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Corporate Legal Theory Under the First Amendment: *Bellotti* and *Austin*

Charles D. Watts Jr.

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I. INTRODUCTION

It is generally uncontroverted that the corporation is an artificial person with independent legal status. Indeed, much of corporate law is built upon this notion of the corporation as a separate entity. However, this conception of the corporation is only accurate on a superficial level. Recent corporate law scholarship seeks to remove conventional assumptions about corporate identity and, instead, critically examine what is meant by the corporate persona.[1] Critical

* Assistant Professor of Law, Vanderbilt University School of Law. I am grateful to Robert Rasmussen, Nicholas Zeppos, Thomas Hazen, Robert Belton, Michael D. Newsom, David Millon, William Bratton, and Deborah Watts Hill for their constructive comments on an earlier draft of this article. I also benefited from the comments of my colleagues during a Life of the School ("LOTS") program at Vanderbilt University School of Law. Adolpho A. Birch III, Class of 1991, and Olivia Walling, Class of 1991, provided valuable research assistance. Responsibility for the theories contained in this Article, however, rests with the author.

1. The term "corporate persona" is a shorthand reference to the corporation's theoretical conception. It has been used to suggest that there is a context of moral values that may be imposed on corporations as well as on individuals. *See, e.g.*, Thomas L. Hazen, *The Corporate Persona, Contract Failure, and Moral Values*, 69 N.C. L. REV. 273 (1991) (examining shortcomings of the contractarian model when moral values are imposed upon corporations). I use this term because the First Amendment tends to broaden the perspective of any debate into which it is injected. With the corporation, the First Amendment motivates consideration of the social, as well as the economic, implications of corporate regulation.

inquiry into the nature of the corporate persona has important policy consequences.[2] A conception of the corporation as a creature of the state obviously suggests a different regulatory environment than one that views the corporation as a naturally occurring vehicle for collaborative private action. Debate over the nature of the corporate persona has illuminated the full range of corporate law questions. An important area left largely unexamined in this debate, however, is the significance of the conception of the corporate persona in determining the constitutional protection that should appropriately be afforded corporate speech.

Typically, the treatment of a human activity under the First Amendment generates an examination of that specific activity. The recent spate of prominent First Amendment questions amply illustrate this proposition. In the flag burning cases, courts scrutinized the act of burning a flag to determine its expressive content.[3] Similarly, in the recent obscenity cases involving Robert Mappelthorpe's homoerotic photographs and the lyrics of the rap music group 2 Live Crew, the question of whether First Amendment protection precluded state regulation focused not on questions of First Amendment doctrine but on the character of the expression.[4]

Interestingly, in *Austin v. Michigan Chamber of Commerce*,[5] the

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2. *See, e.g.*, David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 232-40 (reviewing debate over corporate legal theory in context of the hostile takeover boom of 1980s); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 835-44 (1989).

3. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404, 2407-08 (1990) (holding that flag burning, as an act of expression, enjoys First Amendment protection); Texas v. Johnson, 491 U.S. 397, 406 (1989); United States v. Haggerty, 731 F. Supp. 415, 421 (W.D. Wash. 1990) (holding that the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700 (West Supp. 1990)), violated the First Amendment when applied to defendants charged with flag burning during demonstration protesting the Act's enactment).

4. In Contemporary Arts Ctr. v. Ney, 735 F. Supp. 743, 744 (S.D. Ohio 1990), after the gallery and certain of its principals were indicted on charges of obscenity but before any judicial determinations had been made, the plaintiffs had to seek an injunction to prevent the seizure of Robert Mapplethorpe's homoerotic photographs, which had been displayed at the gallery. The gallery's operators ultimately were exonerated when the jury found that the exhibit was not obscene.

The lyrics of the album, *Nasty as They Wanna Be*, prompted a criminal conviction for the sale of obscene material. TWO LIVE CREW, NASTY AS THEY WANNA BE (Luke Records 1989). The language of this album is admittedly unacceptable for certain audiences, yet over two million copies have been sold. The album represents a genre of music which has its roots in certain facets of African-American culture. Its treatment raises the question whether certain forms of communication, particularly those that do not derive from majoritarian culture, will be allowed to thrive. Much of the debate on this matter has focused upon the underlying question of our commitment to and understanding of cultural diversity. *See, e.g.*, Henry L. Gates, Jr., *2 Live Crew Decoded*, N.Y. TIMES, June 19, 1990, at A23. Therefore, the issue became which characterization of the activity-speech would the judge respect.

5. 110 S. Ct. 1391 (1990).

Court upheld limitations on corporate speech in the form of contributions and independent expenditures on behalf of state political candidates without focusing on the appropriate characterization of the activity involved—that is, whether the corporate form of doing business[6] affected the relevant First Amendment doctrine.

Austin is the Court's most recent statement on the extent of First Amendment protection accorded corporate speech. Implicit in the opinions of both *Austin* and *First National Bank of Boston v. Bellotti*[7] is a disagreement among the justices as to the appropriate theoretical conception of the corporate persona. This disagreement is critical, because one's theory of the firm affects the First Amendment analysis and therefore the protection afforded to the speech. The Court's lack of direct analysis of corporate theory raises the question of the proper role for corporate legal theory in resolving issues that involve the First Amendment and corporate participation in public discourse.

Recently, several scholars have debated the relationship between corporate theory, doctrine, and practice. Morton Horwitz[8] asserted that corporate legal theory helped to legitimize the development of large corporate entities shortly after the turn of the century. He also argued, in part as a response to the characterization of legal concepts as indeterminate or as simply a function of the interpreter's viewpoint,[9] that corporate legal theory is not "infinitely flippable" and has

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6. The term "corporate speech" generally refers to speech made on behalf of the corporation, whereas "commercial speech" refers to speech concerning consumer affairs. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-38 (1990) (discussing differences that Supreme Court has found between commercial and non-commercial speech); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Belotti, 67 GEO. L.J. 1347, 1351 (explaining centrality of source of communication in context of corporate speech). Individuals, partnerships, and corporations can engage in commercial speech; corporate speech, however, involves speech funded by or prepared within the corporate structure that injects the corporation into the polity. If corporate theory is to be useful in determining the extent of First Amendment protection, the analysis must identify the particular source of the speech, not merely the business irrespective of form.

7. 435 U.S. 765 (1978).

8. Professor Horwitz is a legal historian and participant in the critical legal studies movement. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1491 n.96 (1989); Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 667-68 (1982).

9. This is a position espoused by many within the critical legal studies movement. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000, 1006-07 (1985) (arguing that, because doctrinal structure cannot reconcile tension between competing values, critical discourse favors one viewpoint over others and promotes indeterminacy of legal theory); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984) (discussing the fallacy that legal theory should always produce determinate results); Roberto M. Unger, *The Critical Legal Studies Movement*,

determinate potential.[10] William Bratton and David Millon have challenged Horwitz's positions by questioning his suggestion that corporate theory drives doctrine and practice.[11] Instead, they argue that the determination of theory, doctrine, and practice is a dynamic, interactive process in which each element both generates causes and effects and responds to the causes and effects of the other elements. Neither of these scholars, however, doubt Horwitz's basic assertion that corporate legal theory is a significant component in the more dynamic process that they envisage.

This debate about the determinant relationship between corporate legal theory, corporate law doctrine, and corporate practice is directly relevant to the question of how the First Amendment should apply to expressions funded by and prepared within the corporate structure. At the intersection of the First Amendment and corporate law is a similar dynamic involving First Amendment doctrine and corporate legal theory. The heightened significance of corporate legal theory in this context is based on two precepts. First, it seems to be a logical requirement that one characterize the entity calling for First Amendment protection before constitutional protection can be ascertained. First Amendment rights are not so broad as to protect speech irrespective of its source. The Court has made clear that the source of the speech may be relevant, as in the case of children's speech and corporate speech.[12]

Second, allowing the separate incorporation of business ventures clearly was intended to aid the accumulation and allocation of resources for the achievement of desirable commercial goals. Corporate dominance in the commercial sphere, however, has affected society in many other, non-commercial respects. The resolution of concerns about the societal role of the corporation are informed by and, to some extent, are dependent upon the perceived contours of its theoretical conception. Therefore, in areas where basic commercial concerns are not the focus of debate, one's conception of the corporation takes on greater significance. In the First Amendment context, questions of corporate law doctrine and practice are fairly remote, and normative concerns involving the appropriate role of the corporation in society rise to the fore.

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96 HARV. L. REV. 561, 567-76 (1983) (criticizing leftist legal thought for its subjective interpretation and rejection of all tenets of formalism and objectivism).

10. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175-76 (1985) (stating that "most important controversial legal abstractions do have determinate legal or political significance").

11. Bratton, *supra* note 8, at 1511-13; Millon, *supra* note 2, at 241-51.

12. *See infra* notes 190-91 and accompanying text.

In both *Austin* and *Bellotti*, the Court had to consider the proper interpretation of the First Amendment,[13] but equally it had to consider the proper characterization of the corporation. Because not all organizations or groups of individuals are treated identically under the First Amendment,[14] and because the application of First Amendment principles to corporations requires some special analysis, an underlying fundamental question begs to be answered: "What are corporations?"

This Article considers the relevant academic theories of the corporation, examines the theory of the firm implicit in the various opinions rendered in the corporate speech cases, and suggests a theoretical perspective of the corporation which informs how First Amendment law should address corporate speech. Part II reviews the various corporate theories that have developed since the corporate form became generally accessible in America. Part III dissects the opinions in *Bellotti* and *Austin* in an effort to demonstrate how the theories described in Part II have been adopted by the Justices. Part IV considers the impact of these theories on the outcomes of the various opinions. Finally, Part V explores the appropriate role of corporate theory and its selection in the context of First Amendment questions.

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13. Much has been written about the scope and meaning of First Amendment protections in the context of corporate speech. *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 YALE L.J. 235 (1981); Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. Rev. 157, 189-90 (1980); Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Francis H. Fox, *Corporate Political Speech: The Effect of* First National Bank of Boston v. Bellotti *upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75 (1979); Gary Hart & William Shore, *Corporate Spending on State and Local Referendums:* First National Bank of Boston v. Bellotti, 29 CASE W. RES. L. REV. 808 (1979); O'Kelley, *supra* note 6; William Patton & Randau Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (1981); Lionel S. Sobel, *First Amendment Standards of Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 VAND. L. REV. 517 (1988); Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925 (1990); Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904 (1989). However, the corporate theory perspective has not been developed.

14. While such unequal treatment would render irrelevant the selection of a corporate theoretical conception under the First Amendment, it actually suggests a conception of the corporation as an aggregation of its members. Such a conception indicates that all organizations be treated similarly.

II. REVIEW OF THE HISTORICAL DEVELOPMENT OF CORPORATE LEGAL THEORY

Because corporations are conceptually complex,[15] both lawyers and lay persons have reified the corporation as an entity.[16] This in turn has led to the acceptance of the "fictional entity" description of the corporation.[17] While the curious use of such an oxymoron[18] may

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15. William Bratton uses the following language to capture the complexity of the corporate concept:

> Firms are bundles of unruly phenomena. They entail not just production, but production by groups of people. Therefore, theories designed to contain and regularize the appearance of firms go beyond concepts about economic production to articulate concepts about communities. These concepts variously distinguish the individual and the group, usually according the interests of one or the other greater moment.

William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 407 (1989).

16. The tendency to reify the corporation has been aptly described with the following language:

> Both lawyers and lay persons tend to speak instinctively of the corporation as an 'it'—that is, as a thing that has an identity and existence of its own. While this is sometimes a helpful shorthand form of expression . . . corporations should not be analyzed in this fashion, *except when the complexity of the actual relationships becomes so unmanageable as to make it unnecessary to reify*. . . . This statement may seem confusing, because it is clear that the law, itself, does not do this. In general, the corporation is reified. . . . That is, the law conceives of the corporation as having an existence separate from that of its employees, customers, suppliers, and so forth—but mainly, from its shareholders. Sometimes, to be sure, the corporation is called a "fictional" entity—in apparent recognition of the abstract and potentially misleading nature of the concept. Still, there is the basic notion of a barrier, a psychological wall, between the shareholder (and other participants in the venture) and the corporation. . . . Sometimes the process goes a step further. The fictional (conceptual) entity becomes a putative person—capable, for example, of committing a crime or of bearing the burden of a tax. In other words, reification sometimes leads to anthropomorphism—that is, treating the corporation as if it were a human being.

WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 101-02 (1990) (emphasis added).

17. The terms "legal fiction" or "artificial entity" do not explain the actual nature of the corporation or how such an entity fits into the confines of our society. However, the terms are imbedded deeply in the law. As to legal persons, Blackstone notes that "[n]atural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 7 OXFORD ENGLISH DICTIONARY 724 (1961) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1765-69); *see also* Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 564 (1987) (discussing influence of Blackstone's characterization of corporate personality on American law).

18. The word "entity" has been defined as "something that has a real existence." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 649 (2d ed. 1987). Fictional, on the other hand, has been defined as "something feigned, invented, or imagined." *Id.* at 713. The definitions would suggest, at least facially, that "fictional entity" is oxymoronic.

provide a shorthand point of reference,[19] a more accurate conceptualization of the corporation is necessary for the application of First Amendment principles to expressions which are prepared within and funded by the corporate structure.

Corporate law literature has focused extensively upon the theoretical characterization of the corporation. It has been unsuccessful, however, in creating any enduring view. Over time the various characterizations of the corporation have infused debates about corporate policy. These debates generally assumed a particular theoretical characterization of the corporation and, therefore, were bound within that particular paradigm.[20] As social, political, economic, and doctrinal circumstances change, however, the accepted paradigm of the corporation has evolved and corporate policy debates have assumed new theoretical constructs.

William Bratton has suggested that the evolution of legal theory over the better part of two centuries consistently has revolved around three or four fundamental questions.[21] Each of the theories developed to date can be defined by its position regarding these essential questions concerning the nature of the corporate persona: (1) whether the corporation should be viewed as an entity or an aggregate of its participants; (2) whether the corporation owes its creation to a concession from the state or to the motivation of the individual entrepreneurs; and (3) whether the corporation is appropriately characterized, legally, as a public or private phenomenon.[22] Historically,

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19. Professors Klein and Coffee have noted that "[w]hile this [characterization] is sometimes a helpful shorthand form of expression, a basic message of [their] book is that corporations should not be analyzed in this fashion, except when the complexity of the actual relationships becomes so unmanageable as to make it necessary to reify." KLEIN & COFFEE, *supra* note 16, at 101. They aptly point out that shorthand references should be used only when a more precise characterization becomes useless due to its complexity.

20. See *infra* note 23 for a discussion of the current debate over the interrelationship between practice and theory in corporate law.

21. Throughout the evolution of corporate theory, the theories that have attained dominance for any period of time have seemed to respond differently to this fixed set of questions. *See, e.g.*, Coates, *supra* note 2, at 829, 841-42 (explaining how different corporate theories have been dominant at different times in our history).

22. Bratton describes these enduring questions in terms of pairs of opposing concepts. Bratton, *supra* note 8, at 1510-13. This Article makes reference to only three of the four pairs that Bratton identifies. Not included is the fourth pair, which characterizes the nature of the contracts in which the corporation is engaged as either discrete or relational. While this conceptual conflict exists now and may continue in the future, it has not had the same overt historical significance on the debate because the relational theory of contracts has been articulated only recently.

Millon recognizes that theorists traditionally examined corporate legal theory in two dimensions, the aggregate-entity dimension and the creation dimension. He describes the latter as the dimension that considers "the distinction between the corporation as an artificial creation of state law and the corporation as a natural product of private initiative." Millon,

these concepts have been components of the corporate legal theories espoused by various judges, scholars, politicians, and business persons who have opined about particular issues within the field of corporate law and policy.

Although there is some disagreement among legal historians as to the reasons for the rise and fall of the various corporate legal theories,[23] there is fair agreement that the rise and fall of each theory coincides with changes in other relevant circumstances, such as the corporate practice techniques and legal doctrines accepted at the time; the political, social, and economic situation; and the prevalent theoretical schools of thought on economic, political, and social issues.[24]

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supra note 2, at 201. He describes the additional dichotomy of the public-private distinction, which he suggests "operated at a deeper level, explicitly and implicitly structuring thought about the nature of corporate activity and the appropriate goals of corporate law." *Id.*

23. Horwitz considers theory potentially determinative of corporate practice:

> I wish to deny that legal conceptions are infinitely 'flippable' and instead to insist that they have 'tilt' or influence in determining outcomes. Thus, for example, I wish to dispute Dewey's conclusion that particular conceptions of corporate personality were just as easily used to limit as to enhance corporate power. Instead, I hope to show that, for example, the rise of 'natural entity' theory of the corporation was a major factor in legitimating big business and that none of the other theoretical alternatives could provide as much sustenance to newly organized concentrated enterprises.

Horwitz, *supra* note 10, at 176. Bratton accepts the "temporal confluences of theory and practice," but he questions whether the proximity in time can conclusively establish the direction of the causal link. Bratton, *supra* note 8, at 1510-17.

Most recently, Millon has questioned both perspectives, asserting that the relationships between practice and theory are too interrelated to establish causation in either direction. Millon, *supra* note 2, at 204. He states:

> These legal theories are based on positive or descriptive assertions about the world—assertions about what corporations *are*. In a characteristic form of legal argument, normative implications then are said to follow from the positive assertion. However, at the same time that theory is influencing doctrine, theories of the corporation themselves are influenced strongly by legal doctrine defining the corporation's attributes. The relationship between legal theories of the corporation and corporate doctrine is thus dynamic and interdependent: Each simultaneously influences the other. Our ideas about what corporations are provide us with a critical perspective toward corporate doctrine, while our interpretation of corporate doctrine reveals what appears to be [the essence] of corporations.

Id. at 204. I would assert that our conceptions of corporations provide a critical perspective for the application of First Amendment doctrine as well.

24. For example, the rise of the neoclassical economic view of the corporation, which seemed to reach its zenith in the 1980s, was fueled by the development of the high risk, high yield "junk bond" market, which in turn fueled the market for corporate control. Similarly, the prevalence of supply-side economic theories of government also may have promoted the neoclassical conception of the corporation. It is yet to be seen how the recent collapse of the junk bond market will affect the level of acceptance of various corporate theories. However, the recently realized power of states to retard control transactions may have precipitated the rise of a new conception—the stakeholder vision of the corporation. Millon has demonstrated that corporate theory and doctrine, over time, have oscillated between a public orientation and

These theoretical perspectives from other fields resonate with corporate theory and with the changes in practice and doctrine to promote an evolving conception of the corporation.[25] The relevance and meaning of each particular theory, therefore, is dependent upon the historical context within which it achieved general acceptance. Although corporate legal theories provide a useful foundation for the application of law to corporations, they are, at least to some extent, bound to the period in which their general acceptance defined the parameters of debate. The chronological description which follows provides the proper orientation for understanding the reasons behind their rise and applicability.

A. *The Fictional Entity Theory*

The first relevant theory or paradigm of the corporate persona predominated from approximately 1780 until 1890.[26] It reflected the theoretical perspective of a period when corporate chartering was limited strictly to special concessions from the legislature. The charters issued during this period restricted corporate accumulation of economic power in several ways. These restrictions included limitations on both the duration and the capitalization of corporations as well as the requirement for and enforcement of specific single corporate-purpose descriptions in the context of a rather narrow application of the ultra vires doctrine.[27]

This first theory—the fictional entity theory—focused primarily upon the corporation's relationship with the state. The state's per-

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a private orientation. Millon, *supra* note 2, at 205-34. If this is true, corporate legislation may be headed toward more of a public orientation in the near future.

25. Conceptual evolution is hardly new to constitutional theory. *Compare* Betts v. Brady, 316 U.S. 455, 471 (1942) (finding that the Sixth Amendment's guarantee of counsel is not fundamental right), *with* Gideon v. Wainwright, 372 U.S. 335 (1963) (finding right to counsel is a fundamental right). Typically, however, conceptual evolution, when examined in the constitutional sphere, focuses on the evolution of a legal principal. Here, I am arguing that there must be a mature conception of the nature of the corporation for the application of a given constitutional principle. A more concrete example is the area of cruel and unusual punishment, where it has been noted that "the Court has not interpreted [the cruel and unusual punishment] provision in a purely historical or static manner, but has accepted the concept that it must develop over time." John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 484 (1990). In early America, for example, flogging represented neither cruel nor unusual punishment, but today such punishment would not be acceptable. Although neither the constitutional language nor the activity have changed, our contemporary understanding of the nature and effects of such punishment have changed the way in which we apply the law to the facts.

26. JAMES W. HURST, *From Special Privilege to General Utility 1780-1890*, *in* THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 13-57 (1970).

27. *See id.* at 37-44.

ceived dominance over the corporate form[28] was such that, as Willard Hurst has noted, "[t]he standard formula spoke as if the state not only gave an indispensable consent but itself created the whole working reality of any business association which took corporate form."[29] An example can be seen in the language of *Trustees of Dartmouth College v. Woodward*,[30] which was replete with references to the artificiality of the corporate persona and its subservience to state law.[31] The language of this case is recognized as emblematic of the prevailing theory during this period.[32] As a result, the debate during this era focused on the effects associated with public control of corporate affairs.[33]

B. *The Natural Entity Theory*

The second paradigm, the natural entity theory, developed in the 1890s. While the natural entity theory still appears in modern litera-

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28. Corporate law during this period strongly favored public regulation of corporate activity. *See* Millon, *supra* note 2, at 211 (arguing that extensive regulation evidenced a distrust for corporations generally and was, therefore, reflected in 19th century theory).

29. HURST, *supra* note 26, at 9.

30. 17 U.S. (4 Wheat.) 518 (1819).

31. *Id.* at 636.

32. Chief Justice Marshall stated: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." *Id.* Hurst indicated that Marshall borrowed this language from Coke and Blackstone. HURST, *supra* note 26, at 9. Even though the *Dartmouth College* Court limited the states' authority to modify the corporate contract when it had not reserved such a right, states shortly overcame this setback by passing statutes that explicitly reserved their right to change the corporate charter. In any event, this episode did not change the general perception of the time that corporations were creatures of state law. *See generally* Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 774-75 (1989) (explaining that, even after *Dartmouth College*, corporations were considered artificial beings which owed their existence to special legislative acts).

33. This entity orientation has been deeply embedded in the Supreme Court's analysis of corporations. *See, e.g.*, Berea College v. Kentucky, 211 U.S. 45 (1908). In *Berea*, the Court found constitutional that portion of a Kentucky statute which made it illegal for corporations to educate "white and colored children" together. *Id.* at 55. In fact, the statute made it illegal for "any person, corporation or association" to do so, but the Court was confronted with a case involving only a corporation. *Id.* at 54. The Court's analysis clarifies its assumption that though the Constitution precludes such a statute relating to individuals, it presents no similar impediment to the regulation of corporations. Clearly, the Court adopted a fictional entity conception of the corporation. Justice Harlan noted in dissent,

> In so ruling, it must necessarily have been assumed by this court that the legislature may have regarded the teaching of white and colored pupils at the same time and in the same school or institution, when maintained by private individuals and associations, as wholly different in its results from such teaching when conducted by the same individuals acting under the authority of or representing a corporation.

Id. at 61.

ture, it seems to have lost its dominance, at least in the academic community.[34] Unlike its predecessor, this model rejected the notion of state dominance and conceded the significance of the individual initiative required to create a corporation.[35] After a period,[36] the focal point of debate within this paradigm became the moral basis and legitimacy of management's control over the corporate entity. The issue of management legitimation became an important concern as large "management corporations" proliferated.[37] The natural entity

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34. Actually, the debate over natural entity theory seemed to cease in the late 1930s. While the corporate persona debate receded to relative obscurity until the 1980s, corporate policy analysis and discussion continued to assume a natural entity paradigm. Horwitz notes:

> For almost forty years after 1890, American jurists, like their German, French, and English counterparts, were preoccupied with the theory of the corporation, or, as it was then frequently called, with corporate personality. Then the issue suddenly vanished from controversy. The last great analysis of the question, which is sometimes thought to have permanently put it to rest, appeared in the 1926 *Yale Law Journal* article, by the philosopher John Dewey. Writing in sympathy with the powerful contemporaneous Legal Realist attack on "conceptualism," Dewey sought to show that theories of corporate personality were infinitely manipulable and that at different times the same theories had been used both to expand and to limit not only corporate but trade union powers.

Horwitz, *supra* note 10, at 175; *see also* HURST, *supra* note 26, at 73 (explaining change in states' attitudes toward corporations during 1930s); Bratton, *supra* note 8, at 1491 (discussing criticism of corporate realism that occurred in 1920s and its demise).

35. Around the turn of the century, states began to eliminate many of the restrictive provisions governing corporations, such as limitations on capitalization and limitations on the power to own stock of other corporations. This loosening of the reins by state law and the corresponding development of large corporate entities spawned a debate regarding the nature of the corporate personality. *See, e.g.*, W. Jethro Brown, *The Personality of the Corporation and the State*, 21 LAW Q. REV. 365 (1905); George F. Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 COLUM. L. REV. 128 (1917); Wesley N. Hohfeld, *Nature of Stockholders' Individual Liability for Corporate Debts*, 9 COLUM. L. REV. 285 (1909); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Arthur W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253 (1911).

36. Initially, the debate focused on the appropriate conception of the corporation after the relaxation of state control. One approach was to characterize corporations as aggregates similar to partnerships. This approach resolved the question of whether corporations were persons under the Fourteenth Amendment on the theory that courts, and indeed the Constitution, should allow individuals the same rights through the corporate form as they would maintain in any other group. *See, e.g.*, Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886); The Railroad Tax Cases, 13 F. 722, 747-48 (C.C.D. Cal. 1882), *appeal dismissed as moot sub nom.* San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885); *see also* O'Kelley, *supra* note 6, at 1352-59 (arguing that Justice Field's rationale in *Railroad Tax Cases* could adequately explain *Bellotti*). The opposing theory derived largely from European scholars and endorsed the impact of group dynamics over the contributions of individuals to the corporate venture. This theory reinforced the characterization of the corporation as an entity. *See* Bratton, *supra* note 8, 1489-91 nn.81-90 (discussing how entity theory obtained dominance over European ideas about group life); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 579-82 (1989). Ultimately, the recognition that shareholders were losing the battle for control of the corporate activities to management buttressed the entity view of the corporation.

37. Bratton uses the term "management corporations," as opposed to the term "collective

model reflected the general attitude that neither states nor shareholders could effectively check management's power over these massive entities.[38] The central question was whether management's position of power could be justified in this context.[39]

C. *The Aggregate Theory*[40]

Building upon the theories initially presented by Ronald Coase in

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capitalism" which was employed by Means, in order to avoid the political implications of Means. The term describes the development of a management class within the corporate structure, and anticipates the multiple layers and combinations of corporate entities within that structure. Prior to this period, states tended to limit the amount of capital that could be held by a corporation and precluded the ownership of stock in one corporation by another. *See* GARDINER C. MEANS, THE CORPORATE REVOLUTION IN AMERICA 50-51 (1962); Bratton, *supra* note 8, at 1487 n.72 (explaining Means' analysis).

38. Interestingly, the cognates of the statute involved in *Austin*, as well as similar federal statutes, were initially enacted during this era to "prohibit corporate contributions and expenditures in connection with political elections." Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 399 (W.D. Mich. 1986), *rev'd*, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 110 S. Ct. 1391 (1990).

39. The landmark book, ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 277-87 (rev. ed. 1967), not only identified the developing separation of ownership from control in the public corporations, but also argued for a narrowing of the role of corporate directors in the mold of trust theory. *See id.* at 247-76; *see also* Adolf A. Berle, *Corporate Powers As Powers in Trust*, 44 HARV. L. REV. 1049, 1073 (1931) (explaining that powers given to management are designed to advantage all shareholders); Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1368-70 (1932) (arguing that separation of ownership and control is necessary and proper in a system where management's role is to maximize wealth). This view was challenged by the notion that corporate directors should be corporate statesmen, acting as trustees for the corporation rather than the shareholders, and respecting the corporation's obligations to a broader segment of society. *See* E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932) (observing that separation of ownership and control necessarily requires that managers act as trustees); E. Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1934); Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 COLUM. L. REV. 1458 (1964).

40. I entitle this subsection "The Aggregate Theory," and the atomistic nature of its vision substantially distinguishes it from the previously described theories. However, it is based upon a set of neoclassical foundations, and its methodology in the law has been described as contractarian. So the labels "neoclassical" or "contractarian" might also be applicable.

the 1930s,[41] economists[42] and, subsequently, legal scholars[43] began to examine the corporation from a contractarian perspective, focusing upon agency cost minimization as a justification for incorporation. The corporation envisioned under this model, in its strongest form, is not an entity at all.[44] Instead, it is merely the focus for a set of contractual agency arrangements—a nexus of contracts. Scholars who adopted this view refuted the entity characterization of the corporation that had been a central theme of the previous theoretical models.[45] Under this contractarian model, market mechanisms, as

41. Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); *see also* Bratton, *supra* note 8, at 408 n.3 (identifying connection between the 1937 Coase article and new economic theory); Hazen, *supra* note 1, at 15 n.67.

42. *See* K. ARROW, THE LIMITS OF ORGANIZATION (1974); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organizations*, 62 AM. ECON. REV. 777 (1972); Steven S. Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1 (1983); Eugene F. Fama & Michael C. Jensen, *The Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Vernon L. Smith, *Economic Theory and Its Discontents*, 64 AM. ECON. REV. 320 (1974).

43. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 HASTINGS L.J. 1327 (1979); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Kenneth E. Scott, *Corporation Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983).

44. Bratton has actually discerned two schools of thought within the contractualist vision: a weak version, typically described as "institutionalist," and a strong version, typically described as "neoclassical." Bratton, *supra* note 15, at 411-17. As might be inferred from the nomenclature, the institutionalists examine the corporation from a contractarian perspective but accept the hierchical structure of the corporate form. Therefore, they retain, to some degree, an entity perception of the corporation. The neoclassical counterpoint totally rejects the significance of the institutional structure and tends to view corporations as comparable to the market. However, even the institutionalist vision does not consider the corporation's entity status in the sense in which it was previously accepted. Bratton notes:

> The institutionalists . . . developed a variant of contractualism . . . . The opportunistic conduct and bounded rationality of their actors leave room for tensions between individuals and corporate collectives that do not self-resolve. Nonetheless, like the neoclassicists, their work offers normative comfort to management interests. They legitimize the received hierarchical picture of the management corporation as a contractual arrangement which minimizes transaction costs.

Bratton, *supra* note 8, at 1500 (footnotes omitted).

45. The demise of fictional entity theory continued with changes in circumstances which affected the actual nature of the corporate form. The conceptual differences between the natural entity theory and the contractarian approach cannot be said to coincide with any such changes in the corporation itself, but represent an interpretational dispute over the same set of circumstances. The only other general model of the corporation to be reflected in the literature is the power model described in Lynne L. Dallas, *Two Models of Corporate Government: Beyond Berle and Means*, 22 U. MICH J.L. REF. 19 (1988). Dallas' model examines behavior within the corporate structure and the potential effect of that behavior upon the actions of the

opposed to the state or the original incorporators, control the interstitial details of both day-to-day business and, via the market for corporate control, management of the corporation. The scholarly examination of corporate regulation under this paradigm typically scrutinizes regulatory choices to determine their effect on the economic efficiency of the relationships that arise under the corporate rubric. As a result, the aggregate theory discounts the significance of the non-economic impact of corporations in society.[46]

D. *Why Choice of Theory is Important*

While scholarly debate has evolved through the fictional entity, natural entity, and contractarian (or aggregate entity) paradigms, each paradigm has been defined by its position relative to three aspects of the corporate persona: the entity/aggregate plane, the initiative plane, and the legal characterization plane.[47] As one might

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corporation. Therefore, it does not erect a particular conception of the corporation, but still may suggest certain normative implications.

46. For a reflection of the numerous articles analyzing various corporate law problems from the perspective of the contractualist paradigm, see Bratton, *supra* note 8, at 1476 n.22. There have been several notable critiques of this contractarian approach. *See, e.g.*, Bratton, *supra* note 8, at 1512-17 (arguing that strict adherence to contractarian model will fail to depict corporate decision making accurately); Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1404-05 (1985) (criticizing contractarian model for its failure to examine degree of individual volition actually exercised and individual's relative access to information); Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887-88 (arguing contract doctrine is inherently inconsistent with law governing fiduciary obligation); Hazen, *supra* note 1, at 36-43. While the contractarian theory is not uniformly accepted in the academic community, this litany indicates that those who disagree feel compelled to engage in the debate. After all, framing the debate is all that can be asked of a dominant paradigm.

47. The following diagram illustrates this point:

	THEORY		
QUESTION	*Fictional Entity*	*Natural Entity*	*Contractarian*
Entity/Aggregate	Entity	Entity	Aggregate
Initiative	Government	Individual	Individual
Legal Characterization	Public	?	Private

As this analysis reveals, fictional entity theory views incorporation primarily as establishing an entity separate and apart from its owners, derived primarily from state grant. It therefore legally characterizes the corporation as a public concern, subject to public control. Natural entity theory generally accepts the entity aspect of corporateness, but presumes private action initiates corporate existence instead of sovereign concession. Thus, this theory does not clearly charactize the corporation as public or private. Contractarian (or aggregate entity) theory exalts the private perspective of all three levels. It views corporations as merely the aggregate

expect, there is less evidence of this ideological evolution among lawyers and judges.[48] For decisionmakers and commentators, however, selection of a particular vision of the corporate persona significantly affects policy considerations. The choice of a particular theoretical conception of the corporation reflects one's view of the role of corporations in society and, consequently, one's normative view of the world.

As Professor Roberta Romano argues, the corporate law policy choices made by those in the academic community reflect their particular "world view."[49] Professor Romano develops a topology of democratic ideals which she suggests undergird corporate law scholarship. Her thesis is that the position taken by a scholar on matters of corporate law scholarship, which generally tends to focus upon answers to discrete regulatory questions, will be dictated by and categorized under the "vision of the good society that informs their policy package."[50]

Professor Romano's point proves true in the corporate speech area. For example, the neoclassical view of corporate legal theory reasons, consistent with the conservative Chicago School ideology, that since the corporation is merely a nexus for contracting, it is no more obligated to be socially conscious than the stock market. As might be expected, Justice Scalia endorses this conservative approach in his dissent in *Austin*.[51]

Corporate legal theory can be expected to significantly affect one's thinking about how corporations should fit into the fabric of our society and, ultimately, whether and how corporate speech should be

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of or the nexus for individual relations that derive from private collective action and that ought to be legally characterized as private concerns. *See supra* notes 21-22 and accompanying text (describing Bratton's analysis of corporate legal theory under the entity/aggregate, initiative, and legal characterization concepts).

48. As will be shown later, the Supreme Court continues to refer to each of these paradigms as though it constitutes primary authority for the appropriate conception of the corporation. *See infra* part III. As previously noted, the most prominent conceptual understanding of the corporation among lawyers is that of a separate entity.

49. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 1013 (1984).

50. *Id.* at 924. Romano's article attempts to lay out the various broad categories of political ideas in a grid, which also maps corporate scholarship on particular matters of both internal and external corporate regulation. *See also* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979) (providing another effort to analyze the ends-means relationship in corporate law scholarship).

51. However, the *Austin* case makes one recognize that anomalous results do occur. There we find justices with world views as divergent as Justices Marshall and Brennan and Chief Justice Rehnquist concurring in the majority opinion. This anomaly is probably more a matter of coincidence than a convergence of normative vision.

treated under the First Amendment.[52] Indeed, scrutiny of the texts of the Court's opinions that address corporate speech reveals that the justices have, either consciously or unconsciously, adopted particular theories. Ultimately, the justices differ sharply in their normative visions.

III. THE SUPREME COURT'S CORPORATE FREE SPEECH DOCTRINE

Not until *First National Bank of Boston v. Bellotti* did the Court question whether the First Amendment protects corporate speech.[53] In *Bellotti*, a state criminal statute prohibited corporations from making contributions or expenditures to influence referenda not affecting the corporation's business or assets.[54] A group of corporations brought a declaratory action challenging the statute under the First Amendment. Applying First Amendment principles, the Court rejected the state's asserted basis for its regulation.[55] While the justices generally agreed that corporations had a somewhat different basis for asserting First Amendment rights than individuals, the *Bellotti* majority found no principled basis for distinguishing between the state's interests in limiting individual speech generally and its interest in limiting corporate speech in this case.[56] Thus, *Bellotti* recognized some corporate First Amendment rights.

Twelve years later, in *Austin v. Michigan Chamber of Commerce*, a majority of the Court established that, at a minimum, a corporation's First Amendment rights are not coterminous with those of individuals.[57] In *Austin*, the challenged state statute precluded corpo-

52. For a discussion of the appropriate approaches to theory selection for the corporate free speech issue, see *infra* part IV.

53. 435 U.S. 765 (1978). The Supreme Court had previously enforced First Amendment protections where the protected party was a corporation. *See, e.g., Bellotti*, 435 U.S. at 778 n.14 (listing series of cases holding state laws invalid as infringements on corporate speech); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). However, the question of whether corporations enjoyed First Amendment protections because of their status as corporations had never been addressed. In *Bellotti*, the Court initially stated that issues presented were matters of first impression, and rejected the Massachusetts Supreme Judicial Court's characterization of the issue as a question of corporate rights. *Bellotti*, 435 U.S. at 767, 775-76, 777 n.13. The Court further found no "occasion to consider . . . whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations." *Id.*

54. *Bellotti*, 435 U.S. at 767-68.

55. *Id.* at 784-95.

56. *Id.* at 784.

57. 110 S. Ct. 1391 (1990). The disparate treatment between corporations and individuals appeared unlikely after *Bellotti* and Buckley v. Valeo, 424 U.S. 1 (1976). In *Buckley*,

rations from making contributions to, or independent expenditures on behalf of, state political candidates. Although the Court concluded unanimously that the First Amendment did apply to the speech in question, the majority upheld the state's limitation of corporate speech.[58] *Austin*, therefore, permitted what the Court in *Bellotti* had strained to avoid—differential treatment of corporate speech and individual speech under the First Amendment. The Court previously had held that the ability of individuals, rich or otherwise, to contribute funds to individual political campaigns could not, consistent with core First Amendment values, be curtailed.[59]

The *Austin* Court determined that certain characteristics of corporate status granted by state law gave corporations the potential to amass "immense aggregations of wealth."[60] The Court's ultimate concern, however, was the state's interest in protecting shareholders. The Court wanted to protect the state's interest in ensuring that corporate expenditures correlated with the political ideology of those whose contributions made the accumulation of wealth possible.[61] Thus, the state's limitation of corporate contributions and independent expenditures overrode First Amendment concerns because of the potential corruption resulting from a misalignment of shareholder interest and corporate expenditures.[62]

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corporations were treated in the same way as individuals; and, in *Bellotti*, the corporate right was protected in the same manner as that of an individual. *See* Brice M. Clagett & John R. Bolton, Buckley v. Valeo, *Its Aftermath, and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing*, 29 VAND. L. REV. 1327, 1375 (1976) (article by two of plaintiff's lawyers in *Buckley* arguing for aggressive action by corporations, taking position that their protections were coterminous with those of individuals).

58. *Austin*, 110 S. Ct. at 1398.

59. *See Buckley*, 424 U.S. at 25-26 (finding state's interest in limiting actual or apparent corruption sufficiently compelling to regulate corporate speech); *Austin*, 110 S. Ct. at 1408-11 (Scalia, J., dissenting) (criticizing majority for failing to follow *Buckley's* compelling state interest test).

60. *Austin*, 110 S. Ct. at 1397. Corporations are phenomenal capitalist vehicles. While individuals and partnerships may come to control great wealth, the basic purpose of the corporation has always been to serve as capital receptacles for particular purposes. Initially, legislatures had to sanction these purposes specifically, but over time they dropped restrictions on capital accumulation in favor of enhanced economic activity. HURST, *supra* note 26.

61. *Austin*, 110 S. Ct. at 1398. The Court did not address the issue of who should be in the baseline constituency. Yet, this has been one of the defining questions for some time, and to some extent, it traces the question, "What are corporations?"

62. The Court stated:

> Regardless of whether this danger of "financial *quid pro quo*" corruption . . . may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: 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 1397. The Court ultimately reasoned that the "unique state-conferred corporate struc-

Rarely in any of the various opinions do the justices explicitly address their conception of the corporate persona. Implicit, however, in both *Austin* and *Bellotti* is a sharp disagreement over the appropriate legal conception of the corporate persona. The concern for the wishes of capital contributors and the potential miscorrelation between their interests and the uses of the capital provided the basis upon which the majority distinguished the rights of individuals from the rights of corporations. Support for this rationale among the justices diverged on the basis of their inexplicit, but discernable, theories of the corporation.

A. *The Underlying Disagreement*

1. *FIRST NATIONAL BANK OF BOSTON V. BELLOTTI*

In *Bellotti*, the Supreme Court avoided the issue of whether speech loses its First Amendment protection "simply because its source [was] a corporation."[63] The Massachusetts State Legislature engaged in an effort to establish a graduated individual income tax.[64] Apparently the corporate interests in the state had opposed the measure. Therefore, the Legislature, consistent with its custom, attempted to amend the statute to preclude corporations from participating in public debate of the referendum.[65]

The Massachusetts Supreme Judicial Court posed the threshold issue of whether and to what extent the First Amendment applied to corporate speech in this context.[66] However, the United States Supreme Court avoided altogether consideration of the relationship between corporate status and First Amendment coverage. Neverthe-

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ture that facilitates the amassing of large treasuries warrant[ed] the limit on independent expenditures." *Id.* at 1398.

63. *Bellotti*, 435 U.S. at 784. The majority opinion sought to avoid this issue with the following treatment of the lower court's decision:

> We believe that the [lower] court posed the wrong question. . . . The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.

Id. at 776. In the end, however, the language of the opinion reveals that the nature of the corporate entity had an impact on the Court's reasoning. Although the holdings in both *Bellotti* and *Buckley* left open the possibility that no difference in treatment between individuals and corporations may have existed, the Court's decision in *Austin* clearly establishes that under First Amendment analysis individuals and corporations can be treated differently on a constitutional level.

64. *Id.* at 769.

65. Cognates of the challenged statute date back to 1946. *Id.* at 769 n.3.

66. *Id.* at 769.

less, the Court's response indicates that the majority inculcated a conception of the corporation as a natural entity.

Both the lower court and the State of Massachusetts took the position that the contours of established First Amendment doctrine allowed the restrictions of corporate speech provided by the statute.[67] The First Amendment theory they suggested came to be known as the "materially affecting" theory.[68] In rejecting the corporate plaintiffs' request for a declaratory judgment striking down the statute, the Massachusetts Supreme Judicial Court directly confronted the issue of whether the First Amendment applied to corporations.[69] The

67. *Id.* at 771-72, 781.

68. *Id.* at 781.

69. The corporate plaintiffs had argued, among other things, that the statute, both on its face and as applied to them, violated the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. First Nat'l Bank of Boston v. Attorney General (*First Nat'l Bank II*), 359 N.E.2d 1262, 1265 (Mass. 1977), *rev'd sub nom.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). While it acknowledged that the state statute "potentially implicate[d] the First Amendment," the Massachusetts court went on to note:

> [A]ny distinction between 'speech' and 'conduct' . . . has no validity here. . . . But this premise does not reach a more basic question here involved, namely, whether business corporations, such as the plaintiffs, have First Amendment rights coextensive with those of natural persons or associations of natural persons. Therefore, before we consider the plaintiffs' various claims, we must first consider whether and to what extent corporations possess First Amendment rights.

First Nat'l Bank II, 359 N.E.2d at 1269 (citations omitted). The Supreme Court, in its review of this decision, characterized this language in the following way:

> In addressing appellants' constitutional contentions, the court acknowledged that [the statute] "operate[s] in an area of the most fundamental First Amendment activities," . . . and viewed the principal question as "whether business corporations, such as the [plaintiffs], have First Amendment rights coextensive with those of natural persons or associations of natural persons."

Bellotti, 435 U.S. at 771 (footnote omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976), and *First Nat'l Bank II*, 359 N.E.2d at 1269). The Massachusetts court also stated:

> It is undisputed that a corporation "is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment." . . . Furthermore, it has been stated that "[t]he liberty referred to in [the Fourteenth] Amendment is the liberty of natural, not artificial persons." . . . But there are limits on the extent to which corporations may be totally deprived of what would be considered due process "liberty" rights if normal persons were involved.

First Nat'l Bank II, 359 N.E.2d at 1269 (citation omitted) (quoting Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (1945), and Northwest Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906)). The court further noted that "as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment." *Id.* at 1270. The court then held:

> [O]nly when a general political issue *materially affects* a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. This limitation is identical to the legislative command in

court focused on the relationship between the First Amendment and the Fourteenth Amendment, as applied to corporations.[70] The Attorney General argued that since a corporation could not claim protection of liberty interests under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the corporation could not claim any aspect of a right to free speech based solely upon its liberty interest.[71]

The argument further suggested that incorporation of the First Amendment through the Fourteenth Amendment narrowed the scope of any First Amendment protection for corporations to speech that related to the corporation's business or assets or other property interests. Although the Massachusetts Supreme Judicial Court rejected this argument as both unsupported and non-persuasive, the court ruled, without supporting authority, that corporations did not have "the same First Amendment rights to free speech as those of a natural person, [although] . . . a corporation's property and business interest [were] entitled to Fourteenth Amendment protection."[72] Thus, speech connected with matters "materially affecting" the business of the corporation would be constitutionally protected.

The Supreme Court, however, was critical of this line of analysis.[73] It found the doctrine "untenable under [its] decisions."[74] The court cited several of its precedents for the proposition that First

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> the first sentence of [the statute]. Put in another way, the Legislature has clearly identified in the challenged statute the parameters of corporate free speech.

Id. (emphasis added). With this language, the Massachusetts court enunciated what became known as the "materially affecting" theory.

70. *First Nat'l Bank II*, 359 N.E.2d at 1270.

71. *Id.* at 1270 n.12 (noting that same issue was raised in challenge to earlier version of statute and was rejected in First Nat'l Bank v. Attorney General (*First Nat'l Bank I*), 290 N.E.2d 526, 535 (1972).

72. *Id.* at 1270 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).

73. The Supreme Court characterized this analysis in the following manner:

> The court below found confirmation of the legislature's definition of the scope of a corporation's First Amendment rights in the language of the Fourteenth Amendment. Noting that the First Amendment is applicable to the States through the Fourteenth, and seizing upon the observation that corporations "cannot claim for themselves the liberty which the Fourteenth Amendment guarantees," . . . the court concluded that a corporation's First Amendment rights must derive from its property rights under the Fourteenth.

Bellotti, 435 U.S. at 778 (quoting *Pierce*, 268 U.S. at 535). Interestingly, it seems that this First Amendment theory dictates a fictional entity conception. The corporation's participation in political issues is totally subordinate to the state's power to regulate. Had the Court accepted it, and thereby categorically denied First Amendment protection to corporate political speech not related to corporate assets or business, there would be no need for an analysis of the corporate conception employed by the Court. First Amendment analysis would have mandated a particular corporate conception and obviated any consideration of other approaches.

74. *Id.* at 779.

Amendment speech was "within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action."[75] The Court then noted that it had "not identified a separate source for the right when it has been asserted by corporations."[76]

The State buttressed its argument with references to several Supreme Court precedents. It claimed that the cases outlined the contours of the application of First Amendment doctrine to corporations in two respects: through those decisions that established constitutional protection for communications businesses, and through similar decisions that protected commercial speech.[77] The State sought to explain how its understanding of First Amendment doctrine could support the results in these cases while denying First Amendment protection to corporations generally.[78] It argued that the "materially affecting" theory explained both the legitimate protection of communications businesses, some of which may choose the corporate form, and limitations on corporate political speech.[79]

In the State's view, the expression of media corporations, such as newspapers and television and radio stations, would "materially affect" their business and, therefore be protected by the First Amendment from burdens imposed by state government. The State argued

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75. *Id.* (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-01 (1952)). The Court supported its position with references to NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

76. *Bellotti*, 435 U.S. at 780. The Court noted that in Grosjean v. American Press Co., 297 U.S. 233, 244 (1936), it found that the liberty protected by the Fourteenth Amendment was that of "NATURAL not of artificial persons," and went on to point out that such reasoning would logically lead to the conclusion that "the protection afforded speech by corporations . . . would differ depending on whether the source of the alleged abridgment was a State or the Federal Government." *Bellotti*, 435 U.S. at 780 n.16. The Court further pointed out that although such a theory had been accepted by certain members, notably (then) Justice Rehnquist, Justice Jackson, and Justice Harlan, the view had never been accepted by a majority of the Court. *Id.* This position, which would allow the states but not the federal government to regulate corporate speech, was characterized by the majority as "semantic reasoning" that would logically lead to a previously unendorsed conclusion. *Id.* This approach, however, seems compatible with a view of the corporation that focuses on the state's relationship with the corporation as its creator. *See supra* notes 31-36 and accompanying text.

77. *Bellotti*, 435 U.S. at 781-83.

78. *Id.* at 781.

79. *Id.* Chief Justice Burger joined in the opinion and judgment of the majority, but he wrote separately to address his concern that acceptance of the State's position might endanger the rights of communications businesses that might choose to adopt the corporate form. In his concurring opinion, he explicated his theory of the Free Press Clause, which he found to be an integral aspect of the First Amendment. Given this perspective, it would be difficult to conceive of an effective limitation upon corporate speech, which might also be construed as guaranteed by the Free Press Clause. *Id.* at 795-802. While it seems possible to distinguish between the press and non-press related activities of a corporation, Justice Burger's treatment of the Press Clause effectively obviates the question of corporate theory posed by this Article.

that this theory was implicit in prior Supreme Court doctrine. The Court disagreed, holding that the "materially affecting" theory "was not the governing rationale" in any of its cases.[80]

The Court similarly rejected the claim that the "materially affecting" theory undergirded its decisions to protect commercial speech. Noting that the theory supporting commercial speech caselaw was related more to the "free flow of commercial information" for the benefit of "members of the public"[81] than to the business interests of the commercial speaker, the Court suggested that the cases reflect a deeper meaning of First Amendment protection, one which goes beyond merely the right to self-expression.[82] The Court then concluded, in language reflecting the majority's implicit theory of the corporation:

> 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 is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of *speech based on the identity of the interests that spokesmen 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.*[83]

This language indicates that the majority conceives of the corporation as a discernable entity having rights in contemplation of law.[84] When the corporation is the "speaker"—meaning that both the message and the funding are generated by and from the corporate structure—the state cannot impose a limitation based on the "identity of the interests that it may represent."[85] The Court's distinction between the legislature's treatment of corporations and the limitation on the prerogatives of stockholders illustrates its view that corporations are entities capable of being placed on equal footing with individuals as part of the polity. Although this approach clearly is distinct from an aggregate theory, the Court fails to indicate whether a natural entity or fictional entity paradigm undergirds its approach.

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80. *Id.* at 781.

81. *Id.* at 783.

82. *Id.*

83. *Id.* at 784 (emphasis added).

84. The Court's entity characterization and its recognition of the corporation as somewhat independent of the state suggests its underlying theory is the natural entity paradigm. *See id.*

85. *Id.*

After concluding that the First Amendment protects corporate speech, however, the Court examined whether the State had shown a compelling interest justifying the regulation. In its examination of these interests, the Court once again exposed its underlying conception of the corporation as an entity. Moreover, the Court's treatment of the issue revealed one problem with inexplicit reliance on a particular theory—the potential for confusion.

The State asserted two interests: (1) the retention of citizen confidence in government by sustaining the active role of individual citizens in the electoral process;[86] and (2) the protection of the rights of shareholders whose views differ from those expressed by the corporation.[87] While the majority did not reject the importance of these interests, it found them to be either unaffected or not substantially served by the statutory prohibition.[88]

The Court acknowledged the distinction between partisan candidate elections and public referenda, as well as the implications of the distinction for First Amendment purposes.[89] It reasoned that however weighty First Amendment interests may be in the context of partisan candidate elections, they either were not implicated in the referendum context or were not served by the Massachusetts

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86. *Id.* at 787.

87. *Id.* The Court recognized the state interest in the integrity of government and retaining the confidence of the people in a democratic process by preventing the sheer wealth and power of corporations to drown out the views of the populous. Here, however, the State's failure to produce legislative evidence that this dilution of views was imminent led the Court to find no showing that "the relative voice of corporations [had] been overwhelming in influencing referenda in Massachusetts or that there [had] been any threat to the confidence of the citizenry in government." *Id.* at 789-90 (footnote omitted).

More importantly, the Court also asserted that arguments which might apply to candidate elections were inherently unpersuasive when applied to referenda and were not supported by precedent. *Id.* at 790. For cases discussing corruption in candidate elections and public referenda, see United States v. Auto Workers, 352 U.S. 567 (1957) (labor organization indicted for using union dues to sponsor commercial television broadcasts designed to influence electorate); United States v. COI, 335 U.S. 106 (1948) (labor organization indicted for issuing publication in which its president promoted a particular candidate); *see also Bellotti,* 435 U.S. at 790 (noting that the risk of corruption generally perceived in cases involving candidate elections simply was "not present in a popular vote on a public issue").

88. *Bellotti,* 435 U.S. at 787-88. The Court stated that "[p]reserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *Id.* at 788-89 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

89. The Court relied upon the election-referenda dichotomy to distinguish the doctrinal implications of *Austin* from those of *Bellotti.* Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1397 (1990). The majority opinions indicate that the State in *Bellotti* failed to support the allegations regarding the corrupting influence of corporate wealth in a referendum, but that in *Austin,* involving candidate elections, the State did not need to make such a showing. The Court has failed to explain the reasons for its burden allocations. The persuasive power of corporate resources is equally effective in either situation.

prohibition.[90]

In addressing the concern that corporate advertising might affect referendum outcomes, the Court provided another indication of its underlying theory of the corporation in society. Specifically, the Court opined: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution protects expression which is eloquent no less than that which is unconvincing.' "[91] The Court then quoted from *Buckley v. Valeo*[92] that " 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' "[93] The Court's adoption by reference of the language "elements of our society" and "voice of others," as well as the conscious rhetorical suggestion that the dominance of the corporate perspective could only result from its eloquence, again makes clear that the *Bellotti* majority viewed corporations as additional entities in our society, or merely other parts of the polity.[94] Indeed, the Court suggests that corporations have rights as members in our society, as opposed to having rights, as is the case with associations, appropriately derived from a connection with individuals. This analysis further suggests that the majority's conception of corporations fits within an entity-based paradigm.[95]

The Court rejected the second arguably legitimate governmental

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90. *Bellotti*, 435 U.S. at 789-90.

91. *Id.* at 790 (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959)). Some public-choice theorists, examining the process of legislative decisionmaking, posit that convincing political speech may actually have little influence on legislative outcomes. Under the public choice model, the legislature is a market where influential pressure groups attempt to codify their selfish interests. " '[L]egislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation.' " Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878-79 (1987) (quoting William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 877 (1975)). In *Bellotti*, the Court appears to adopt the policy that free speech should be protected because it encourages the free flow of information essential to rational decisionmaking by the electorate. The underlying assumption is that the values of the governing body will be determined by an electorate that is free from state interference. Alexander Meiklejohn, *Free Speech Is an Absolute*, 1961 SUP. CT. REV. 245, 255. Public choice theory undermines this assumption by characterizing the legislature as a market dominated by interest groups.

92. 424 U.S. 1 (1976).

93. *Belloti*, 435 U.S. at 790-91 (emphasis added) (quoting *Buckley*, 424 U.S. at 148-49).

94. *Id.*

95. Dan-Cohen argues that because associations do not have the autonomy rights of individuals, their right to free speech must derive from the autonomy interests of the public to hear the communication. Dan-Cohen interprets *Bellotti* to grant First Amendment protection on this basis. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 104 (1986).

interest asserted by the State—the concern for minority shareholders whose resources might be used in support of views with which they disagree.[96] The Court concluded that the statute was too narrowly drafted to serve such a purpose, and, in this respect, found the statute both underinclusive and overinclusive.[97] The Court's treatment of the arguments addressing the tailoring of the statute to this interest illustrates the confusion that may flow from a failure to explicitly delineate one's conceptual foundations. Until this point in the opinion, the Court had written of corporations as entities that have status independent of their connection with shareholders and critically distinguishable from mere associations of individuals. In addressing the various arguments regarding the tailoring of the statute, the Court strayed from this course and began to treat corporations as analogous to associations.

The Court found the statute inexcusably underinclusive for its failure to include in the prohibition: (1) corporate legislative lobbying; (2) corporate speech relating to public issues prior to their becoming the subject of any referendum; or (3) other entities or organized groups.[98] The Court found that the absence of these types of corporate speech and the speech of non-corporate groups "undermine[d] the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered."[99] The Court also viewed the statute as overinclusive because it precluded corporate expression even when there was shareholder unanimity.[100]

These underinclusiveness arguments seem designed to place the regulation of corporate speech on a "slippery slope" which ultimately would allow the silencing of any group of individuals. The overbreadth argument is highly speculative because the likelihood of unanimity in a large corporation is roughly as probable as unanimity in a senatorial election.[101] Additionally, it misperceives corporate law

96. *Bellotti*, 435 U.S. at 792-93.

97. *Id.*

98. *Id.* at 793.

99. *Id.* at 782 ("The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject.").

100. *Id.* at 794.

101. According to statistics from the last general Senate elections before 1990, the winning candidates received 1,573,709 votes on average out of 2,920,340 votes cast. MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS (1988). The statistics are drawn from individual election results reported. On December 31, 1989, the record date for the 1990 Board election, General Motors Corporation had 1,933,000 shareholders entitled to vote.

doctrine.[102]

These problems aside, however, the Court's analysis reveals an apparently unconscious shift from an entity oriented corporate paradigm to an aggregate paradigm. The shift here undermines the cogency of the opinion because it suggests that fundamental premises used in one portion of the opinion were unconsciously and without explanation modified in another, and raises the question whether this opinion represents reasoning or mere justification. This critique goes beyond the legal realist premise that opinions merely justify judicial attempts to achieve certain policy objectives. There would be no basis for concern if the meandering between various corporate theories was purposefully designed to achieve particular policy objectives. While one might be concerned about the basis upon which the court moved between those theories, such changes might be appropriate for the fulfillment of policy objectives. The concern for justification raised here is that the Court inadvertently may be re-conceptualizing the corporation in response to particular arguments. This may result in a failure to objectively consider whether an appropriate corporate legal theory may provide a firm foundation for the consistent resolution of all the issues in a case.[103]

The concern for shareholders' rights in this respect suggests that the majority has altered its conception of the corporation, from the previously expressed entity conception to a view of the corporation is as an aggregation of its shareholders.[104] Of course, the opinion's

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GENERAL MOTORS CORPORATION, ANNUAL REPORT (1989). Thus, individual senatorial elections are comparable to the election of a board of directors.

102. Since corporations are managed by their board of directors, pursuant to state statutes, the corporation's position on non-business related matters would not be within the province of the shareholders. *See, e.g.*, CAL. CORP. CODE. § 300 (West Supp. 1990); DEL. CODE ANN. tit. 8, § 141 (1974); N.Y. BUS. CORP. LAW § 701 (McKinney 1986); REVISED MODEL BUSINESS CORP. ACT § 8.01 (1984). Thus, unanimity of shareholders on the particular position would merely result in a unanimous resolution favoring that particular perspective. It would only be translated into corporate action in the event that the matter was of sufficient significance to motivate the threat of or actual ouster of the board and the selection of a new board with views similar to those of the shareholders.

Further, assuming that the public corporation is subject to the proxy regulations of the federal securities laws, corporate management could exclude from its proxy materials the proposal to change the corporation's position on the issue. Such a stockholder proposal would be excludable under Rule 14a on at least two bases: under (c)(5) as not significantly related to the issuer's business; or under (c)(6) as beyond the issuer's power to implement. 17 C.F.R. § 240.14a-8 (1990). In *Bellotti*, the matter of individual tax rates would clearly have been open to exclusion under either of these provisions.

103. For discussion of the rationales to be considered in selecting or changing one's concept of the corporation, see *infra* parts III and IV.

104. This rationale was first explicitly put forth in Justice Field's opinion in Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26 (1889). O'Kelley has termed this construct the "Field rationale," which presumes that the rights of a business corporation are "coextensive with the

flawed reasoning may also be due to oversight rather than the product of serious consideration. One benefit of coherently applying the entity oriented theory initially adopted—at least in the context of corporate involvement in political discourse—would be that the Court simply could have dispensed with the concern for minority shareholders. Under an entity conception, the corporate body is separate and distinct from that of its shareholders. Any shareholder potentially disturbed by statements of the corporation could either accept the difference of opinion or sell the shares.

This minor deviation from an otherwise solid entity-oriented analysis must be viewed as exactly that, a deviation from the main thesis of the opinion. Further, the lack of any explicit discussion of the conception of the corporation implemented in the opinion promotes such deviations.[105] In this instance, the uncertainty of the majority's corporate theory selection requires analysis to determine the paradigm the Court envisions as it addresses the issues presented.[106] The language, except for the minor exceptions noted

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rights that its shareholders would enjoy if they had chosen to conduct their business in an unincorporated form." O'Kelley, *supra* note 6, at 1355-56. The majority's concern in *Bellotti* that management may use corporate resources to further causes with which some shareholders disagree may indicate that the Court supports Field's rationale for the protection of corporate speech.

105. For a discussion of the need for cogency in the justices' selection of the appropriate corporate legal theory, see *infra* notes 199-201 and accompanying text.

106. Some suggest that Justice Powell was able to avoid any expression of his theory of the corporation. Phillip Blumberg writes:

> [Justice Powell] did not find it necessary to articulate his own theory of the nature of the corporation in order to dispose of the case. Instead, he relied on the fundamental value of "the right of public discussion" from the societal point of view and he held that the corporation, as well as its officers or directors, could not be constitutionally barred from discussion of public issues.

Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 316-18 (1990); *see also* Hager, *supra* note 36, at 579-82, 644 ("If the *Bellotti* dissents resurrected the fiction paradigm ironically as pro-regulatory, it might be expected that the majority would revive the real entity theory to buttress its anti-regulatory theory of corporate free expression 'rights.' In fact, however, the majority avoided defending any theory of corporate personhood."). I reject this conclusion and submit that the application of law, particularly the First Amendment, to the corporation requires that one take a position on the issue of corporate legal theory. Although Hager reaches the conclusion that the majority effectively avoided any characterization of the corporate persona in *Bellotti*, he uses an analytical approach similar to mine in concluding that the Court's subsequent opinion in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), did assume a natural entity conception of the corporation. Hager notes that

> the Court [in *Consolidated Edison*] wrote, 'Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.' The context makes clear that the Court meant to include the regulated utility within the category of 'private person' so analyzed. This first amendment treatment of a corporation enjoying a state-sponsored monopoly

above, suggests that the Court was not willing to treat the corporation as solely an aggregate of its constituencies. Similarly, the majority did not adopt a fictional entity conception wherein the state's dominance would have unquestionably justified the statutory restriction.[107] Given the majority's substantial adoption of an entity orientation and its respect for the interests of shareholders vis-à-vis the authority of the state, it seems that the majority's vision of corporateness could best be described as favoring a natural entity conception.

An examination of Justice White's dissenting opinion reveals a similar contradiction in his conception of the corporation, although he generally seems to adopt a fictional entity conception. In his opinion, Justice White first narrowed the question presented to the Court. He took the position that the plaintiff's failure to challenge the constitutionality of the irrebuttable statutory presumption, which deemed referenda on individual taxation not to affect corporate business, removed the issue of business-related communication from consideration by the Court. Therefore, in his view the Court was presented with the question of "whether a State may prevent corporate management from using the corporate treasury to propagate views [which, in fact, have] no connection with the corporate business."[108]

Next, Justice White reasoned that the state's regulatory interests derived from a concern for First Amendment values.[109] Consequently, for Justice White, the question raised by *Bellotti* was how to balance appropriately the opposing First Amendment interests.[110] In his view, the majority erred because it supplanted the legislature's judgment regarding the appropriate balance, not merely because it applied the First Amendment to corporate speech. According to Justice White, the error was amplified because legislators have greater expertise than the Court in the political arena.[111]

Justice White made it clear that the nature and extent of First Amendment protections afforded to corporate speech were not coterminous with those afforded to individual speech.[112] He indicated that,

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> as a private person' would be laughable were it not so ominous. . . . The Court's rhetoric may indicate an emerging tendency to use corporate [natural] entity imagery in defense of free expression rights for capital.

Hager, *supra* note 36, at 645.

107. See *infra* notes 122-27 and accompanying text for discussion of Chief Justice Rehnquist's treatment of this case under fictional entity theory.

108. *Bellotti*, 435 U.S. at 803.

109. *Id.* at 804.

110. *Id.*

111. *Id.*

112. *Id.* ("First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with

among the interests supported by the First Amendment, those values related to self-actualization[113] were not furthered by corporate speech.[114] While accepting the principle that speech, irrespective of its source, furthers the First Amendment interest in promoting the exchange of ideas, Justice White questioned whether the public's interest in receiving corporate communication was of the "same dimension" as its interest in receiving other forms of expression.[115] This proposition was supported by his position that corporate action, in this regard, had only an attenuated connection with individual self-expression. He concluded that "[i]deas which are not a product of individual choice are entitled to less First Amendment protection."[116] Justice White also noted that restrictions upon corporate speech concerning political issues "impinge[] much less severely upon the availability of ideas to the general public than do restrictions upon individual speech,"[117] and that "[e]ven the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers,

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communications emanating from individuals and is subject to restrictions which individual expression is not.").

113. *Id.* at 804-05 (listing the values of "self-expression, self-realization, and self-fulfillment").

114. *Id.* Justice White then noted, "It is clear that the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self.' " *Id.* at 805 (quoting THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966)). On this basis, Justice White distinguished NAACP v. Button, 371 U.S. 415 (1963), which involved non-profit membership corporations "formed for the express purpose of advancing certain ideological causes." *Bellotti*, 435 U.S. at 805. Apparently, Justice White would be willing to conceive of representational types of corporate entities, such as the NAACP, as primarily aggregates for purposes of First Amendment analysis. Therefore, conversely, he apparently maintains an entity conception of general purpose for-profit corporations. *Cf.* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 252-53 & n.6 (1986) (finding that corporation dedicated to advancing pro-life movement was subject to limits that Federal Election Campaign Act placed on corporate contributions); *see also infra* notes 147-63 and accompanying text (discussing justifications in *Austin* for limiting corporate speech and not speech by other associations).

115. *Bellotti*, 435 U.S. at 807 (finding "the right of the general public to receive communications financed by means of corporate expenditures is of the *same dimension* as that to hear other forms of expression") (emphasis added). While on its face, this remark seems only to suggest that the financing is derived from the corporate entity, it intimates that the message, not merely its financing, may be different from a synthesis of the shareholders' actual positions.

116. *Id.* The assertion that corporate expressions are "not a product of individual choice" makes it clear that Justice White views corporate expression as more than merely derivative of shareholder positions. This view sharply contrasts with the aggregate conception expressed explicitly by Justice Scalia in *Austin*. *See* 110 S. Ct. at 1411.

117. *Bellotti*, 435 U.S. at 807.

free to communicate their thoughts."[118]

In bolstering this position that the governmental interest in regulating corporate political communications differs from those governing the regulation of individual speech, Justice White explicitly described his fundamental theory of the corporation.

> Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.... The State need not permit its own creation to consume it.[119]

This demonstrates an acceptance of a fictional entity theory of the corporation. The state's dominance over the corporate form clearly is basic to his conception. Although subsequent segments of the dissenting opinion suggest different views of the corporation, the fictional entity theory seems to be the most explicit theoretical explanation.[120]

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118. *Id.* Justice White notes that certain communications, typically associated with the corporation's business, if curtailed could "impinge[] seriously upon the right to receive information," but that nothing in the statute contemplates curtailment of communication associated with the corporation's business. *Id.* at 807-08. Further, Justice White states that nothing in the statute prohibits the formulation of corporate views on non-business matters that might be publicized at the expense of individuals associated with the corporation. *Id.* at 808-09.

119. *Id.* at 809. Justice White states that "[c]orporations . . . are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put." *Id.* at 818-19.

120. One example of Justice White's deviation from fictional entity theory surfaced when he supported the First Amendment interest in preventing minority shareholders from financially supporting positions with which they disagree and that are ancillary to the business of the corporation. *Id.* at 812-22. Justice White argued that statutes that affect corporate political participation outside the scope of the business of the corporation are consistent with the First Amendment and protect freedoms that the Court found to be guaranteed under the First Amendment in a series of other circumstances. He pointed to three cases to demonstrate his point: Board of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (striking down state statute compelling both saluting flag and recitation of pledge of allegiance in public school, on theory that First Amendment prohibits public authorities from requiring individuals to express support for or disagreement with causes with which they disagree or concerning which they prefer to remain silent); Machinists v. Street, 367 U.S. 740, 770 (1961), and Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (sustaining challenges by union members to the promotion of political views with which they disagreed). White's analysis suggests that he thinks of the corporation as an aggregation rather than an entity.

Justice White's failure to hold true to his expressed fundamental corporate theory explains his analogies to labor unions, which he might simply have rejected as inapplicable.[121] Instead of positing that the remedies applied in the union context would be unworkable in the corporate context, the theory of the firm described previously by Justice White would have provided an adequate basis for simply acknowledging the fundamental conceptual difference between labor unions and corporations.

Justice Rehnquist, in his dissenting opinion, expressed the most clearly focused conception of the corporation. He views the corporation as a fictional entity, quoting the language of Chief Justice Marshall from *Trustees of Dartmouth College v. Woodward*:[122]

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.[123]

Because Justice Rehnquist consistently viewed the corporation as a fictional entity dominated by the state of its creation,[124] he con-

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121. Given the fictional entity view of the corporation, the analogy to labor unions seems inappropriate. The First Amendment values protected, where the participants are members of a group created to represent their interests but whose expressions no longer conform to their beliefs, only have relevance in the corporate context under an aggregate conception. The nature of the minority shareholder's interests under a fictional entity conception of the corporation is simply not comparable to the nature of a union member's interest in a union shop. The shareholder's interests may be more analogous to the interests of a lending institution than to a union member. At least under the fictional entity theory, the corporate entities involved in *Bellotti* had not been created by its incorporators, authorized by their respective states of incorporation, or subscribed to by subsequent equity purchasers as representational bodies. Instead, they were created as separate and distinct economic entities. On the contrary, unions, which also serve economic objectives, are created precisely to *represent* the interests of employees in their joint contractual relations with management, which acts on behalf of the employer.

Another distinction between both corporations and labor unions, at least from the perspective of the fictional entity corporate theorist, is the role of voting. Voting in unions is performed on a one person, one vote basis. With corporations, although the term corporate democracy is used, voting is generally performed on the basis of the number of shares held, and in some cases, share ownership may not even entitle the shareholder to vote at all in corporate elections.

122. 14 U.S. (4 Wheat.) 518 (1819).

123. *Id.* at 636, *quoted in Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting). This famous quotation has been recognized as one of the quintessential statements of the fictional entity theory of the corporation. *See* Bratton, *supra* note 8, at 1484 & n.60; *see also* Hager, *supra* note 36, at 642-43 (characterizing both dissents in *Bellotti* as employing the fictional entity paradigm).

124. *Bellotti*, 435 U.S. at 823-24 & n.2 ("The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes

cluded that the Court's critical inquiry was "to determine which constitutional protections [were] 'incidental to [the corporation's] very existence.' "[125] Thus, Justice Rehnquist found it entirely reasonable that the state might be concerned about the impact that this economic entity would have in the political arena.[126] Additionally, he was satisfied that the "materially affecting" theory provided sufficient protection to corporations.[127] Clearly, Justice Rehnquist views the corporation as a fictional entity with a set of constitutional rights that are distinct from those available to natural persons.

In *Bellotti*, therefore, it seems that two of the three paradigms of the corporation are intentionally, though not always consistently, applied. The majority opinion expresses its view least explicitly and attempts to sublimate the question of corporate theory in favor of focusing on the First Amendment question. Implicit in the majority's language, however, is a strong natural entity conception. The dissenting opinions of both Justices White and Rehnquist rely upon and are driven by fictional entity conceptions. The outcome in *Bellotti*, in which five justices joined in an opinion implicitly founded upon a natural entity conception and four justices joined in opinions driven by fictional entity conceptions, suggests a significant cleavage on this fundamental issue. The significance of the selection of a particular paradigm is further supported by the Court's recent opinion in *Austin*. With the addition of Justice Scalia to the Court, however, the third paradigm, nexus of contracts, is consciously introduced.[128]

2. *AUSTIN V. MICHIGAN CHAMBER OF COMMERCE*

In *Austin*, the Supreme Court upheld a Michigan statute that

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described in their charters and regulated by state law."). Later Rehnquist states "[t]here can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law." *Id.* at 824.

125. *Id.* at 824 (quoting *Dartmouth College*, 17 U.S. (4 Wheat.) at 636).

126. *Id.* at 826 ("It might reasonably be concluded that those properties [of the corporation], so beneficial in the economic sphere, pose special dangers in the political sphere.").

127. *Id.* at 827-28. The Court noted:

> [The Massachusetts Supreme Judicial Court] reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expression by a corporation "when a general political issue materially affects a corporation's business, property or assets."

Id. (quoting *First Nat'l Bank II*, 359 N.E.2d at 1270).

128. The contractarian perspective that drives Justice Scalia's analysis reflects the economist's vision one might anticipate from his University of Chicago credentials.

effectively precluded "corporations from making contributions and independent expenditures in connection with state candidate elections."[129] The Michigan State Chamber of Commerce, a non-profit membership corporation,[130] brought an injunctive action challenging the constitutionality of the state regulation under the First Amendment.[131]

The district court denied the injunction.[132] It found that the statute infringed on the Chamber's speech and did not qualify as a reasonable "time, place, and manner regulation[] . . . 'applicable . . . irrespective of content.' "[133] The court concluded, however, that the statute was sufficiently narrow to protect the state's compelling interest in preventing the appearance of corruption in the electoral process.[134] Interestingly, although the district court noted that such a regulation of individual speech would violate the First Amendment, it

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129. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1395 (1990) (citing § 54(1) of the Michigan Campaign Finance Act, MICH. COMP. LAWS § 169.254(1) (1979)). This statute, as noted by the Court, was modeled after the Federal Election Campaign Act of 1971, 2 U.S.C. § 441b (1985), and did allow expenditures by the corporation from a segregated account that was to have been funded by contributions from various constituencies of the corporation.

130. The Chamber had some 8,000 members, nearly 6,000 of which were for-profit corporations. It was funded solely by the membership, primarily from its members' contributions of annual dues. Interestingly, the Chamber's by-laws stated its goals were

> to promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community on such matters; to train and educate its members; to foster ethical business practices; to collect data on and investigate matters of social, civic, and economic importance to the State; *to receive contributions and to make expenditures for political purposes; and to perform any other lawful political activity*; and to coordinate activities with other similar organizations.

Austin, 110 S. Ct. at 1395-96 (emphasis added).

131. The Chamber had, in fact, established a separately funded account for political purposes, but wanted to used funds from its general treasury to place certain local newspaper advertisements in support of a particular candidate for the Michigan House of Representatives. *Id.* at 1396.

132. Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 401-04 (W.D. Mich. 1986), *rev'd*, 856 F.2d 783 (6th Cir. 1988), *rev'd*, 110 S. Ct. 1391 (1990).

133. *Id.* at 402 (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980)).

134. *Id.* The state proposed to the court that three concerns were compelling: (1) "the integrity of the electoral process by preventing corruption and the appearance of corruption created by large, corporate independent expenditures on behalf of political candidates"; (2) "the interest of some shareholders by preventing the use of corporate funds to elect political candidates whom those shareholders may oppose"; and (3) the interest in ensuring "that the electorate is fully informed of the sources of campaign finances." *Id.* The district court ultimately relied upon the first interest solely, and noted that the Supreme Court had thus far identified only this interest as sufficiently compelling to justify restricting speech. *Id.* at 402 & n.7 (citing FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985)).

concluded that this statute did not precisely because the regulation restricted only corporate expression.[135]

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court.[136] The court based its reversal upon the intervening Supreme Court decision in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*,[137] which held that non-profit membership corporations had the same First Amendment protection as individuals.[138] The court did not dispute the district court's reasoning as it may have related to general purpose corporations. Instead, it reversed because it found the Michigan State Chamber of Commerce similar to Massachusetts Citizens for Life, Inc., the corporation involved in *MCFL*.

The Supreme Court reversed the Sixth Circuit's ruling, finding that the statute's restrictions burdened the exercise of political speech.[139] It also found that "[t]he mere fact that the Chamber is a corporation [did] not remove its speech from the ambit of the First Amendment."[140] The Court, however, went on to hold that although the state had burdened corporate speech, it had "articulated a suffi-

135. *Austin*, 643 F. Supp. at 403-04. The district court's distinction between what would be permissible regulation of individual speech and permissible regulation of corporate expression was based upon three premises: (1) that the benefits conferred by the government upon corporations justified enhanced regulation; (2) that the judiciary should defer to legislative determinations of the need for prophylactic measures; and (3) that, given the historical restriction (since 1913) of such expression, there was no need for any legislative finding on the threat of corruption. *Id.* at 404.

136. Michigan State Chamber of Commerce v. Austin, 856 F.2d 783 (6th Cir. 1988) *rev'd*, 110 S. Ct. 1391 (1990).

137. 479 U.S. 238 (1986).

138. *Id.* at 263-64.

139. *Id.* at 263. The Court reasoned that "the use of funds to support a political candidate is 'speech' " and that "independent [campaign] expenditures constitute [political] expression 'at the core of our electoral process and of the First Amendment.' " *Id.* at 251 (relying upon Buckley v. Valeo, 424 U.S. 1, 39 (1976) (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968))). Following its ruling in *MCFL*, 479 U.S. at 252, 266, the Court found that the required use of segregated funds, while not stifling corporate speech, did burden expressive activity to the extent that a compelling state interest would be necessary to justify such regulation in the face of the First Amendment challenge.

140. *Austin*, 110 S. Ct. at 1396 (citing First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)). The *Bellotti* majority clearly articulated the point that speech otherwise protected by the First Amendment would not be denied such protection merely because the speaker was a corporation. *Bellotti*, 435 U.S. at 775-86. However, the Court expressly left unanswered the extent to which corporate speech would be protected. The majority stated, "[W]e need not survey the outer boundaries of the [First] Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Id.* at 777. Further, the Court found no "occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.* at 777 n.13.

ciently compelling rationale to support its restriction."[141] This rationale was based on Michigan's efforts to regulate 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."[142]

The Court then examined whether the regulation was "sufficiently narrowly tailored to achieve its goal."[143] The majority found that the state regulation was, in fact, "precisely targeted to eliminate the distortion caused by corporate spending."[144] The majority also found that the statutory limitation that allowed the spending of segregated funds specifically solicited for political purposes was a viable avenue for corporate expression. If such funds were used, the Court reasoned, corporate expression would more accurately reflect contributors' support for the expression.[145]

The majority rejected arguments regarding the substantially overinclusive effect of the state regulation. As a practical matter, the regulation clearly affected small closely held corporations, whose spending would probably correlate strongly with the vision of their stockholders, as well as the statute's target, large publicly held corporations. Despite this, the majority rejected the overinclusiveness attack because of the potential for both sorts of entities ultimately to

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141. *Austin*, 110 S. Ct. at 1398.

142. *Id.* at 1397 (emphasis added). The Court went on to respond to assertions in the dissenting opinions of Justices Kennedy and Scalia that the effect of the decision was to authorize attempts "to equalize the relative influence of speakers on elections." *See id.* at 1421 (Kennedy, J., dissenting); *id.* at 1408 (Scalia, J., dissenting). This response suggested that the effect of justifying the regulation was to "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations." *Id.* at 1398. The Court stated:

> We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the 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.

Id.

143. *Id.*

144. *Id.*

145. *Id.* The majority asserts that both Justices Kennedy and Scalia, when they argued that the regulation prohibited corporate speech, assumed that the expenditure of segregated funds did not provide a viable opportunity for corporate expression. *See id.* at 1418, 1419, 1422 (Kennedy, J., dissenting); *id.* at 1409 (Scalia, J., dissenting). In fact, these dissenting justices recognized the patent opportunity for the corporation to set up what, in effect, would be a captive political action committee ("PAC"). However, they proposed interpreting the expenditures of such an entity not to be expenditures by the corporation as a corporation but expenditures of the corporation's captive PAC. *Id.* at 1423.

distort the political process.[146]

After establishing this basic First Amendment rationale, the Court addressed three specific contentions of the Michigan Chamber of Commerce. The first, based upon the Court's ruling in *MCFL*, was that even if the statute were constitutional in its regulation of corporate speech generally, it was not constitutional to regulate non-profit, membership corporations.[147] The Sixth Circuit had accepted this distinction in its ruling.[148] The contention stemmed from characteristics used by the Supreme Court in *MCFL* to distinguish the treatment of certain non-profit, membership corporations from that of the typical for-profit corporation.

MCFL involved an organization incorporated as a non-profit, membership corporation for the express purpose of engaging in the Massachusetts debate over reproductive choice.[149] The Court considered the constitutionality of a provision of the Federal Election Campaign Act ("FECA")[150] that, like the Michigan statute involved in *Austin*, required corporations to establish segregated funds in order to make any expenditures in connection with a federal election. The FECA already had survived a facial attack in *Buckley*; the question in *MCFL* was whether such a provision could be applied to a non-profit, non-stock, or membership corporation. The Court, in *MCFL*, seized upon three aspects of non-profit corporations that distinguish them from typical for-profit corporations.

The first characteristic was that the corporation in *MCFL* was not an ordinary business corporation because it was formed for the express purpose of "promoting political ideas, and [could not] engage in business activities."[151] The Court explained that this "narrow political focus 'ensure[d] that [its] political resources reflect[ed] polit-

146. *Id.* at 1398. This reasoning was supported by FEC v. National Right to Work Comm., 459 U.S. 197 (1982), where the Court accepted the congressional judgment "that it is the *potential* for such influence that demands regulation." *Id.* at 209-10. In *National Right to Work*, the Court held that § 441b restricted both corporations and labor unions, covering a range of sizes and financial resources. Because the statute was intended to stem the potential to improperly influence the political process, the Court accepted Congress' judgment that these divergently situated entities should be treated similarly. *Id.*

147. FEC v. Massachusetts Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 263 (1986) (holding that non-profit organization which had features more akin to "voluntary . . . associations than business firms . . . should not have to bear burdens on independent spending solely because of [its] incorporated status").

148. Michigan Chamber of Commerce v. Austin, 856 F.2d 783, 788-90 (6th Cir. 1988) *rev'd*, 110 S. Ct. 1391 (1990).

149. *MCFL*, 479 U.S. at 241-42.

150. 2 U.S.C. § 441b (1985).

151. *MCFL*, 479 U.S. at 264.

ical support.' "[152] Since the Chamber had a broader purpose which was not strictly political in nature, the Court found that it was distinguishable from *MCFL*.[153]

In *MCFL*, the Supreme Court was also swayed by the fact that the corporation did not have "shareholders or other persons affiliated so as to have a claim on [the] assets or earnings" of the organization.[154] This characteristic provided the second basis for the Court's distinction between the non-profit, membership corporation in *MCFL* and typical for-profit corporations. Shareholders made a difference because the nature of their relationship with the corporate entity created barriers to their disassociation from the organization in the event of disagreement. As a result of the relatively low barriers to disassociation presented by the corporation in *MCFL*, the Court presumed that there would be a closer correlation between the political views of members and the entity itself. After all, when such barriers are low, mere disagreement, particularly with expressions of an organization created to project a particular view, might provide a sufficient basis for an individual member to withdraw.

The Court found that the Chamber did not qualify in this respect even though it had no shareholders. Although the Chamber was a non-profit membership organization just as the corporation in *MCFL*, the Court distinguished it from Massachusetts Citizens for Life, Inc., on the relative significance of its service functions. Membership in the Chamber was attractive because of the additional services made available to members. Therefore, certain disincentives to disassociation with the Chamber existed which had no relation to its political stance.[155] The Court noted that the Chamber's political agenda was "sufficiently distinct from its educational and outreach programs that members who disagree with [its political expression] may continue to pay dues to participate" in the non-political aspects of the organization.[156] The majority thought that these more subtle disincentives to renouncing membership were sufficient to result in the Chamber's members being "more similar to shareholders of a business corporation than to the members of [Massachusetts Citizens for Life, Inc.]"[157] The majority went on to note that required disclosure would not

152. *Austin*, 110 S. Ct. at 1399 (quoting *MCFL*, 479 U.S. at 264).

153. *Id.*

154. *MCFL*, 479 U.S. at 264.

155. *Austin*, 110 S. Ct. at 1399.

156. *Id.*

157. *Id.* at 1399 n.2. At least one dissenter, Justice Kennedy, seemed to think that since membership was not related to one's livelihood, the Chamber's members were more like those in *MCFL*. *Id.* at 1424 (Kennedy, J., dissenting).

change the Chamber's character due to these disincentives.[158]

The third characteristic found by the Supreme Court to distinguish Massachusetts Citizens for Life, Inc., from for-profit corporations—and more than any other, the Michigan Chamber of Commerce as well—was "independence from the influence of business corporations."[159] The Court, through its focus on this characteristic, displayed concern for the potential of entities subject to the influence of business corporations to act as conduits for the "type of direct spending that creates a threat to the political marketplace."[160] The Court noted that Massachusetts Citizens for Life, Inc., had no corporate members but "[i]n striking contrast, more than three-quarters of the Chamber's members [were] business corporations, whose political contributions and expenditures can constitutionally be regulated by the State."[161]

Thus, the majority in *Austin* concluded that none of the three characteristics—a political corporate purpose, low barriers to disassociation, and independence from the influence of business—could be attributed to the Chamber; therefore, the *MCFL* principle supporting the protection of expressions by certain non-profit organizations would not apply.[162] These three factors seemingly allow non-business corporate entities, whose expressions might be expected to be more closely aligned with the expectations of members or stockholders, to avoid the application of a rule which limits corporate political activity. Essentially, the Court in *MCFL* attempted to avoid a wooden, formalistic treatment of the corporation in favor of a more sensitive scrutiny of the particular application of the corporate form.[163]

The Court's treatment of membership corporations emphasizes the aggregate theory and displays little concern about the membership corporation's status as an entity. Because membership corporations are intended to be representational, this viewpoint appears appropriate.[164] While the Court makes this seemingly correct theory selection,

158. *Id.* at 1399 n.2.

159. *Id.* at 1400.

160. *Id.*

161. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1400 (1990) (citing Buckley v. Valeo, 424 U.S. 1, 29 (1976)).

162. *Id.* at 1398.

163. It becomes apparent from any attempt to regulate corporate activity that there is a wide range of entities denominated as "corporations." These include public, non-public, non-profit, for-profit, or membership. Each has certain common characteristics such as limited liability or centralized management. The diversity of the nomenclature reflects the reality of distinctions in nature, purpose, and effect on society.

164. Although this intent to be representational may be a key difference, it may not totally eliminate the sociological factors which make a membership corporation's perspective and communications different from those of the individuals of which it consists.

it does so without express consideration and, instead, focuses upon the elemental analysis first articulated in *MCFL*. This is not to suggest any error in the elements themselves, but only to note that they seem to derive from the overall characterization of the corporation as an aggregate of its members rather than as an entity.

The Supreme Court then addressed the Michigan Chamber of Commerce's contentions that the statute was not valid because of its inclusion or exclusion of certain other organizations.[165] The Chamber's challenges were twofold. First, it asserted that the statute's coverage of corporations was underinclusive because labor unions were not affected. Second, it argued that regulation specifically addressing the fundamental right of speech failed to treat similarly situated entities in the same fashion and, therefore, did not comply with the requirements of the Equal Protection Clause of the Fourteenth Amendment. This argument relies on the non-regulation of unincorporated associations, as well as the non-regulation of media businesses organized in the corporate form.

Addressing the underinclusiveness argument, the Supreme Court found that the ability of union members to opt out of union political activities was a sufficient basis for differential treatment. As to the claim that the regulation singled out corporations over unincorporated associations, the Court found the state's decision to "regulate only corporations [to be] precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations."[166] With regard to the media exemption, the Court noted that it "ensures that the Act does not hinder or prevent the institutional press from reporting on and publishing editorials about newsworthy events" and that "although the press' unique societal role may not entitle the press to greater protection under the Constitution . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."[167] Similarly, though now in the face of the strict scrutiny standard imposed whenever a statutory classification impinges upon a fundamental right, the Court rejected the equal protection claim that regulation of corporations, but not unincorporated associations and media corporations, failed to treat similarly situated entities equally.[168]

165. *Austin*, 110 S. Ct. at 1398.
166. *Id.* at 1401.
167. *Id.* at 1402.
168. *Id.* at 1401-02.

The majority opinion is built on the premise that the state has a compelling interest in protecting the political process from wealth amassed pursuant to the "benefits of corporate law"[169] and expended without a sufficient correlation between the views espoused by the corporation and the views of those whose interests are represented by the corporation. This compelling interest is measured against the First Amendment principle that the individual's right either to speak or to hear is fundamental. The Court's underlying conception of the corporation as a natural entity helps to resolve the dissonance between the state's perceived interest and the core First Amendment principle. This conception, as understood by the Court, suggests that corporations may hold positions with which their constituents disagree.[170] Therefore, the Court concludes that these entities do not

169. Justice Marshall, writing for the majority, noted:

> State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

Id. at 1397 (quoting FEC v. Massachusetts Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 257 (1986)).

Previously, in *Bellotti*, the Court placed the burden on the legislature to establish that the economic power of corporations actually threatened the integrity of the electoral process. There the Court stated:

> 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 the government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.

Bellotti, 435 U.S. at 789. In *Austin*, the Court authorized the restriction without any such findings. The Court stated:

> We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the 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. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.

Austin, 110 S. Ct. at 1398.

170. The Court's conceptual understanding of the for-profit corporation is distinguished in

require First Amendment protection equal to that accorded to individuals.

The key characteristic of the corporation in the Supreme Court's analysis seems to be the separation and potential miscorrelation between the expressions of the corporation and the positions of the corporation's constituency. The Court is concerned with the alleged unfairness to those minority shareholders or members who might differ with the expression of the corporation. However, there also seems to be an overriding concern for the protection of society from the effects of corporate participation in politics.[171]

This general perception of the corporation differs from both the aggregate and the fictional entity visions of the corporation. Obviously, the Court's adoption of an entity characterization distinguishes it from an aggregate approach. Additionally, the Court's concern for the interests and views of minority shareholders distinguishes its view from the fictional entity theorist's position. Because fictional entity theorists, such as Chief Justice Rehnquist, treat the corporation as subordinate to the state, the majority's concern for this lack of alignment between the corporate entity and its supporters seems to set Justice Marshall's opinion outside of the fictional entity model. In fact, this concern actually seems to be a veiled reference to the lack of shareholder control over the actions of management, reminiscent of the corporate persona debates during the early part of this century. The goal of unregulated management, together with an entity conception of the corporation, casts the majority's model within the natural entity paradigm.[172] Interestingly, the differently constituted majorities in both *Austin* and *Bellotti* adopt the natural entity conception of the corporation.[173]

MCFL from its view of non-profit ideological corporations. FEC v. Massachusetts Citizens for Life, Inc. (*MCFL*), 479 U.S. 238 (1986). Clearly, the Court views the latter as fundamentally a representational body whose expressions are more directly tied to the views of its constituents.

171. The Court stated, "Michigan's regulation aims at a different type of corruption in the political arena: 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." *Austin*, 110 S. Ct. at 1397. This new "type of corruption" differs substantially from the quid pro quo type of corruption that concerned the Court in Buckley v. Valeo, 424 U.S. 1, 27, 47 (1976), and *Bellotti*, 435 U.S. at 788 n.26.

172. *See supra* part II.B for discussion of the natural entity paradigm.

173. Presumably, the fact that Chief Justice Rehnquist would dissent from the majority's decision in *Bellotti* and sign on to Justice Marshall's majority opinion in *Austin* when the two opinions adopt a similar conception of the corporation suggests that he disagreed with the result in *Bellotti* and agreed with the result in *Austin*. His failure to concur separately in *Austin* only serves to reinforce the concern expressed herein for the inexplicit adoption of particular conceptions of the corporation. One would tend to doubt that Chief Justice Rehnquist has changed his mind regarding his basic conception of the corporation. Once

Justice Brennan's concurrence in *Austin* generally employs the natural entity theory of corporations.[174] However, on several occasions, an aggregate conception creeps almost inadvertently into his analysis. For example, Justice Brennan considered the concerns of a minority shareholder who disagreed with the political expression of the corporation when he noted that "[a] stockholder might oppose the use of corporate funds drawn from the general treasury—*which represents, after all, his money*—in support of a particular political candidate."[175] This view of the corporation as representing the shareholders investment is reminiscent of the refrain "whose money is it, anyway?" used by Judge Easterbrook whenever public policy is argued as a justification for limiting the range of actions available to corporate decisionmakers.[176] Second, in rejecting the underinclusiveness argument, Justice Brennan stated that "just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech."[177] Both of these statements imply an understanding of the corporation as an aggregate of its constituents.

The doctrine suggests that when the corporation is viewed as an entity, the shareholders have, as a group, certain decisionmaking powers and, individually, certain claims to profits after dividends are declared. Only upon dissolution do shareholders have any right to the corporation's assets.[178] Moreover, after dissolution, the corporation's entity status is terminated. Recognizing the impact of theory selection could eliminate the need for this analysis.

As might be expected of Justice Scalia, his opinion presented a clear and consistent theoretical conception of the corporation.[179] He viewed the corporation as an aggregate of its members. Thus, he

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again, the failure to focus on this fundamental question unravels the cogency of the opinion thus undermining one's understanding of the Court's position on the nature of corporations.

174. *Austin*, 110 S. Ct. at 1404-05 (Brennan, J., concurring).

175. *Id.* at 1403 (emphasis added).

176. Frank Easterbrook, Lecture at the National Federalist Society Meeting on Corporate Law (Fall 1989).

177. *Austin*, 110 S. Ct. at 1407 (Brennan, J., concurring) (emphasis added).

178. The availability of appraisal rights only generates an obligation of the corporation to pay departing shareholders. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262 (1991) (describing appraisal rights); MICH STAT. ANN § 450.1764 (Callaghan 1991) (identifying the events that trigger dissenters' rights); REV. MODEL BUSINESS CORP. ACT §§ 13.01-13.28 (West 1991) (describing procedures for the exercise of dissenters' rights).

179. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES L. REV. 581, 586-90 (1989-90). Scalia critiques Emerson's famous passage that includes the statement that "[a] foolish consistency is the hobgoblin of little minds." Ralph W. Emerson, *Self-Reliance*, *in* ESSAYS AND ENGLISH TRAITS 66 (C.W. Eliot ed. 1909). Scalia expresses his belief in the virtues of consistency characterizing the Emerson passage as substantively "unmitigated nonsense," especially in the context of judicial decisionmaking.

characterized state restriction of the members' expression as discriminatory treatment of "that type of voluntary association known as a corporation."[180] Throughout his critique of the majority opinion in *Austin*, Justice Scalia compared corporations to other types of associations and wealthy individuals, neither of which achieve the legal status of entities separate from the individual.[181]

Justice Scalia argued that *Austin* effectively overruled the Court's decision in *Buckley v. Valeo*.[182] He found no basis for distinguishing the two cases. Justice Scalia's reluctance to distinguish these cases derives directly from the incompatibility between the language found in *Buckley* and his theoretical conception of the corporation. Because the definitional language of the statute facially validated in *Buckley* treated persons and virtually every other group, including corporations,[183] in the same fashion, and because Justice Scalia viewed corporations as merely another sort of group or aggregation of individuals, he found the results of *Austin*, which relate solely to corporations, irreconcilable with *Buckley*.[184]

In rejecting the majority's characterization of the Michigan stat-

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180. *Austin*, 110 S. Ct. at 1408 (Scalia J., dissenting).

181. *Id.* at 1408-09.

> Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the action of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages . . . . The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need. . . . Which is why the Court puts forward its second bad argument, the fact that corporations "amas[s] large treasuries." But that alone is also not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates.

Id. Because he does not distinguish between corporations, on the one hand, and individuals and noncorporate organizations, on the other, Justice Scalia characterizes the majority in obstreperous terms as "Orwellian" censors. *Id.* at 1408.

182. 424 U.S. 1 (1976). Justice Scalia also forcefully argued that the majority's concern with a "new" type of corruption arising from the size and misalignment of the interest of shareholders and expenditures that could justify the state's limitation of corporate expenditures may have eroded the theoretical underpinning of *Bellotti*, reversing it by implication. *Austin*, 110 S. Ct. at 1414; *see also Bellotti*, 435 U.S. at 788 n.26 (stating that there is no concern that political contributions create political debt with referendums).

183. *Buckley*, 424 U.S. at 23 ("The statute defines 'person' broadly to include 'an individual, partnership, committee, association, corporation or any other organization or group of persons.' ").

184. The congressional choice to draft legislation in a way that treated corporations and other groups and individuals in the same fashion, though found facially valid upon challenge before the Supreme Court, simply did not raise the issue of whether Congress or the states could make a different choice.

ute as protecting shareholders, Justice Scalia described his understanding of the machinations of corporations:

> A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, *i.e.*, to make money. Some corporate charters may specify the line of commerce to which the company is limited, but even that can be amended by shareholder vote. Thus, in joining such an association, 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: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. 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.[185]

Justice Scalia thus endorses the aggregate view of the corporation. When he says "[t]hat is the deal," Justice Scalia asserts that the essence of the corporation is a contract. In this conceptual view, individuals connect themselves pursuant to contracts under the rubric of the corporation. The terms of these agreements and individual economic advantage orchestrate individual activity. If there is disgruntlement, then the individual must resolve it through the options specified in these various contracts. In Justice Scalia's view, individuals are free to engage, not engage, or disengage from the corporate venture under the terms of the agreements that bind them and the market at the time.

This theoretical conception of the corporation leads Justice Scalia to visualize the corporation as merely another group of individuals contending in the public debate.[186] Therefore, he ultimately

185. *Austin*, 110 S. Ct. at 1412 (emphasis added). In many instances, persuasion of other shareholders may be ineffective since the corporation is run by its board with the assistance of management. The control that Justice Scalia refers to here, pursuant to the theoretical line of analysis that his opinion follows, is the market for corporate control. The problem with any reference to such a market is the difficulty of imagining circumstances under which attempts to take over the corporation would be generated by the marginal economic impact of corporate political expression.

186. As Justice Scalia states in *Austin*:

> The premise of our Bill of Rights, however, is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do.

rejects the majority position because of his skepticism toward empowering the government to limit corporate expression.[187] This expresses an aggregate conception of the corporation in which the corporate structural overlay essentially is transparent, devoid of any values or perceptions contrary to those of the individuals involved.[188]

> The very first of these is establishing the restrictions upon speech that will assure "fair" political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan legislature was genuinely trying to assure a "balanced" presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a "balanced" presentation because it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech "for fairness' sake" simply out of bounds.

Id. at 1415.

187. *Id.* at 1415-16. Justice Scalia discussed de Tocqueville's 1835 statement regarding the role of government, associations, and individuals in the public debate:

> Ah, but there is the special element of corporate wealth: What would the Founders have thought of that? They would have endorsed, I think, what Tocqueville wrote in 1835:
>
> When the members of an aristocratic community adopt a new opinion or conceive a new sentiment, they give it a station, as it were, beside themselves, upon the lofty platform where they stand; and opinions or sentiments so conspicuous to the eyes of the multitude are easily introduced into the minds or hearts of all around. In democratic countries the governing power alone is naturally in a condition to act in this manner; but it is easy to see that its action is always inadequate, and often dangerous. . . . No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises even unintentionally, an insupportable tyranny. . . . Worse still will be the case if the government really believes itself interested in preventing all circulation of ideas; it will then stand motionless and oppressed by the heaviness of voluntary torpor. Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.
>
> . . . While Tocqueville was discussing "circulation of ideas" in general, what he wrote is also true of candidate endorsements in particular. To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate.

Id. (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109 (Bradley ed. 1948)). Given Justice Scalia's adherence to more modern views, such as public choice theory, it is interesting that he would reference theories announced before the complexities of our society, such as today's multinational management corporation, began to unfold.

188. *See* Romano, *supra* note 49, at 940-41. Romano describes several different models that explain corporate structure normatively and descriptively. Her discussion of pluralism appears to confirm Justice Scalia's view that the individual is free to enter or exist the corporate form at any time. Romano believes that the pluralist views the corporate form as a shell for the efficient channelling of individual preferences. *Id.* If corporate participants are

B. *The Significance of the Corporate Conception Evidenced in* Bellotti *and* Austin

At least one justice has substantially adhered to each of the historically significant theoretical perspectives of the corporation. In both *Bellotti* and *Austin*, the majority inexplicitly but substantially adopted a natural entity corporate conception.[189] Justice White and Chief Justice Rehnquist expressly adopted fictional entity understandings of the corporate persona in their dissents in *Bellotti*. Finally, Justice Scalia used an aggregate conception of the corporation in his dissent in *Austin*. While the opinions of Scalia, White, and Rehnquist expressly embrace a particular conception of the corporation, as opposed to the two majority opinions, only Chief Justice Rehnquist and Justice Scalia rigorously retain their theoretical perspective throughout their opinions, and only the Chief Justice explains his theory selection.

Logically, unless First Amendment doctrine is unresponsive to the distinctions in conceptual characterization, and thus treats corporations exactly the same as individuals, some conception of the subject under regulation, here corporations, is inescapable.[190] In fact, even if the Supreme Court's First Amendment doctrine is somehow unresponsive to these distinctions, it still assumes some conception of the corporation. The doctrine would reflect the adoption, over other available theories, of a conception of the corporation as a person or

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dissatisfied with the organization's collective choices, the free market allows them to disengage from that particular corporate venture and look elsewhere. *Id.* at 945.

189. *See Austin*, 110 S. Ct. at 1404-05 (Brennan, J., concurring).

190. The Court's First Amendment treatment of school children illustrates how its analysis depends on the subject being regulated. In Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 505, 506 (1969), the Court began its opinion by recognizing that minor school children do retain First Amendment rights; however, the parameters of those rights depend on the extent to which they "collide with the rules of the school authorities." *Id.* at 507. After balancing these competing interests, the Court held that the school may proscribe student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513; *see also* Bethel School Dist. Number 403 v. Fraser, 478 U.S. 675, 677-78 (1986). In *Fraser*, a student had been punished for making a sexually suggestive speech at a school assembly. The Court stated that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults." *Id.* at 682. The Court noted that the proper role of a public school is to inculcate fundamental values that disfavor offensive or vulgar language. *Id.* at 683. Because of this function, the school's restriction on Fraser's speech was acceptable.

In these cases, the Court's analysis depends, to a large extent, on its vision of the speakers, here children. Had the Court simply applied the traditional First Amendment analysis governing speech by adults, the protection afforded in both of these cases would have been broader in scope. Because of the Court's view of children and the role of school in society, the Court narrowed students' free speech protection. This analogy aptly suggests that courts consider the nature of corporations in order to limit the scope of corporate First Amendment rights to something less than adult First Amendment rights.

group of persons.[191]

Each justice's particular theory of the corporation affects their view of the First Amendment protection appropriately accorded corporate speech. The fictional entity and aggregate conceptions nearly dictate conclusions concerning speech rights. One who views the corporation as purely a creature of state statute, as does Chief Justice Rehnquist, limits First Amendment values to the public interest in a free exchange of ideas. Values of self-expression and self-defense via advocacy would be inapplicable. Given this perspective, First Amendment justifications for corporate protection are limited. Not surprisingly, Chief Justice Rehnquist and Justice White reach the conclusion that the scope of First Amendment protection for corporations is not as extensive as that available to individuals.

Justice Scalia's vision of the corporation as merely another form of group behavior limits the possibility of distinguishing between the First Amendment rights of individuals and those of corporations. For example, in *Bellotti*, the Court validated the state's concern that corporate speech might potentially "drown out" the views of the populous.[192] No justice in *Bellotti* retained an aggregate conception of the corporation, but it would be hard to imagine an aggregate theorist's acceptance of this view of the First Amendment. Under such a corporate conceptualization, there is little principled basis for discriminating between individual and corporate contributions to the overwhelming mass of communication.

The natural entity theory, however, lies between the two polar positions of the aggregate and the fictional entity theories. It recognizes a distinction between individuals and the corporation and respects the significance of individual initiative and participation in the venture. Precisely because the natural entity conception exists in a gray area between the other theories, it yields more flexibility in distinguishing between the rights of individuals and of corporations. To the same extent, the dual aspects of this middle-ground perspective explain the apparent inconsistency between *Austin* and prior cases.[193]

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191. DAN-COHEN, *supra* note 95, at 27 ("[W]e must make some pre-legal cognitive peace with the phenomenon of the organization before we can intelligibly tackle the question of its appropriate normative treatment.").

192. *See Bellotti*, 435 U.S. at 784; *see also supra* notes 87-88 and accompanying text. Although the Court validated this concern, it rejected the state's argument because of a lack of proof.

193. As suggested by Justice Scalia, Chief Justice Rhenquist, and others, the respect accorded individual participation in a separate entity is inherently conflicting. *See* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 614 (1991) ("Apart from the

Given these influences, corporate legal theory potentially determines the application of First Amendment principles to corporations. However, to assert that conceptualizations may determine the difficult and manipulable principles of First Amendment doctrine seems to fly in the face of legal realism and, more recently, critical legal studies ("CLS") scholarship, which deny that rules or concepts may be determinative of legal decisions. Both schools tend to view rules and concepts as cloaking the more significant policy choices that underlie legal decisions. However, based upon the forgoing analysis, it appears that corporate legal theory has some determinative bite.[194]

One scholar has described the influence of corporate theory as affecting the " 'iconic' dimension of legal and political dispute."[195] This approach classifies the influence of corporate theory as rhetorical. However, where the object of constitutional analysis is ab initio a legal conceptualization, as with the corporation, the significance of its theoretical characterization is more than merely rhetorical. The choice of a particular corporate paradigm, in fact, forms part of the policy analysis that the legal realist and CLS devotees advocate. Therefore, as these movements suggest, the policy analysis underlying the various conceptual choices should be explicit.

The application of the First Amendment to corporate expression poses three somewhat distinct questions. Two of these questions substantially depend upon the decisionmaker's choice of corporate paradigm. First, it is important to determine whether the corporation is a representational body or a separate entity having an independent perspective. Were one to categorize corporations as essentially representational bodies, then the Supreme Court's treatment of the corporation in *MCFL* would be appropriate for all corporations. The

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apparent inconsistency of the *Austin* decision with the Court's earlier rulings . . . the opinion leaves the reader with the distinct impression that the court has pulled something . . . out of its hat"); *see also supra* notes 179-81 and accompanying text. This approach does, however, allow the Court to select from a larger set of First Amendment values than either of the other perspectives.

194. *See supra* notes 21-23 and accompanying text (describing the debate between Bratton, Millon, and Horwitz over the significance of corporate legal theory to corporate doctrine and practice).

195. Hager, *supra* note 36, at 576.

> "Iconic" dimensions of legal conceptualization always lay behind the formalist sophistry of "legal reasoning" and they persist undiminished in our contemporary age of skepticism concerning legal logic. Attention to this iconic dimension helps explain why decisions on a given cluster of issues might consistently "tilt" toward one side or the other, even though the logical apparatus deployed in articulating the decisions can easily be shown as indeterminate and "flippable" to favor opposite outcomes.

Id.

second important question is whether a concern for minority participants in the corporate venture should justify corporate speech regulation. The third question is whether the First Amendment value of a free flow of ideas is sufficient to justify the protection of corporate speech, and if so, how much protection should be afforded. Although one's vision of the corporation may seem unrelated to this final question, the value attached to hearing corporate speech may depend on a particular world view and how corporations fit within it. As previously discussed, the various corporate paradigms refect a particular world view. Therefore, while this third question does not involve corporate legal theory per se, the choice of a particular legal theory may indicate a certain attitude toward this issue as well.[196]

Corporate legal theory essentially determines whether corporations are representational. Under a fictional entity conception they are not. This vision all but ignores the participation of individuals within the corporation. Conversely, an aggregate vision anticipates that the end results of the atomistic transactions within the corporate structure derive from choices made by shareholders. Therefore, the speech that emanates from the corporate structure would represent the interests of shareholders.

The natural entity characterization, though it recognizes the contribution of individuals to the corporate venture, sees corporate speech as reflective of managerial choices, and not necessarily of derivative shareholder desires. Under a natural entity characterization, if there is miscorrelation between the interests of shareholders and management, the issue is whether corporate speech represents individual interests. The natural entity theorist would answer affirmatively but note that the individuals represented by such speech have the opportunity to fund their expression with capital provided by other individuals whose interests this speech in no way represents. Under the natural entity view, the issue of representation devolves into the significance of any miscorrelation between the views of shareholders and the expression of the corporation.

As to the significance of the minority's subsidization of corporate views with which it disagrees, the natural entity conception recognizes that managerial discretion allows management to fund corporate expressions not supported by either majority or minority shareholders. Theorists supporting this perspective might favor external regulation of corporate expressions because of a concern for the extent of managerial discretion, not because of concern for minority

196. For a discussion of research suggesting this connection, see *supra* notes 49-50 and accompanying text.

subsidization of divergent corporate expressions alone. Interestingly, neither of the other theories seem to be as concerned with this issue. The fictional entity theory ignores shareholder interests as expressed through the corporation. One who conceives of corporations in this way, therefore, would view the concerns of minority shareholders as disconnected from the expressions of the corporation. Under the aggregate theory, such shareholders would weigh the economic benefits of association against the injury inflicted by the corporation's espousal of views with which they disagree. While it recognizes discordant shareholder views, the aggregate theory would take the position that regulations should not be designed to correct any miscorrelation between minority views and corporate expression.

The two questions directly related to one's conception of corporateness—whether the corporation is a representational body, and whether minority participants deserve special concern—are dictated by one's view. One who conceives of corporations as fictions, like Chief Justice Rehnquist does, finds no representational quality in the nature of corporateness and, therefore, is not concerned for minority subsidization. Further, such a view characterizes corporations as subservient to state authority, and would, like Chief Justice Rehnquist,[197] authorize governmental restriction of corporate political speech. Under this paradigm, nothing further would be considered and the third question would not even arise. Conversely, an aggregate perception sees the corporation as representational to the extent of the various deals made within the corporate structure, and views minority speech concerns as resolved by the private ordering that makes up the corporate structure. Given this premise, aggregate theory's proponents would reject state regulation of corporate speech.[198] Finally, the natural entity conception of corporateness would not perceive the corporation as representational, but generally would support restrictions on managerial discretion. The skeptical attitude toward corporate management evinced by natural entity theorists generally suggests a favorable view towards state regulation of corporate speech.

Given the significance of the particular conception selected, it is important to consider the factors which determine the applicability of

197. Chief Justice Rehnquist dissented in *Bellotti* and joined in the majority opinion in *Austin*. First Nat'l Bank v. Bellotti, 435 U.S. 765, 822-28 (1977); Michigan State Chamber of Commerce v. Austin, 110 S. Ct. 1391, 1394 (1990). Justice White also adopts the fictional entity theory, but bases his decision more on the issue that I have identified as the third question than on his conception of the corporation. *See Bellotti*, 435 U.S. at 802-22.

198. Justice Scalia, the Court's only proponent of this view, did in fact take such a position. *See Austin*, 110 S. Ct. at 1408-16.

a particular theoretical conception. Also, given the array of positions adhered to by the various justices, it is important to examine current perspectives on the corporation and its role in society.

IV. THE CORPORATE CONCEPTIONS THAT APPLY TO FIRST AMENDMENT ISSUES

The foregoing analysis indicates that a significant factor in the Court's corporate free speech holdings is the theoretical conception of the corporation harbored by each justice. The lack of explication leaves many questions open. Considering the significance of concept selection and the lack of any thorough explanation of the justices' positions, one wonders how such clear differences in the concept of the corporation could go unexplored.[199] Within the scope of this Article, however, it is necessary to examine whether the corporate theory used to resolve issues involving corporate free speech should be selected on the basis of the descriptive reality presented in each case or on the basis of other normative goals.

While the question may also involve issues beyond the scope of this Article, such as concerns for judicial activism, two points are clear. First, normatively driven selections can only be made within the set of descriptively plausible corporate conceptions. For example, if the fictional entity conception is descriptively inaccurate, then no policy goal could justify using it. However, among a set of descriptively accurate conceptions, such as an aggregate theory or a natural entity conception, normative policy considerations are important. Therefore, corporate conceptual analysis may operate to affect outcomes in two ways: (1) narrowing the set of conceptions to the set of descriptively plausible alternatives, and (2) assisting in the assessment of policy objectives.

While only Chief Justice Rehnquist provided an explanation for the selection of his theory, each justice inculcated a view of the corporate persona as a fundamental underlying principle in support of his opinion.[200] Unfortunately, in certain instances, the lack of explication

199. Even Chief Justice Rehnquist and Justice Scalia, although staking out their respective conceptions as fundamental to their decisions, do not make explicit reference to the divergent perspectives evidenced in the opinions with which they disagree.

200. There are at least three explanations for the justices' failure to explain their choices of a theory describing the nature of the corporation. The justices may have been unaware of the scholarship that traces the development of these theories or their own varying yet inexplicit acceptance of such views. This possibility would seem, however, to underestimate their perceptiveness. After all, each of the various models has at least one proponent on the Court and presumably these models did not just occur to each justice a priori. Assuming that the failure to explicate the theoretical underpinnings of their decisions has not been due to mere naivete, two other possible reasons come to mind: (1) that the theoretical debate may not

resulted in inadvertent inconsistency. In those instances, reference to the primary theoretical vision would have provided a more solid foundation for reaching the justice's result than the partial analysis ultimately given.[201] The question then would become whether such inconsistency is inappropriate and whether a more integrated theoretical framework would provide a better basis for judicial decisionmaking.

Certainly, the application of an integrated theoretical framework would provide a clearer understanding of the reasons for the judicial decision.[202] This, however, does not require the Court to adopt a single, unaltering theoretical conception and apply it uniformly across circumstances and issues. There are different types of corporations, including for-profit, non-profit, public, closely held, membership, and stock corporations. Although in many instances these different corporate forms are governed by different state statutes, they each retain the essential feature of existence under the law which is, to some degree, separate and apart from its incorporators. The Court's treatment of *MCFL* judicially recognizes that corporations are not a monolith of indistinguishable legal constructs. This descriptive reality narrows the normative alternatives.

Because of underlying policy concerns, particular corporate conceptions may be appropriate for certain types of legal issues but inappropriate for others. For example, the contractarian approach

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appear to the justices to increase the potential for culling a majority of the Court; or (2) that the formalist orientation of the Court leads it to resolve cases on First Amendment grounds rather than addressing matters traditionally left to state law. *See* Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 406-12 (1989) (discussing the search for legitimacy in judicial decisionmaking). Though intriguing, consideration of these practical considerations ignores the more significant question of which point of view has validity and will stand up under the scrutiny of explicit judicial consideration.

201. For discussion of the specific shifts in corporate conception made, presumably unconsciously, in both *Bellotti* and *Austin*, see *supra* notes 83-85, 103-07, 164-73 and accompanying text.

202. The debate regarding judicial candor has seriously challenged the traditional approach to statutory interpretation, which focuses on legislative intent. JAMES W. HURST, DEALING WITH STATUTES 32 (1982). Guido Calabresi has gone so far as to assert that judges should interpret statutes to comport with present day experience, and in so doing, eliminate the justifications that obscure the true basis for their decisions. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32, 179-80 (1982). David Shapiro takes a more conservative approach and argues that although judges should base judicial rules on principles, it is also legitimate for them to consider policy grounds and fill gaps when necessary. David Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 556-58 (1988). On the other hand, Nicholas Zeppos asserts that the judicial decisionmaking process frustrates candor. He states that it may be just as difficult for judges to distinguish between "real" and "false" bases for their opinions as it is to discover "true" legislative intent under an originalist approach. Zeppos, *supra* note 200, at 407, 411, 412. The debate focuses on the problems involved in achieving candor while not seriously questioning the value of judicial candor itself.

adopted by Justice Scalia in *Austin* may be appropriate for addressing the relationship between management and shareholders in a public corporation,[203] because of a certain congruence between the aggregate conception and policy objectives affecting the regulation of the shareholder-management relationship. The focus of the aggregate conception is the achievement of the efficiency objective, and this goal justifies management discretion over corporate action. The harmony between the goals of shareholder-management regulation and the aggregate conception suggests the propriety of employing the aggregate conception in such cases. However, whether an aggregate conception should apply to the question of corporate free speech depends upon whether efficiency is a virtue where corporate participation in political discourse is concerned. While efficiency may generally be a good thing, the core protection provided by the First Amendment is participation by the individual in public discourse about government. To the extent that the efficiency objective undermines this core goal, it becomes a less important concern for theory selection.

In other situations, it may be appropriate to use an aggregate conception of the corporation. For example, federal environmental legislation seems to treat corporations as aggregates.[204] Here, liability is not merely compartmentalized within the corporate structure; liability may extend to a very broad array of corporate constituents, including directors, prior and current controlling shareholders, managers, parent corporations, and lending institutions. Because the legislature deems protection of the environment so significant, it has designed regulations to make all participants in the corporate venture potentially liable. Apparently, Congress found that the fictional entity approach, which would have cabined liability within the entity

203. In *Austin*, Justice Scalia states that Justice Brennan's concern that corporate funds will be used to support a candidate whom shareholders oppose is not a legitimate basis for restricting corporate speech. He asserts that when people become stockholders, they know that management may take action that only a majority of shareholders support. Under this construct, the appropriate remedy for dissatisfied shareholders is either to persuade a majority to change management's action or to sell their stock. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1411 (1990). The nexus of the contract model of the firm suggests that this construct may, in fact, be appropriate both normatively and descriptively. New economic theorists minimize the importance of the hierarchical nature of the corporation by emphasizing the voluntary nature of corporate participation. The participant surrenders some decisionmaking power in exchange for efficiency. "[A] participating rational economic actor who dislikes the terms of the deal offered can walk away and find an arrangement that better suits him." Bratton, *supra* note 15, at 455.

204. *See* George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151, 152-56 (1991) (focusing upon the Comprehensive Environmental Response, Correction, and Liability Act (CERCLA), 42 U.S.C.§§ 9601-9675 (1988)). *See generally* Symposium, *Environmental Law and the Corporate Entity*, 26 WAKE FOREST L. REV. 1 (1991).

structure and protected many of the corporate constituents, would be normatively inappropriate.

Thus, the proper response to the question, "What are corporations?" may be dictated by the context in which the question is posed. Where the context is shareholder-management relations, the efficiency objective may support an aggregate orientation. Where the context is environmental regulation, the prophylactic policy objectives may make a fictional entity conception wholly inappropriate. Where the context is the regulation of corporate speech, the objectives of the First Amendment must be considered when selecting the appropriate vision of the corporate persona. Had the justices thoroughly considered the basis for theory selection in *Austin* and *Bellotti*, they would have addressed many of the concerns raised in this Article, and applied the theories they selected more consistently, or possibly reconsidered them.

Although Chief Justice Rehnquist firmly and expressly based his opinion upon the fictional entity theory, he did so without expressly considering the basis for its application. Moreover, he stated the applicability of the theory without analysis. Interestingly, the theory he applies reflects what some might consider an antiquated, descriptively inaccurate picture of the corporation. The fictional entity conception arises from the concession theory, in which the sovereign privatized monopolies via corporate charters. Under concession theory the state's role was paramount because its discretion was necessary for the creation of a corporation. The passage of general incorporation statutes, however, rendered this theory obsolete. No longer is there any meaningful state involvement in the creation of a corporation. Mere ministerial recordation does not constitute a concession from the sovereign,[205] although the establishment of a corporation, or its equivalent, is not possible without such ministerial action. The liability limitation simply is not attainable by contract because potential creditors would not prospectively waive their rights against the would-be incorporators.

On the other hand, corporations operate pursuant to corporate statutes that theoretically could establish the state dominance necessary for the fictional entity theory to be viable. These statutes, however, are largely enabling statutes that promote private action beneficial to society at large. One might question whether state

205. *See* William W. Bratton, Jr., Welfare and Good Will in Corporate Fiduciary Law 116-39 (Summer 1991) (unpublished manuscript, on file with author) (seeking to establish "a framework for public justification of fiduciary constraint that avoids reliance on the moribund notion of the corporation as a delegation of sovereign authority").

antitakeover legislation that has proliferated since *CTS Corp. v. Dynamics Corporation of America*[206] is as a reassertion of state dominance over corporations.[207] Although the fictional entity theory may not accurately depict the current descriptive reality of corporate existence, it fairly describes the allocation of power between state and federal authority as it relates to corporations. Therefore, the propriety of a fictional entity conception depends upon state legislative choices.

State legislative choices are affected by more than the collective wisdom of state legislators about the appropriate characterization of the corporate persona. The incorporators decide where to incorporate, based primarily upon the nature of state corporate regulation. The dynamics of legislative and individual choices have been described as the "Race to the Bottom," or the interstate market for corporate charters. This market may be the primary constraint on state legislative choices, and most probably is responsible for current legislation. The resulting mix of state legislative authority and the market for corporate charters limits the potential applicability of the fictional entity concept and suggests the descriptive accuracy of a natural entity conception.

The majority positions in *Austin* and *Bellotti* both inexplicably embrace the natural entity paradigm. Under this view, management has enormous unchecked power. For example, management's authority to make political expenditures is substantially unfettered. This is true as long as the expenditure is small relative to the size of the corporation and management can at least articulate some basis upon which the expenditure might benefit the corporation. Under this paradigm, collective action problems mitigate against shareholder action to check management control.[208] Therefore, this view continues to

206. 481 U.S. 69, 89 (1987) (validating state's power to control share voting of corporations created pursuant to state's laws).

207. As a matter of political reality, a more accurate description may be that large corporations dominate various state legislatures, co-opting state power for the protection of corporate management. *See* Donald C. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on* CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96, 116-117 (1987) (arguing that, in reality, legislature passed statute deterring hostile takeovers in order to protect its tax base); David Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV. 903 (1988).

208. *See* Stephen E. Gottlieb, *A Symposium on Campaign Fiance: The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 260 (1989). Gottlieb describes disincentives to collective action as flowing "from problems created by the differences between special and general interests. The larger the group of people that must be involved in any activity, the more difficult it is to organize the effort." *Id.* As a result, the marginal cost to any individual for expending the energy to organize the effort is likely to be higher than the expected return for that particular individual. Therefore, economic incentives are insufficient to motivate anyone to challenge or possibly even monitor management on matters such as political expenditures, where the return is simply the prevention of such behavior in the future.

apply to matters, such as political expenditures, where management's reign goes substantially unchecked.

Given the deeply imbedded legislative inclination to regulate corporate participation in the political discourse and the orientation of the natural entity paradigm toward regulating management discretion, there is a clear congruence between the legislative policy choice and the natural entity paradigm. This, however, does not consider the relationship between the normative objectives of the First Amendment and the characteristics of a natural entity paradigm. It is important to remember that this paradigm respects both the power of the state and the initiative of the individual. In so doing, it maintains substantial flexibility. Given the alternatives, this paradigm probably would accommodate the array of First Amendment policy goals that the Court seems to seek.

Turning to Justice Scalia's contractual view of the corporation, it is important to consider the normative objective which was employed in developing the aggregate paradigm. Under that view, the corporate entity is essentially a set of contractual relationships. The guiding principle is that corporate regulation should enhance the efficiency of the transactions constituting the corporate structure.[209] This neoclassical economic analysis probably represents the dominant academic model of the corporation today.[210]

While under neoclassical economic analysis the market for corporate control checks the authority of management, this check may not be reliable or sensitive to relatively small political expenditures by the corporation. Given the collapse of the junk bond market and the proliferation of state anti-takeover statutes, barriers to hostile takeover efforts have become fairly daunting. The extent of these barriers, in addition to the equally significant transaction costs associated with

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See also Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 12-16 (1991) (describing this problem and arguing that political constraints have been primary factors precluding evolution to more responsive vehicle for capital accumulation).

209. *See* Millon, *supra* note 2, at 230 (noting that if there is role for legal rules under nexus of contracts model, it is to "provide mandatory contract terms designed to lessen agency costs by discouraging mismanagement").

210. *See, e.g.*, Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 HASTINGS L.J. 1327 (1979); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Kraakman, *supra* note 43; *see also* Bratton, *supra* note 15, at 408 n.6 (stating that analysis under contractarian model has become "commonplace"). Bratton states that the contractualist language appeared in legal literature during the 1970s, and that it has been widely accepted since 1980. Bratton, *supra* note 8, at 1476. Indeed, the prevalence of this model is so wide, that its opponents have felt compelled to join the debate. *See, e.g.*, Symposium, *American Law Institute's Corporate Governance Project*, 52 GEO. WASH. L. REV. 495 (1984); Clark, *supra* note 46, at 55-79.

hostile takeover, may prevent a hostile takeover due to management's misuse of power for even relatively significant political contributions. So, the principal challenge to the managerialist paradigm provided by this economist vision—the market for corporate control—is likely to be both an unreliable and unresponsive means of checking management control over the vast capital that corporations manage.

Oddly, Justice Scalia does not refer to the principle of efficiency. Instead, he rejects the statute in *Austin* because it limits the rights of individuals to form corporate entities for the purpose of participating in the political debate by making contributions or independent expenditures.[211] The freedom of contract aspect of the contractarian-neoclassical view is the basis for his analysis. There are, however, limits on the contractarian acceptance of freedom of contract. In fact, the freedom of contract aspect of the contractarian analysis is purely a means to achieve the ultimate contractarian goal, efficiency.[212]

If, however, efficiency in the broad sense had been considered, the statute in *Austin* might yield *more* efficiency. Segregated accounts for political contributions and independent political expenditures would separate their function from the corporate form and require management to compete in the market for contributions to political action committees and the like. This market discipline is likely to be more efficient than management's uncontrolled expenditures.[213]

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211. *Austin*, 110 S. Ct. at 1409 n.10. *Compare* FEC v. Massachusetts Citizens for Life, Inc. (*MCFL*), 479 U.S. 238, 259 (1986) (holding that, because corporation in *MCFL* "was formed to disseminate political ideas, not to amass capital," regulation of political expenditures was unconstitutional as applied).

212. The efficiency goal is typically served by allowing the parties to seek the terms that best fit their particular objectives. Contractualists typically argue for corporate statutes that present a standard form agreement to which the parties would have agreed ex ante, but the flexibility of allowing the parties to modify the terms of this standard form agreement is also an integral part of this approach. *See* Lucian A. Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989) (arguing from contractualist perspective for certain limits upon freedoms allowed parties in drafting corporate charters).

213. If one defines inefficient political expenditures as those authorized by management to protect its own interests at the expense of shareholders (for example, state anti-takeover statute lobbying), and if one were to assume that management made a relatively insignificant amount of selfless political expenditures, inefficient expenditures would increase without the *Austin*-type regulation. Under the traditional doctrine, which allowed such expenditures as long as there were any articulable benefits to the corporation, such expenditures would not even enter the investment analysis of prospective investors because they would be insignificant in comparison to the assets and income of the corporation generally. Under the Michigan statute, since such expenditures would have to be separately attracted and accounted for, the level of significant expenditure would be substantially less. Further, rational potential contributors would compare political action committees to find the particular fund that has the lowest percentage of "inefficient contributions." Therefore, under the Michigan statute, not only would there be a greater correlation between the contributors' interests and the

Justice Scalia has taken the contractarian view of the corporation and argued that limitations on corporate freedom of speech constrain those contracting in the context of the corporate venture. If segregating contribution funds from the corporate venture resulted in their less efficient utilization, then Justice Scalia's concern that government not be allowed to limit speech might be more consistent with the basis of his contractarian theory. However, because segregation is likely to increase the efficiency of the funds used, there may well be more funds available for corporate expression; hence, more expression would be encouraged.

This analysis begs the question whether the efficiency-based aggregate conception is appropriate for the resolution of corporate First Amendment questions. The analysis must focus on the normative value of efficiency and core First Amendment concerns. If we view these concerns as protecting speech related to various aspects of the nature of government and involving individual consent to be governed, then one might wonder whether efficiency relates at all to individual expression.

Justice Scalia implicitly suggests that corporations represent the interests of individuals and, therefore, silencing corporate speech in this way benefits incumbent politicians. This conclusion is descriptively inaccurate. Professor Dan-Cohen has identified the judiciary's tendency to cast organizations generally on the side of individuals in a somewhat bipolar analytical framework pitting individuals against the government.[214] Dan-Cohen relates the issue, in part, to the question

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expenditure, but also less inefficiency in the expenditure of funds for the support of those issues.

If one defines inefficient political expenditures as those authorized by management primarily to protect its own interests, and one assumes World *A* allows corporations to make such expenditures and World *B* has a Michigan-type regulation, it becomes apparent that World *A* would have more inefficient expenditures. In World *A*, the investor-contributor resource allocation, even assuming perfect information, would require weighing expected corporate income against the amount of inefficient expenditure as well as comparison to other investment alternatives. Therefore, the longer the anticipated corporate return is above the market average, the greater license managers have to make such expenditures. In World *B*, the Michigan statute would require corporate political funds to compete for contribution dollars based solely upon the contributor's interest in the position espoused by the fund. Any inefficiency in actual expenditures would undermine the basis for contributions. There would be no trade-off between earnings and the espoused position.

214. *See* DAN-COHEN, *supra* note 95. Dan-Cohen identifies a tendency of courts to presume a bipolar discourse between government and individuals, with corporations and other organizations cast on the side of or as representative of individual interests. Dan-Cohen treats this as a problem because he recognizes that this tendency misconceives reality; sociological evidence indicates that individuals behave differently in the context of organizations and that organizations develop and carry out agendas that are separate and apart from their conponent individuals. He suggests solutions to this problem which, in large part, presume a certain

of how the rights of corporations are derived. If one views corporations as entities whose rights derive from the rights of their shareholders, then Justice Scalia's reasoning would have merit. Assuming that the stockholder group were made up of individuals, a fact subject to some controversy, it remains highly questionable whether large, general purpose corporate entities represent, in any real sense, the interests of individuals.[215]

On the other hand, if, as Dan-Cohen suggests, the corporate entity and other organizational forms represent a third perspective unlike those of either government or individuals, then there might be a different conclusion: the actions of corporate entities occur independent of any particular individual.[216] Therefore, corporate entities represent a third perspective to which society might assign a certain priority.[217] Little reason exists, however, to regard this priority as equivalent to that assigned to individual speech.

Although an individual may draft the statements and positions that emanate from the corporate structure, that individual will undoubtedly be affected, in significant part, by aspects of the corporate structure. Group involvement generally affects individual behavior. Moreover, the view that corporations represent individual

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understanding of the nature and role of large corporations in society and advocate an adjustment of our jurisprudence to take into account his theory of the firm. While both his understanding of the firm and his suggested modifications of law constitute significant contributions to the literature addressing the legal theory appropriate for a society dominated by organizations, his failure to consider other theoretical constructs of the corporation binds his analysis to a particular theory without any explanation of why this theory is appropriate.

215. Undoubtedly, the ultimate financial beneficiaries of corporate activity are individuals. However, while an individual is at one end of the chain and a corporation is at the other, the links between the two may include brokers, banks, mutual fund managers, index fund managers, and others. Because the relational chain between corporations and individuals is beyond the scope of this Article, I assume for purposes of discussion that corporations are owned by individual shareholders.

216. *See* Dallas, *supra* note 45. Dallas makes a strong challenge to the traditional model of corporate governance. She states that "[t]his traditional ownership model rests on the theory that society should recognize the rights of shareholders to control corporations because the shareholders have the incentive to maximize profits. This incentive causes them to utilize factors of production most efficiently and to strive to maximize the satisfaction of human wants." *Id.* at 19. She finds this traditional model to be inaccurate and develops what she characterizes as the "power model" which "focuses upon the political nature of decision making in the large corporation." *Id.* at 25. This power model suggests that the "the firm is very much an actor in its environment that seeks to increase its discretion and autonomy by decreasing its dependence on various constituencies. . . . The firm is not merely responsive to an environment but acts to modify that environment." *Id.* at 26.

217. The ascertainment of appropriate societal priority appears to coincide with the view expressed by Justice White in *Bellotti* that the Supreme Court should allow the legislature's pronouncement to stand because it emanates from a First Amendment value and represents a balance that the state legislature is more appropriately situated to decide. *See supra* notes 109-11 and accompanying text.

concerns will become even more descriptively questionable as the chain between the corporation and the individual continues to grow, by virtue of the greater "securitization"[218] of investments. Also, the movement from the management corporation to the truly multinational corporation will further attenuate this connection.[219] This trend supports the viability of a third perspective, of the corporation provided by the corporation itself, as representative of neither individuals nor government. Once the representational perspective is abandoned, efficiency analysis remains as the only applicable aspect of the neoclassical economic approach.

Under the forgoing analysis, the only truly viable corporate conception is the natural entity theory, given the descriptive weaknesses of the fictional entity paradigm and the lack of harmony between the normative goals of the First Amendment and the orientation of the

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218. Securitization is typically used to describe the packaging of, for example, real estate loans into instruments which are then sold as securities. *See* Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1373-75 (1991). The authors describe a variety of financial transactions characterized by the term "securitization," but they employ the following working definition:

> the sale of equity or debt instruments representing ownership interests in, or secured by, segregated, income producing asset or pool of assets, in a transaction structured to reduce or reallocate risks inherent in owning or lending against the underlying assets and to ensure that such interests are more readily marketable and, thus, more liquid than ownership interests in and loans against the underlying assets.

Id. Here I use the term to identify a similar phenomenon relative to stocks. Mutual funds and equity futures are just two examples of the many ways that equity offerings are being repackaged and managed by institutions. These offerings have also been described as "equity derivative products":

> "An equity derivative is a security or private contract whose cash value rises or falls depending on what happens to the one or more stock or market indexes to which it is tied. A derivative can be the form of an option, a warrant, a swap, a bond, a certificate of deposit or any manner of hybrid."

Edward D. Kleinbard, *Equity Derivative Products: Financial Innovation's Newest Challenge to the Tax System*, 69 TEX. L. REV. 1319, 1322-23 (1991) (quoting Saul Hansell, *Is the World Ready for Synthetic Equity?*, INSTITUTIONAL INVESTOR, Aug. 1990, at 55). Traditional institutional investment by pension funds and insurance companies has also stepped into a position between actual individuals and corporations. Depending on the extent to which these institutions and managers play an active role in handling equity investments and monitoring managements, we may see a reintegration of the ownership and control cleavage identified by Berle and Means. *See supra* note 39.

219. *See, e.g.*, Robert B. Reich, *Who is Us?*, 90 HARV. BUS. REV. 53 (1990). Reich discusses the actual distinction between the interests of multinational corporations and the interests of there putative home country. There Reich points out that "the competitiveness of American-owned corporations is not the same as American competitiveness." *Id.* at 55. This greater scope surely provides an even stronger basis for the traditional fear of the corporate form. *See, e.g.*, Blumberg, *supra* note 106, at 372-75. Blumberg argues for the creation of a body of "enterprise" law to supplement corporation law in the context of the multinational firm. The basis for this argument is, in part, derived from the inconsistent application and incomplete nature of corporate legal theory.

aggregate paradigm. Notably, this approach garnered a majority of the Supreme Court in both *Austin* and *Bellotti*.

V. CONCLUSION

The analysis of this Article advocates using a fictional entity conception of the corporation when considering corporate free speech issues. Given current state incorporation statutes, the market for corporate control, and the impact of context on individual action, it appears that a majority of the Supreme Court appropriately chose the natural entity conception of the corporate persona as the foundation for its corporate free speech analysis. The forgoing analysis indicates, however, that the Court's failure to focus on a theoretical choice has led to unnecessary dissention, uncertainty about the choice in future cases, less confidence in the Court's reasoning, and less consistency regarding its vision of the corporate persona. Nevertheless, this lack of focus in no way undermines the significance of theory selection to the Court's ultimate decision.

Three practical considerations suggest the importance of thorough judicial explication of the underlying assumptions and conceptions involved in the regulation of corporate speech. First, a deeper understanding of the Supreme Court's theoretical conception of the corporation would aid future litigants and students in understanding and predicting the Court's decisions. Part of the difficulty in understanding the Court's initial corporate free speech ruling in *Bellotti* resulted from the Court's attempt to avoid formal consideration of the corporate persona.

Second, a deeper understanding of its theoretical conception of the corporation would help the Supreme Court to maintain internal consistency in its resolution of similar cases. Analogies propounded by litigants which compare dissimilar organizations, such as general purpose corporations and advocacy corporations or labor unions, could be rejected as simply lacking foundation.

Finally, as new and competing theoretical conceptions of the corporate persona arise, this deeper understanding would assist the Supreme Court in resolving future disputes. A better understanding of the reasons for theory selection would allow the Court to deal effectively with the presentation of new theoretical approaches, such as the aggregate conception proffered in *Austin*. Clearly, the dynamic evolution of that theoretical construct called a "corporation" has not yet come to an end, and as new visions or characterizations develop and gain acceptance, the Court will need a basis for making distinctions.

Moreover, explicit consideration of the appropriate societal role

for corporations is important today, and promises to become more so as national borders recede in the face of global economic competition. Controversies over the constitutional rights of corporations generally, and their First Amendment rights more specifically, provide an opportunity for defining the societal role of corporations. The Supreme Court's attempts to dodge this question, which is necessitated by logic and counseled by practical reasoning, serves no particular purpose. A greater understanding of what we mean by the term "corporation" and why we have chosen that particular meaning would help to identify the scope of corporate constitutional rights as well as other issues involving their regulation.