested in this type of investment vehicle, however, the aggregate effect of dissonant or incongruent political speech is hard to ignore. An individual occurrence may seem insignificant, but the aggregate weight of such harms warrants consideration even if not significant to the individual. Our law recognizes the value of aggregate harms in mechanisms such as class action lawsuits and allowing a series of seemingly insignificant breaches over time to constitute a material breach.<sup>167</sup> Here too the

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<sup>167</sup> See, e.g., FED. R. CIV. P. 23 (defining the procedural rules for class action lawsuits); PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., 1 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 4:14 (2010), available at Westlaw BOCL ("The most insidious type of 'cardinal' change is that created by the cumulative impact of numerous changes, none of which individually would be deemed 'cardinal.' Contractors refer to this financial peril as 'death by a thousand cuts.' Where the cumulative effect of numerous changes is judicially determined to constitute a 'cardinal change,' i.e., a material breach of contract, contract performance may be 'abandoned,' and the financial impact remediated under common law breach of contract principles."); HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 11:17 (1999) (discussing what constitutes substantial impairment of value); 4 LARY LAWRENCE, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-612:23 (3d ed. 2006) ("Determination as to whether an alleged breach of the installment sales contract constituted substantial impairment of the entire contract is dependent upon a cumulative effect of the breaching party's performance under the contract based on the totality of the circumstances."); 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 2:5 (7th ed. 2010), available at Westlaw MCLAUGHLIN ("[I]n a diversity-based class action the separate and distinct individual claims of class members may not be aggregated to satisfy the amount in controversy requirement . . . . The claims of each individual class member, however, whether related or unrelated, may be aggregated. For example, each class member may aggregate his or her own claims for compensatory and punitive damages." (footnote omitted)); 15 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 45:25 (4th ed. 2000) ("The determination whether a nonconformity in one or more installments substantially impairs the value of the whole contract, thereby excusing the buyer from further performance, is dependent upon the cumulative effect of the seller's performance based on the totality of the circumstances, which may include the cumulative effect of a series of nonconforming installments." (footnote omitted)); Carter Ott, In re Tobacco II Cases: *Potential Erosion of the Standing Requirement in Class Actions*, 16 No. 8

aggregate harm of incongruent political speech should be recognized despite the minimal effect on the rights of the individual citizen-shareholder.

Both direct and indirect investors face potential bifurcation of political and economic interests and therefore are subject to the threat of compelled speech. Relying on corporate democracy or the economic/political bifurcation of selling one's shares when one disagrees with the corporation's political speech are empty remedies. The Court relied on the assumed efficacy of these remedies in dismissing the argument that § 441b's ban on corporate independent expenditures was a necessary mechanism to protect shareholders from compelled incongruent political speech. Stock ownership is widespread, and the majority of investors own their stock through employer plans with a restricted pool of stocks. The limitations of corporate democracy, and the exacerbating effect of being an indirect owner through a mutual fund, reveal the flaws in the Court's dismissal of the threat of compelled shareholder speech. The danger of engaging in the First Amendment debate regarding corporate political speech rights without grounding that discussion in the context of the economic, political, and legal realities of corporations is an opinion that rests a crucial decision with far reaching impact upon flawed assumptions.

#### *D. Prevalence of Regulated Speech in Corporate Law*

The Court's assertion that the law does not make distinctions based on the identity of the speaker is patently false in the context of corporate law; in fact a great deal of speech is regulated or compelled based upon the corporate identity of the speaker.<sup>168</sup> The corporate charter filing requirements are a striking example. These, along with the requisite continuing disclosures and securities regulations—including registration and proxy requirements at both the state and

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ANDREWS CLASS ACTION LITIG. REP. 2 (Sept. 16, 2009), available at Westlaw ANCALR (“[F]ederal courts may adjudicate class actions in which the value of the class claims, computed in the aggregate, exceeds \$5 million; there are at least 100 class members; and there is minimal diversity of citizenship . . .”).

<sup>168</sup> Applying the First Amendment to the question of securities-related corporate speech is complicated by its multiplicity of audiences (e.g., employees, journalists, shareholders, etc.) and the wide range of issues involved (e.g., sale of new securities, accounting numbers, commentary on public issues such as global warming, etc.). DRUTMAN & CRAY, *supra* note 17, at 46. To state that securities-related speech is purely corporate speech about stock that is issued to investors is a drastically oversimplified view of the situation, but one which is adopted for the purposes of the arguments advanced above; it is perhaps also illustrative of the fallacy of both a single corporate voice and a single corporate audience.



federal levels—create a slew of corporate speech based solely on the corporate identity of the entity.<sup>169</sup> Securities regulations typically focus on disclosure obligations or compelled speech. “Obvious examples of this are the registration statement requirements contained in the Securities Act of 1933 . . . Issuers and reporting companies are required to disclose a wide range of business and financial information. The Sarbanes-Oxley Act of 2002 further extended reporting requirements in a variety of areas.”<sup>170</sup>

Securities regulations can be onerous, requiring registration before a corporation can take a certain action, such as offering for sale a new class or series of securities (stock) in the company.<sup>171</sup> Because of the temporal element—compliance with a government regulation is required *before* the company may speak to potential investors in the form of a prospectus—such securities regulations can be analogized to prior restraints, which present the greatest challenge to First Amendment freedoms.<sup>172</sup> Critics of securities regulations make the argument that such regulations violate the First Amendment.

In technical-financial disclosures, as in political speech, the government’s power to require specific disclosure is the power to mandate the government’s version of proper

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<sup>169</sup> See, e.g., 15 U.S.C. § 77f (2006) (establishing SEC securities registration requirements); DEL. CODE ANN. tit. 8, § 102 (2010) (setting forth required contents of articles of incorporation). For a database of state securities registration and reporting forms, often called “blue sky laws,” see *Blue Sky Laws*, SECURITIESLINKS, <http://www.seclinks.com/id16.html> (last visited Jan. 17, 2011).

<sup>170</sup> Antony Page, *Taking Stock of the First Amendment’s Application to Securities Regulation*, 58 S.C. L. REV. 789, 803 (2007).

<sup>171</sup> For example, under the Truth in Securities Disclosure Act—section 5 of the ’33 Act—the corporation must file a registration statement with the SEC before it can offer any of the securities for sale. “The SEC can, by administrative action or with the ‘assistance’ of court injunctive action, engage in prior restraint of prohibited corporate disclosure.” Wolfson, *supra* note 85, at 287.

Tender offers and solicitations are also subject to prior registration requirements in the form of a Tender Offer Solicitation/Recommendation Schedule 14D-9 for anyone (whether it be the company management, a shareholder, or a potential acquirer) who solicits or makes a recommendation regarding a tender offer. 17 C.F.R. § 240.14d-9(b)(1) (2010).

Other examples of compelled/regulated corporate securities speech are section 4(2) of the ’33 Act, which exempts nonpublic offerings from registration and restricts general solicitation or advertising of such securities by the issuer, 15 U.S.C. § 77d(2); fraud and insider trading regulations under section 10(b) and Rule 10b-5, 17 C.F.R. §§ 230.502(c), 243.100; and regulation FD, which prevents material nonpublic disclosures to certain parties unless such disclosures are made to the public at large, Page, *supra* note 170, at 805.

<sup>172</sup> Wolfson, *supra* note 85, at 266 (footnote omitted) (“[T]he Securities Act of 1933 and rules, in practice, require certain corporate publications to be filed with the SEC staff for review prior to final dissemination to shareholders. A further example of modern prior restraint is that the SEC is empowered to go into a federal district court to obtain, upon a showing of failure to register, misrepresentation, or fraud, an injunction against the dissemination of the corporate publication.”).

orthodoxy. That power interferes with all of the various values that the first amendment presumes to advance. It interferes with the free market's pursuit of truth because governments have no monopoly on that precious commodity and, indeed, frequently have an interest in suppressing it.<sup>173</sup>

Corporate disclosures and registration requirements (securities speech) are regulated under a listener-centered rationale, not dissimilar from the justification used in the commercial speech doctrine.<sup>174</sup> The requirement that corporations file statements about the company and the securities being offered with both state and federal agencies is rationalized as an acceptable form of compelled speech because it facilitates the informed and autonomous decisions of the listeners.<sup>175</sup> Securities-related speech could be equated with commercial speech in that it is speech generated by a corporation and subject to special regulations because there is an economic transaction at the heart of the speech. Such speech, in either scenario has the potential to corrupt the message and mislead the listener.

The First Amendment has generally been interpreted to afford the highest protection to political speech, while allowing restrictions on other kinds of speech, such as “fighting words” and commercial speech (including advertising and corporate communications associated with securities or shareholder proxy statements, where certain forms of corporate speech are either mandated or prohibited).<sup>176</sup>

The blurred lines between pure political speech and the profit-motivated speech of corporations in both commercial- and securities-related contexts is also evident in the context of corporate political speech, where the profit motivation shapes and informs the corporate

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<sup>173</sup> *Id.* at 279.

<sup>174</sup> Securities markets are different from traditional product markets because of the firm-specific information that drives purchases and because the sole source of that information is typically the firm itself. Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 *BROOK L. REV.* 5, 37 (1989); see also Wolfson, *supra* note 85, at 287–88 (“Corporations sell products or services. The sale of shares of common stock or debt securities, however, is not the sale of a corporate service or product, since a share of common stock is an ownership interest in an organization. It carries with it certain rights to vote for the election of directors. It represents an interest in a managerial team that will produce a future flow of corporate earnings.”); cf. Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 *U. KAN. L. REV.* 163, 163–65 (1994) (arguing for First Amendment protection from SEC regulations by analogizing corporate securities speech with political speech).

<sup>175</sup> See Neuborne, *supra* note 174, at 59 (describing the SEC's regulation of primary-market speech and its effect on investor choices).

<sup>176</sup> DRUTMAN & CRAY, *supra* note 17, at 46 (footnotes omitted).

political message, as discussed above.<sup>177</sup> In addition to the prior restraint elements of registration requirements, proxy statement regulations also highlight the special treatment that corporate speech receives based on the corporate identity of the speaker. Proxy statements are communications to the shareholders regarding an upcoming shareholder vote, usually before annual meetings or special votes related to a merger, acquisition, or takeover.<sup>178</sup>

Corporate speech in the form of proxy statements is regulated under a justification similar to that utilized for commercial speech. “The rationale for SEC regulation of the proxy materials is that proxy statements deal with commercial speech. Shareholders invest in the corporation. They can make intelligent decisions to hold or sell only if, *inter alia*, proxy regulation supplies them with truthful information.”<sup>179</sup> Such communications, however, demonstrate the blurred lines between political speech and corporate commercial speech because proxy statements implicate the voting rights of the shareholders and because statements related to the election of corporate directors also evoke corporate policies. Even standard proxy issues related to endgame decisions about the future direction of the corporation (i.e., mergers and acquisitions) involve more than a pure discussion of the commodity (the stock); they evoke larger questions of corporate policy and have implications for all corporate stakeholders including management, shareholders, employees, and the community at large.<sup>180</sup> In addition, filings may include a discussion about social responsibility, governance practices, or other issues that can be reflected or adopted in company policies that marry economic and political interests.<sup>181</sup> For example, McDonalds Corporation

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<sup>177</sup> See Page, *supra* note 170, at 791 (describing how “numbers on a balance sheet” influence political speech of corporations).

<sup>178</sup> SODERQUIST & GABALDON, *supra* note 146, at 129 (“The thrust of the proxy system is the mandate of full disclosure in connection with shareholders’ meetings, and such meetings are the primary concern of state corporation law.”).

<sup>179</sup> Wolfson, *supra* note 85, at 282 (footnote omitted).

<sup>180</sup> See *id.* at 280–82 (describing the directors’ considerations when addressing proxy issues). Shareholder proxy statements can be excluded to the extent that they relate to “ordinary business operations.” 17 C.F.R. § 240.14a-8 (2010). Shareholder proxy statements, however, may not be excluded if they are concentrated on “sufficiently significant social policy issues.” DIV. CORP. FIN., U.S. SEC. & EXCH. COMM’N, STAFF LEGAL BULL. NO. 14A, SHAREHOLDER PROPOSALS (2002), available at <http://sec.gov/interp/legal/cfslb14a.htm> (internal quotation marks omitted).

<sup>181</sup> See Wolfson, *supra* note 85, at 285 (“Assume a corporation lobbies for a tax decrease on products. Full first amendment protection would appear to be granted. However, an internal dispute over the advisability of such a program, if brought to the point of a proxy contest for differing slates of directors, would be subject to the full range of proxy regulation.”); see also DAVID A. KATZ & LAURA A. MCINTOSH, CORPORATE GOVERNANCE UPDATE: 2009 PROXY SEASON REVIEW AND A LOOK AHEAD TO 2010 (2009), available at <http://www.directorsforum.org/conference/materials/DF10%20%20Corporate%20Governance%20Update%202009%20Pro>

recently opposed a Humane Society shareholder proposal included in its proxy materials that would have required the company to purchase five percent of its eggs from suppliers who use cage-free housing systems instead of battery cages.<sup>182</sup>

Corporate speech is subject to regulations based on the corporate identity of the speaker; formation charter requirements and state and federal registration requirements regarding the purchase and sale of stock are two examples. Corporate securities speech is regulated to protect investors from the distorting effect of the profit motivation behind such speech and to level the playing field among investors, even though such speech may often involve both economic and political elements. *Citizens United* answered the First Amendment question of how much protection to afford corporate political speech without considering this and other corporate law principles. Consequently, the Court incorrectly assumed that the law does not treat the speech of corporations differently from that of an individual.

#### *E. Equalization Rationale Argument*

The Supreme Court in *Austin* upheld restrictions on corporate independent expenditures for political speech based on the antidistortion rationale.<sup>183</sup> Such restrictions were justified because of the corrosive and distorting effect of expenditures funded by the aggregations of wealth made possible only by the unique corporate form, and which may have no correlation to public support for the corporation's political speech.<sup>184</sup> Justice Kennedy pierced the antidistortion rationale in *Citizens United* with a two-pronged approach. First, Justice Kennedy highlighted that media corporations do not enjoy special protections under the First Amendment solely because of the phrase "free press."<sup>185</sup> Second, because § 441b

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xy%20Season%20Review%20And%20a%20Look%20Ahead%20to%202010%20%20Mirvis%201-10.pdf (summarizing 2009 shareholder proposals).

<sup>182</sup> *McDonald's Corp. Sched. 14A*, U.S. SEC. & EXCH. COMM'N, [http://www.sec.gov/Archives/edgar/data/63908/000119312509081437/ddef14a.htm#toc45853\\_21](http://www.sec.gov/Archives/edgar/data/63908/000119312509081437/ddef14a.htm#toc45853_21) (last visited Jan. 17, 2011); see also B.C. Upham, *McDonald's Opposes Shareholder Proposal for Cage Free Eggs in US*, TRIPLE PUNDIT (Apr. 16, 2010), <http://www.triplepundit.com/2010/04/mcdonalds-cage-free-eggs> (describing the McDonald's board's recommendation).

<sup>183</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>184</sup> *Id.*

<sup>185</sup> See *Citizens United*, 130 S. Ct. at 905 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. 'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'" (quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting))).

exempted media corporations, which also benefited from the ability to amass wealth due to the unique attributes of the corporate form, it demonstrated the insignificance of the threat of accumulation of wealth to fund political speech.<sup>186</sup> For Justice Kennedy, the ability of some corporations to benefit from the corporate form and participate in the political sphere fatally weakened the antidistortion rationale. Additionally, due to the existence of parent corporations and media-conglomerate corporations, Justice Kennedy argued, an exempted media corporation could become a mouthpiece for a sister company that would otherwise be prevented from participating in such political speech.<sup>187</sup>

So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.<sup>188</sup>

For Justice Kennedy, the resulting contest between small corporations and media conglomerates where media-related corporations have a voice and other corporations do not—or more accurately where they are restricted to speaking through PACs, outside of the independent expenditure time limits, or through indirect methods such as lobbying—created the untenable situation of differential treatment of speakers under the First Amendment.<sup>189</sup>

In addition to analyzing the different treatment of media and nonmedia corporations, Justice Kennedy also rejected the antidistortion rationale on independent grounds, arguing that there will always be disparities in the volume or reach of the speech created based on the funding source—whether that be a wealthy individual or

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<sup>186</sup> *Id.* at 906 (“The law’s exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale.”)

<sup>187</sup> *Id.* at 905 (“[M]edia corporations accumulate wealth with the help of the corporate form, the largest media corporations have ‘immense aggregations of wealth,’ and the views expressed by media corporations often ‘have little or no correlation to the public’s support’ for those views.” (quoting *Austin*, 494 U.S. at 660 (majority opinion))).

<sup>188</sup> *Id.* at 906.

<sup>189</sup> *See id.* at 904–07 (describing the differential treatment of small corporations and media conglomerates).

a well-financed unincorporated business entity such as a partnership.<sup>190</sup>

On one hand, the Court appeared to embrace an equalization argument as between media and nonmedia corporations, rejecting the law in part because of its media exception, which would create inequalities as between small corporations and media conglomerates. On the other hand, the Court referenced the inherent unequal playing field in any marketplace, especially the marketplace of ideas, as a reality of our economic and political system that was beyond the reach of the government to remedy.<sup>191</sup> In overturning *Austin*, the Court returned to *Buckley*'s rejection of the equalization argument.<sup>192</sup>

The equalization-of-voices argument that the Court brushed aside in *Citizens United*, however, is a foundational element of the securities regulations discussed above. For example, the regulation of proxy speech is a protectionist measure undertaken for the benefit of the small investor.<sup>193</sup> The requirement that corporations disclose certain information before the exercise of corporate democracy rights compels speech of the corporation in order to make sure that the small shareholder is equally informed and as prepared to exercise her corporate-democracy rights as the large investor.

Proxy regulation is designed to improve the corporate-political leverage of the small shareholder. Yet, first amendment doctrine does not permit a kind of egalitarian

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<sup>190</sup> Justice Kennedy wrote that the political reality of corporate participation coupled with the independent-expenditure ban in § 441b created an asymmetry between the voice of smaller and nonprofit corporations who cannot engage in lobbying, etc., and those who can. *Id.* at 907.

[T]he result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose.

*Id.*

<sup>191</sup> See *id.* at 908 ("Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures." (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 503–04 (2007))).

<sup>192</sup> *Austin* upheld the ban on expenditures because of "the corrosive and distorting effects of immense aggregations of wealth" in the marketplace of ideas. *Austin*, 494 U.S. at 660. "*Austin*'s reasoning was—and remains—inconsistent with *Buckley*'s explicit repudiation of any government interest in 'equalizing the relative ability of individuals and groups to influence the outcome of elections.'" *Citizens United*, 130 S. Ct. at 921 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)).

<sup>193</sup> Wolfson, *supra* note 85, at 283.

treatment of speech, including proxy speech, and the small shareholder has greater ability and opportunity to opt out of the corporation than [an] ordinary citizen has to opt out of the polity.<sup>194</sup>

Dismissing the equalization and antidistortion rationales as beyond the proper scope of government intervention ignores a fundamental corporate law principle behind the disclosure and registration requirements in securities law. Once again, the Court's assumptions regarding corporate political speech do not comport with the realities of corporate law, which are based, in part, on an equalization rationale.

#### V. CONCLUSION

The Supreme Court's First Amendment analysis of corporate political speech rights in *Citizens United* was divorced from a corporate law perspective and thus rested on five flawed assumptions: (1) that the economic motivation of corporate speech, even corporate political speech, deserves no discount; (2) that there exists a singular corporate voice; (3) that the threat of compelled speech is insignificant; (4) that speech is not regulated based solely on the corporate identity of the speaker; and (5) that the equalization rationale is inapplicable to corporate speech. By examining the constitutional questions evoked in *Citizens United* through a corporate law lens, these assumptions are shown to be false and based on an inherently flawed conceptualization of corporations. The falsity of these assumptions calls into question the Court's holding that corporate political speech cannot and should not be treated differently from individual political speech. The Court's inconsistent conceptualization of corporations and application of First Amendment arguments to corporate political speech has created a doctrine that is subject to political and ideological undercurrents in a way that undermines the validity of the Court's jurisprudence in this arena. In answering the difficult questions about the roles, rights, and responsibilities of corporate political speech in our democratic society, the analysis must be robust and must adhere to both First Amendment and corporate law principles.

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<sup>194</sup> *Id.* at 285 (footnote omitted).