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The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United

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THE PUBLIC CHOICE PROBLEM IN CORPORATE LAW: CORPORATE SOCIAL RESPONSIBILITY AFTER *CITIZENS UNITED*[*]

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The Supreme Court recently held in Citizens United v. Federal Elections Commission *(2010) that the First Amendment forbids Congress from restricting the political speech of corporations. While corporate theory did little to inform the Court's thinking in* Citizens United*, this Article argues that the holding in* Citizens United *requires us to rethink corporate theory. The shareholder primacy norm in American corporate governance relies on the assumption that corporations can be restrained from influencing external governmental operations. We can enjoy the efficiencies generated by shareholder primacy in corporate governance, mainstream corporate theorists have long argued, because we can rely on external regulation to curb or cure the excesses that such a framework will predictably visit upon non-shareholding stakeholders, such as workers, consumers, and communities.* Citizens United *removes this lynchpin from canonical justifications for exclusive shareholder orientation in firm governance. This Article argues that if we cannot as a matter of constitutional law keep corporations out of our democracy, then we must as a matter of corporate law have more democracy in our corporations. After* Citizens United*, we must begin to restructure corporate law to require boards of directors to actively attend to the interests of multiple stakeholders at the level of firm governance.*

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INTRODUCTION

This Article develops a new argument for why corporate law should depart from the shareholder primacy norm which presently dominates American corporate governance. I begin by highlighting shareholder primacy theory's reliance on the availability of external government regulation to curb corporate exploitation of non-shareholding stakeholders in corporate enterprise, including workers, consumers, and communities. I then argue that the shareholder primacy norm itself engenders a public choice problem that makes reliance on such external regulation implausible. Profit-seeking corporations work to undermine the development of the very regulation that shareholder primacy theory charges with curbing corporate operations. Because of their capital concentration, limited liability, singular focus, and relatively small numbers compared to other interest groups, corporations can routinely best other constituencies in the competition for regulatory favor. This public choice problem is well recognized within regulatory theory generally, but it is under-theorized in corporate law. When forced to confront this public choice problem, shareholder primacists usually prescribe greater regulation of corporate political activity in order to insulate the political process from corporate influence. But the Supreme Court's recent decision in *Citizens United v. Federal Elections Commission*[1] makes clear that the First Amendment precludes such a response.

Confronting this analytic dead end, this Article concludes that the only viable response to the public choice problem in corporate law is to alter corporate governance law so that firms are not managed in the exclusive interests of shareholders, but instead operate under a multi-stakeholder regime which requires directors to attend directly to the interests of multiple stakeholders at the level of firm governance. This Article examines in particular the implications of charging firm managers with being fiduciaries of consumers, as the interests of consumers as corporate stakeholders is largely undeveloped in corporate law scholarship.[2] Having reached the conclusion that multi-stakeholder corporate governance is necessary, the Article then demonstrates that implementing a multi-stakeholder regime is feasible and requires little departure from the fundamental mechanics of corporate governance already in place under the shareholder primacy regime.

My argument relies on a series of premises with which most conservative scholars have long agreed, and which many liberal scholars have traditionally resisted, in pursuit of a conclusion that many liberal scholars have long sought, and which I will argue conservatives scholars can no longer deny.

I. THE PUBLIC CHOICE PROBLEM IN CORPORATE LAW

A. *The Shareholder Primacy Norm*

Contemporary corporate theory views the corporation as a "nexus-of-contracts" comprised of the various stakeholders in corporate enterprise, including shareholders, creditors, workers, and

1. 130 S. Ct. 876, 880 (2010).
2. *See generally* David Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253 (2009) (endeavoring to help fill this gap with a broad analysis of the consumer interest in contemporary corporate theory and extant corporate law).

consumers.[3] In the canonical account, firm directors are charged with running the firm in the best interests of shareholders not because shareholders "own" the corporation, but because shareholder primacy in firm governance is the "term" that all of the parties to the corporate nexus would agree to if they actually sat around a bargaining table and negotiated with each other.[4]

Primacy in firm governance provides shareholders the repose they need to invest in diverse enterprises in which they will exercise no day-to-day control, or even much episodic influence. While shareholders thus require the faithful agency of the board of directors, other stakeholders are thought to be capable of managing their own interests in the corporate enterprise. Workers are present on the shop floor and can negotiate their wages and conditions of employment with management directly or through labor unions.[5] Consumers are present at the cash register and can directly inspect and bargain about the quality of the goods and services they desire, or more usually, they can manage their interests simply by accepting or rejecting a price stipulated by firm managers.[6]

Corporate boards can advance shareholder interests in two sometimes-overlapping ways. First, they can strive to increase the overall gains to trade among all parties within the corporate nexus. Second, they can work to increase the percentage of the shareholders' slice of the pie. All stakeholders potentially gain when directors develop organizational efficiencies, but shareholder primacy also pushes managers to exploit non-shareholders in pursuit of shareholder gains. For example, directors can put downward pressure on wages and benefits for corporate employees. Workers, having made firm-specific investments of their human capital and having

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3. *See, e.g.*, STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 28–30 (2008).

4. *See id.* at 51. There is some academic dispute as to whether contemporary American corporate law is rightly described as embracing the shareholder primacy norm. *See, e.g.*, Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008) (disputing the view that corporate law requires directors to maximize shareholder wealth). Here I take as my point of departure the assessment of the most prominent apologists for the dominant regime, who are quite certain that shareholder primacy is the order of the day. *See, e.g.*, BAINBRIDGE, *supra* note 3, at 53 ("[D]espite occasional academic arguments to the contrary, the shareholder wealth maximization norm . . . indisputably is the law in the United States.").

5. For authoritative elaborations of this canonical account, see generally BAINBRIDGE, *supra* note 3; FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

6. EASTERBROOK & FISCHEL, *supra* note 5, at 16–17.

made community-specific investments in other areas of their lives, may find it impossible to punish, or credibly threaten to punish, directors for such opportunistic conduct by exiting to other firms or labor markets.[7] Corporations can also manipulate the design of their products or engage in misleading advertising campaigns, distorting consumers' risk perceptions or their evaluation of other product attributes. Because American corporations operate in robust competitive markets, firms that fail to engage in such opportunistic conduct will quickly be ground-under by firms that do so. Indeed, the capital markets will tend to favor firms that even accidentally stumble into such kinds of practice, as if guided by an invisible hand, even where no natural-person managers conspire or intend to do so.[8]

Conventional corporate law scholars are aware of the incentive that firms have to overreach in their dealings with non-shareholders, but they are not quick to find that firms successfully do so. Most corporate scholars employ a basic rational actor conception of stakeholder behavior. In that model, stakeholders seek to maximize their privately ordered preferences by rationally evaluating the myriad options available to them in the marketplace and other behavioral settings.[9] Under the standard account, so long as firms are operating in competitive markets, they will be forced to provide the best possible quality of work or goods at the best possible prices, otherwise workers and consumers will find another nexus with which to do business.[10] With such a framework in place, employment or consumption decisions are easily viewed as the manifestation of

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7. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 50–53 (2006) (examining worker vulnerabilities under shareholder primacy).

8. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 193–202 (2003) (describing this dynamic as the problem of "power economics").

9. For a general overview and critique of the rational actor model, see Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Analysis on the Human Animal*, 93 GEO. L.J. 1, 144–52 (2004), which analyzes in particular John Bates Clark Medal winner David Krep's explanation and defense of the rational actor; *see also* Andrea M. Matwyshyn, *Imagining the Intangible*, 34 DEL. J. CORP. L. 965, 990 (2009) ("Corporate law theory has been dominated by paradigms from law and economics. The discussion tends to center on wealth maximization by self-interested rational actors . . . ." (citing STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 410–21 (2002); EASTERBROOK & FISCHEL, *supra* note 5, at 37–39)).

10. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 5, at 4 (arguing that corporations succeed "by promising *and delivering* what . . . people value"); *id.* at 38 ("The more appealing the goods to consumers, the more profit.").

personal preferences, and exploitation or manipulation is rarely seen.[11]

Nevertheless, if only at the margins, conventional corporate theory does recognize that because of their relative power, firms can sometimes overreach with respect to non-shareholders by manipulating wages, prices, and perceptions. Even where such problems emerge, however, the standard account insists that the solution does not reside in altering the shareholder primacy norm at the heart of firm governance. Instead, firms should be restrained from engaging in such exploitative conduct by external governmental regulation, such as labor laws, consumer protection statutes, and environmental codes.[12] The threat of profit-reducing fines or criminal punishment will ensure compliance with such a regime, thus protecting non-shareholder interests without undermining the efficiency of shareholder primacy in firm governance. Whatever the social problem intersecting with corporate practice, whether it is 443,000 consumers killed each year from tobacco products[13] or the subprime mortgage meltdown and subsequent global economic collapse, leading corporate law scholars and jurists insist that the troubles not be considered a failure of corporate governance law itself, but a failure of external regulation.[14]

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11. *See* Yosifon, *supra* note 2, at 258–61.

12. *See, e.g.*, BAINBRIDGE, *supra* note 3, at 72 ("[T]argeted legislative approaches are a preferable solution to the externalities created by corporate conduct. General welfare laws designed to deter corporate misconduct through criminal and civil sanctions imposed on the corporation, its directors, and its senior officers are more efficient than stakeholderist tweaking of director fiduciary duties."); Michael C. Jensen, *Value Maximisation, Stakeholder Theory, and the Corporate Objective Function*, 7 EUR. FIN. MGMT. 297, 309 (2001) ("Resolving externality and monopoly problems is the legitimate domain of the government in its rule-setting function.").

13. Ctrs. for Disease Control & Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57 MORBIDITY & MORTALITY WKLY. REP. 1221, 1226–28 (2008), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5745.pdf; *see also* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467, 1502–32 (1999) (reviewing studies chronicling consumers' awareness of the risks of smoking).

14. For a recent example, see Chancellor William Chandler's opinion dismissing a recent Citigroup shareholder derivative suit brought in connection with the sub-prime mortgage crisis:

> It is understandable that investors, and others, want to find someone to hold responsible for these losses, and it is often difficult to distinguish between a desire to blame *someone* and a desire to force those responsible to account for their wrongdoing. Our law, fortunately, provides guidance for precisely these situations in the form of doctrines governing the duties owed by officers and directors of Delaware corporations. This law has been refined over hundreds of years, which no doubt included many crises, and we must not let our desire to blame someone

This "external regulation" escape hatch is an analytic dead end in shareholder primacy theory. Because regulation threatens to diminish profits, and because directors are given the fiduciary obligation to pursue profits, combating the development and implementation of regulation becomes an important aspect of the firm's work. Regulatory institutions are not immune from the influence of the firms they are charged with containing on behalf of non-shareholders.[15]

Of course, firms are not alone in working to influence regulatory institutions. In the halls of government they encounter the other stakeholder groups (e.g., workers, consumers, and communities) that corporate law scholars attest need regulatory protection from corporate operations. But corporations, in general, enjoy competitive advantages over consumers and workers in the competition for regulatory favor. As Mancur Olson explained more than forty years ago, small groups with narrow interests have a collective action advantage over broader groups with more diverse interests.[16] The former find it easier to organize, agree on strategies, generate resources to be deployed in joint activity, and exclude potential free-riders, than do the latter.[17] Shareholders, represented by the corporation, enjoy all of these advantages over workers and consumers. Corporations, on behalf of shareholders, work alone or in

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> for our losses make us lose sight of the purpose of our law. Ultimately, the discretion granted directors and managers allows them to maximize shareholder value in the long term by taking risks without the debilitating fear that they will be held personally liable if the company experiences losses. This doctrine also means, however, that when the company suffers losses, shareholders may not be able to hold the directors personally liable.

In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 139 (Del. Ch. 2009); *see also* Stephen Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 970–72 (2009) (arguing that corporate law was not the cause and does not provide a remedy for losses associated with the subprime mortgage meltdown).

15. Roberta Romano, a leading proponent of the dominant corporate law paradigm and author of *The Genius of American Corporate Law*, acknowledges the prevalence of this corporate practice: "Casual empiricism supports the contention that corporate PACs [Political Action Committees] and political expenditures are in fact vehicles for profit maximization. Corporate PACs . . . tend to be established when there is a substantial connection between government policies and the maintenance of firm profits." Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 996 (1984). There is an extensive literature on capture within regulatory and political theory generally, so robust that it is curious to see the central claims of this literature usually unaddressed within corporate law scholarship. *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED 42–46 (1996); CHARLES E. LINDBLOM, POLITICS AND MARKETS 170–200 (1977); George Stigler, *The Theory of Economic Regulation*, 3 BELL J. ECON. & MGMT. SCI. 3, 3–4 (1971).

16. *See* MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION 5–52 (1970).

17. *Id.* at 22–36.

consort with trade associations in the regulatory arena. Acting singularly or together, these firms have one goal: profits.[18] Other stakeholders are widely dispersed and do not have the kind of focused representation that shareholders enjoy in the firm. While some workers may enjoy union representation, most do not,[19] and consumers are completely dispersed. Therefore, it is illogical to expect that "regulation" will be able to contain the excesses of the shareholder primacy corporation.

Defenders of shareholder primacy in firm governance rarely address the public choice problem directly, but when they do, they voice a position similar to that of liberal critics of corporations—they claim that the proper response to the problem is to insulate the political and regulatory realms from corporate influence.[20] But conservative and critical corporate scholars have failed to bring corporate theory together with free speech analysis and have failed to recognize that the First Amendment, and the values it represents, forecloses the kind of regulation that would be necessary to insulate politics from corporate influence and vindicate shareholder primacy.[21]

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18. Some commentators have focused on the extent to which corporate political activity benefits managers, but "the disciplining power of markets aided by appropriate incentive contracts restrains managers from consistently engaging in political activities adverse to shareholder interests." Romano, *supra* note 15, at 996.

19. "In 2007, 15.7 million Americans, 12.1 percent of employed wage and salary workers, belonged to labor unions. This reflects a sharp decline from 1983, when unionized workers comprised 20.1 percent of the workforce." Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN'S J. LEGAL COMMENT. 1, 1 (2009).

20. Roberta Romano considers restricting the political activity of corporations to be a "second best" solution to the public choice problem in corporate law, with the first best solution being redistribution of corporate regulatory rents through tax and transfer:

> [A recurring critique of corporate political activity] is based upon a claim that corporations, representing wealthy individuals, have been able to buy elections and to shift government policies to their advantage. . . . [E]ven assuming that the analysis is correct, a simpler solution exists—the direct redistribution of income. The obvious criticism against such a solution is of a second best sort, that redistribution is not politically feasible, and therefore indirect approaches like publicly financing campaigns and lowering spending ceilings are necessary. But because those alternatives aggravate the incumbency effect, the cure may pose more severe problems than the supposed disease.

Romano, *supra* note 15, at 999–1000. Romano does not engage the First Amendment problems inherent in the restriction of political activity, but focuses instead on the incumbency effects of corporate patronage. *Id.* at 1000. Thus, while she recognizes the public choice problem that I describe here, she offers no solution to it.

21. For example, Jill Fisch likens the shareholder primacy corporation to the Holmesian bad man who, constrained only by the law, pursues profits for shareholders. Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on*

The next sub-section will briefly summarize the ways in which firms, working on behalf of shareholders, can suppress the operation of the regulatory institutions that corporate theory depends upon to protect the interests of non-shareholders.

B. Regulatory Capture

Corporations can influence the production and administration of law in many ways. Perhaps the most direct way would be for firms to purchase influence by paying bribes to policymakers. Such influence peddling and purchasing is illegal, but it no doubt happens, especially in domestic or international settings where prohibitions against bribery are under-enforced.[22] Nevertheless, because American corporate law does not typically protect corporate directors from personal liability for criminal conduct, even where it is undertaken on behalf of shareholders, managerial risk-aversion probably dissuades firms from regularly pursuing patently criminal routes to legislative influence.[23]

But finer methods of influence abound. Instead of bribes, firms and politicians can engage in explicit or implicit quid pro quo arrangements, in which politicians influence legislation, rule-making, or enforcement, in exchange for contributions to their campaigns for political office. Corporations have sought to make donations directly to political parties,[24] which deploy their resources on behalf of specific candidates. This method of influence is restrained by federal and state legislation, which limits the amount of direct campaign contributions

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Corporate Duty, 75 FORDHAM L. REV. 1593, 1599–1604 (2007). Fisch argues that the conception of the "Holmesian bad man" constrained only by the law must be complicated by an understanding that the bad man may "attempt to change the law with which he does not wish to comply." *Id.* at 1610. Fisch then argues that progressive law scholars must look outside of corporate law and try to ensure that corporations are more constrained from the political process by external regulatory power. *See id.* at 1603–04.

22. *See generally* David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471 (2009) (discussing the SEC's increasing use of disgorgement as a tool to enforce the Foreign Corrupt Practices Act).

23. *See generally* Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729 (1996) (answering yes, for the most part).

24. Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 92–110 (2009) (summarizing means through which corporations have endeavored to influence politics, including donations to political parties).

that corporations can make,[25] but such restrictions are easily evaded by firms funneling money to independent organizations which themselves make contributions to political parties and specific candidates.[26] In addition, campaign contribution limits do not reach explicit or implicit agreements whereby firms make "donations" from the corporate treasury to the politician's favorite charitable institutions, in exchange for favorable legislative consideration. As long as such arrangements are implicit, they are limited only by corporate law restrictions on charitable giving, which are quite lax.[27] Finally, after *Citizens United*, which will be discussed *infra*,[28] corporations are free to expend unlimited resources from their corporate treasuries in support of a candidate who is favorable to their regulatory needs.

Bribes, contributions, and expenditures are not the only way that corporations influence the regulatory process. In fact, they may turn out to be less important than other methods. Like most human beings, politicians like to view themselves in affirming ways, as hard-working, competent, principled, and effective.[29] Effectuating regulatory policies merely for cash payments, or to maintain the salaries and trappings of office, would surely give rise to unmanageable cognitive dissonance for most politicians, unless they could also plausibly believe that the regulatory regimes they support are not just useful to their corporate patrons, but also sound public policy. In the sardonic tones of Stephen Bainbridge, "Any sensible theory of the relationship between politics and corporate governance thus must consider not only naked self-interest, but also the possibility that ideology matters, even in the halls of Congress."[30] In the same tongue-in-cheek manner, Mark Roe has opined that "sometimes the public-policy players have enough slack to be able to

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25. *See* Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1001–02 (2005).

26. *See id.* (emphasizing the ease with which individuals and organizations are able to evade campaign contribution limits by giving money to nominally independent political organizations rather than candidates).

27. *See generally* Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005) (reviewing various methods corporations deploy to influence regulatory processes at the local, state, and federal levels).

28. *See infra* text accompanying notes 83–95.

29. *See* Hanson & Yosifon, *supra* note 9, at 94–106 (reviewing social science that demonstrates widespread, powerful motives that humans have to view themselves and the groups with which they are associated in an affirming, approving fashion).

30. Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 689 (1995).

act on their ideological preferences."[31] All parties in the problematic system may be operating in good faith, with proper motives, in dignified fashion. The public choice problem that I am focusing on here is a problem in the dynamics of influence. It does not rely on any malicious, smoke-filled-room notion of corruption.[32]

A most important arena in which the competition for regulatory favor takes place, then, is inside the mind of the policymaker. One of the crucial ways that firms gain an advantage in this competition is by employing professional lobbyists who have the knowledge, experience, and persuasive skills to make the corporate case to politicians.[33] Without the organizational advantage of the firm, other stakeholders—and consumers in particular—cannot produce the same kind of systematic, personalized lobbying efforts that firms can deploy on behalf of their shareholders.[34] It is surely a lot easier for a politician to support a proposal that advances the interests of a firm that supports her tenure in office when she also has reason to believe that the proposal constitutes sound policy.

In this competition over what constitutes sound public policy in the minds of politicians, corporations also benefit from the nearly universal cognitive bias that social psychologists refer to as the "fundamental attribution error," or the problem of dispositionism.[35] We humans tend to view our own and other people's behavior as being caused by and reflecting privately held preferences, values,

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31. Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2503 (2005).

32. Many discussions of corporate influence in government lose credibility when they make the unwarranted leap from influence to malevolent or selfish purpose, or corruption. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 965 (2010) (Stevens, J., concurring and dissenting) ("The unparalleled resources, professional lobbyists, and single minded focus [corporations] bring to this effort, I believe, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections."). These arguments lack credibility especially among politicians and business persons who see themselves and their cohort as fair-minded, hard-working, ethically upstanding folks in whose communities the rare abjectly corrupt person is despised and considered an outcast just as they are in any other part of society. *See* Hanson & Yosifon, *supra* note 9, at 90–106 (discussing self, group, and system affirmation motives).

33. *See generally* Fisch, *supra* note 27 (emphasizing the role that knowledge and expertise on the part of professional lobbyists plays in the development of regulations that are favorable to corporate enterprise); Steven Brill, *On Sale: Your Government. Why Lobbying Is Washington's Best Bargain*, TIME, July 12, 2010, at 28–35 (discussing politicians' reliance on information provided by corporate lobbyists when developing regulatory policy).

34. *See Citizens United*, 130 S. Ct. at 966 (Stevens, J., concurring and dissenting) ("[C]orporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests.").

35. *See* Hanson & Yosifon, *supra* note 9, at 6–9, 22–34.

desires, and interests.[36] This basic picture of human behavior is echoed in formal and informal versions of the "rational actor" model that animate a great deal of legal scholarship, and corporate theory in particular.[37] Social psychologists call this cognitive baseline disposition*ism* because it is an outlook that overstates the influence of individual disposition in accounting for human behavior and misses the crucial role of situation, or behavioral context, in shaping human thoughts, preferences, choices, and conduct.[38] In their marketing and promotional activity, corporations betray a keen understanding of the situational nature of human behavior and a willingness to exploit it.[39] In their lobbying efforts, however, corporations regularly promote the dispositionist conception of human behavior that policymakers, being

36. *Id.*

37. *See id.* at 8–20, 138–70.

38. *See id.*

39. Examples of this kind of manipulation abound. It was seen where cigarette manufacturers cultivated strains of tobacco with higher levels of nicotine, the addictive compound in cigarettes, which influenced the conduct of smokers in ways that were opaque to their conscious awareness. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1475–78 (1999). It is seen also in the promotional practice of retail "junk food" (defined as "[a]ny of various prepackaged snack foods high in calories but low in nutritional value," THE AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY 440 (1995)). Walking through any mall, one inevitably encounters the wafting smells and calculated visual display of junk food. The human eating system, unbeknownst to our conscious understanding, triggers the subjective experience of hunger not only when our bodies need energy to complete present life tasks, but also when the body anticipates eating or when we are in the presence of food. *See* David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 686 (2008). The mechanics of this system evolved over the eons of human history in which they provided a survival advantage, given that food scarcity and famine was then a chronic condition. *Id.* at 686–87. Then and now, however, when the situation induces within us the experience of hunger, we subjectively conclude that we need to eat now, and when we then patronize the salty, fatty foods in our midst we interpret the firms we buy from as having satisfied preferences we brought to them, rather than preferences they induced. *Id.* Other kinds of situational manipulation involve the use of advertising to, among other things, lower the risk assessments that consumers make regarding specific products. Social psychologists have well documented, for example, that in most informal settings humans make probability assessments not through any formal actuarial analysis, but based instead on the ease with which images or associations of an outcome emerges in the mind. *See generally* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973) (presenting seminal studies identifying this cognitive phenomena). What comes to mind is often a function of what is in the situation when we make our assessments. In light of this cognitive dynamic, it should not be surprising that junk food advertising ubiquitously associates the consumption of junk food with health and happiness, sexual virility, and magic, and that consumers dramatically underestimate the adverse health risks associated with the regular consumption of these foods. Yosifon, *supra*, at 687.

human, are already primed to see.[40] It is this conception of human behavior which tends to view employee or consumer behavior as the manifestation of individual choice, rather than the result of situational manipulation.[41] And it is this view which suggests that contracts—privately ordered choices—are sufficient to protect the interests of non-shareholders in the corporate nexus, with no need for intrusive regulation.[42] In the regulatory competition over the conception of human agency, then, the playing field is not level. Humans begin with a dispositionist baseline, and firms work to promote and deepen it.[43]

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40. *See* Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1769–1801 (2004) (reviewing dispositionism in policymaking generally and with respect to the regulatory response to the obesity epidemic in particular).

41. *See* Hanson & Yosifon, *supra* note 8, at 225–29.

42. *See id.*

43. *Cf.* Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 46 (1988) ("[Public choice theory] implies not only that certain sorts of groups are more effective in obtaining desirable legislation, but also that certain sorts of issues will be most attractive to entrepreneurial politicians."). The modern literature on public choice places great emphasis on the politician as entrepreneur. *Id.* ("[C]ontrary to popular belief, the public choice model is, in fact, inconsistent with the rather primitive 'capture theory' of economic regulation which posits that one particular interest group rather than a group of interest groups drives legislation or regulation."); *see* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 41 (1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102 (1987). Politicians do not just serve the most powerful interests, but rather they manufacture support by finding individuals and groups suffering from collective action problems and promising to help them achieve unified action. This view does not deny that corporations are likely to engage in "socially undesirable rent seeking," but it simply stresses that "legislators, as sellers, play as active a role in the market for legislation as potential buyers such as corporations." Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1135 (2002). Modern public choice theory also suggests that politicians are likely to balance the interests of their non-corporate and corporate constituents by supporting ostensibly anti-corporate legislative programs that provide a salient but superficial salve to non-corporate agitators, while substantively serving corporate interests. MCCHESNEY, *supra*, at 140–41. Campaign finance legislation, for example, has consistently followed this pattern since it first emerged in the early twentieth century—broad public pronouncements and salient new regulations, followed by porous enforcement and the development of numerous loopholes. Sitkoff, *supra*, at 1136. Some scholars point to the existence of profit-restricting legislation as evidence against the public choice problem I am emphasizing. *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 247–48 (1988) (arguing that the New Deal, Great Society programs, federal regulation of tobacco and pharmaceuticals, and the failure to enact tort reform demonstrate that "large corporate interests have not always had their way in the political process"). Such legislation, however, only evidences that there is indeed a competition for regulatory favor. It does not show that corporations are not generally favored over other groups in that competition. Further, where corporate interests do suffer in regulatory completion, it is typically at the hands of other organized groups, most notably organized

The public choice problem I am emphasizing here has received scant attention in leading corporate law scholarship. In his recent book-length apologia *The New Corporate Governance in Theory and Practice*, Stephen Bainbridge actually argues that non-shareholding stakeholders have an advantage over shareholders in regulatory competition:

> Let us assume . . . that nonshareholder constituencies are unable to protect themselves through contract. The right rule would still be director fiduciary duties incorporating the shareholder wealth maximization norm. Many nonshareholder constituencies have substantial power to protect themselves through the political process. . . . Absent a few self-appointed spokesmen [or women], most of whom are either gadflies or promoting some service they sell, shareholders—especially individuals—have no meaningful political voice. In contrast, many nonshareholder constituencies are represented by cohesive, politically powerful interest groups.[44]

This is clearly wrong. Shareholders presently have the magnificently cohesive, relentless, well-funded, and articulate voice of the corporation acting as their political voice. The only non-shareholding group that Bainbridge specifies as having "meaningful political voice" are workers through labor unions, which he acknowledges do not protect non-union workers, but which is not troubling to him because "[v]arious market mechanisms have evolved to protect employee investments in firm-specific human capital."[45] This retreat to the power of the market to protect non-union workers is an odd move in an inquiry that promised, *pace* the block quote above, to assume that "nonshareholder constituencies are unable to protect themselves through contract."[46] Bainbridge has nothing to say about how shareholder primacy theory expects consumers or other stakeholders to overcome their collective action problems in the regulatory arena where they will face in every corner the elephant of the shareholder primacy lobby, which proponents of the dominant paradigm appear not to see.

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labor—regulatory legislation serving such groups may leave consumers no better off, or even worse off, than they are under corporate domination. Finally, even if neither corporations nor labor are able to capture the regulatory agenda, that agenda may be driven by the ideological interests of individual politicians or political parties. The consumer remains in each case an unorganized and ineffective political force.

44. BAINBRIDGE, *supra* note 3, at 71.

45. *Id.* at 72.

46. *Id.* at 71.

C. Capture of Corporate Law

Corporate law is often described as essentially "enabling" in that it allows parties to contract out of specified arrangements,[47] but this "enabling" ideology both understates what corporate law does and exaggerates what corporate law makes possible. There is stickiness to the default once it is prescribed. Even if corporate law is theoretically mutable, most parties to the corporate contract encounter severe collective action problems which preclude the realization of alternative arrangements.[48] Non-shareholding stakeholders are therefore largely stuck with shareholder primacy in firm governance, unless corporate law prescribes some other default.[49]

If the default rules are largely determinative, then it is important to assess how the defaults are determined. Corporate charters are provided, in exchange for a franchise fee, by state governments. Competition for investors forces firms to incorporate in states that provide a body of corporate law which is most advantageous to shareholders.[50] The dominant purveyor of corporate law is the state of

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47. *See, e.g.*, Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 449 (2010) ("Corporate law furnishes 'off-the-rack' rules that are primarily enabling (rather than prescriptive) and which allow the parties to easily negotiate around them."); Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 216 (2005) ("State corporate law is in essence enabling, following a menu approach that permits firms to alter statutory defaults to fit their needs."); *see also* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 545–46 (1990) (analyzing the tension between enabling and mandatory elements in American corporate law).

48. *See* OLSON, *supra* note 16, at 5–52.

49. For an excellent example of the infelicitous operation of the status quo bias and endowment effects, consider the following insightful study on the structure of employee compensation. James Choi and his co-authors found that where employment compensation defaults prescribe all cash salaries with an option to mute the default and take instead a mix of cash and retirement benefits, roughly eighty percent of employees stuck with all cash salaries. *See* James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, 16 TAX POL'Y & ECON. 67, 79–80 (2002). However, where the default is a mix of cash and retirement benefits, with an option to mute the default and take all cash instead, around eighty percent stuck with the mix of cash and retirement benefits. *Id.* The study well demonstrates, in a non-trivial setting, the power of default rules. It is widely believed that workers are better off with a mix of cash and retirement planning than with cash alone. *See* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159–60 (2003) (discussing the Choi study and similar studies). Some policymakers thus take from the Choi study the lesson that employers should establish a mix of cash and savings as the compensation default. *See, e.g.*, *id.*; *see also* Hanson & Yosifon, *supra* note 9, at 39–44 (discussing endowment effects and framing effects); Yosifon, *supra* note 39, at 695–713 (critiquing Sunstein and Thaler).

50. *See* BAINBRIDGE, *supra* note 3, at 12–14, 36.

Delaware. Mark Roe argues that "the first effect of the franchise tax is not just to affect who wins between managers and shareholders, nor just to bond Delaware to try hard to make good corporate law, but also to decide *who* gets to play. Managers and shareholders get to play; no one else does."[51] Non-shareholding stakeholders have a particularly hard time being heard in Delaware, which has no significant labor base or interest group presence, especially as compared to what would be seen in Washington, D.C., if corporations were federally chartered.[52] No jurisdiction or law-producing body has developed an institutional expertise, a tradition, a set of norms, or an occasion of regulatory attention for consumers or labor, that can match what shareholders enjoy in Delaware. Indeed, in Delaware it appears as if there is something going on that looks a lot like a real version of the nexus-of-contract theory's hypothetical conference room.[53] Delaware is a real corporate law conference room (or state) from which non-shareholding stakeholders individually and as a group are absent.[54]

II. FIRST AMENDMENT IMPEDIMENTS TO SHAREHOLDER PRIMACY

Corporate law discourse typically ignores the public choice problem that I have described here. Where scholars do address the problem directly, they tend to assume that a plausible solution would be to insulate regulatory institutions from corporate influence by restricting corporate political activity. For example, Robert Reich, an economist and former secretary of labor in the Clinton administration, argues that corporations should give up on political activity altogether, or be made to:

51. Roe, *supra* note 31, at 2500.

52. Because of the status quo bias, anchoring effects, framing effects, and institutional inertia, it is difficult for Congress to dislodge the presumptions that are established in Delaware. Further, while shareholders and managers are exclusively present in Delaware, they are also present, independently or collectively in the form of the corporation, in Washington, D.C., where they can exercise influence to forestall any overturning of the mutually beneficial compromise established in Delaware. *See id.* at 2517 ("Only when overwhelming force—a major scandal or economic reversal—seriously (and usually temporarily) empowers either the productivity-oriented policymakers or the populists, or both, do the federal authorities act.").

53. *See* BAINBRIDGE, *supra* note 3, at 51.

54. *See* Roe, *supra* note 31, at 2512 ("It's as if Delaware gave managers and investors the means to caucus quickly and set a status quo."); *id.* at 2537 ("Investors, managers, and their lawyers are represented on the bar association's corporate committees; and Delaware's corporate law is itself a quasi-contract between managers and shareholders that is written by the two and enforced by the legislature.").

> Companies have no independent moral or legal authority to use their resources to influence the creation of laws defining their responsibilities to stakeholders other than investors. Society has ceded to them only the responsibility for maximizing investor returns, on the premise that in doing so they will spur growth and improve allocative efficiency. . . . The meta-social responsibility of the corporation, then, is to respect the political process by staying out of it. . . . Should not government enforce this meta-responsibility by passing laws and rules which constrain corporate political activity?[55]

Arguments for the restriction of corporate political activity from the corporate law perspective have, however, usually failed to address doctrinal or normative limitations that free speech protections place on such restrictions. This Part briefly describes the developments of the Supreme Court's jurisprudence on corporate political speech, culminating in the recent decision in *Citizens United*. This Part then examines normative arguments for and against limiting corporate political speech irrespective of what the Supreme Court has said.[56] This Part concludes with an examination of the limited practicality of regulating corporate political activity, regardless of the doctrinal or normative legitimacy of such restrictions.[57]

A. Getting to Citizens United

In a landmark article in defense of corporate political speech a decade ago, Martin Redish and Howard Wasserman lamented that "the modern trend appears unmistakably away from extending full-fledged constitutional protection to corporate speech."[58] Ten years

55. Robert B. Reich, *The New Meaning of Corporate Social Responsibility*, CAL. MGMT. REV., Winter 1998, at 8, 16–17.

56. My treatment here is limited to an analysis of the viability of various arguments in favor or against the regulation of corporate political activity. I use *Citizens United* as a guide to my discussion, but my arguments are both more extensive and more limited than what was at stake in that case. I consider broad justifications for the regulation of corporate political activity which were not directly or extensively dealt with in the case; on the other hand, I do not parse with delicacy the intricacies of the Bipartisan Campaign Reform Act (BCRA) regulatory scheme, nor do I parse the labyrinthine questions of how well or poorly *Citizens United* fits with the Court's previous First Amendment caselaw or how well the Court's work stands up against the principles of stare decisis. For in-depth analysis of *Citizens United* with special attention to the Court's precedents on corporate speech, see generally Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

57. *See infra* Part II.D.

58. Redish & Wasserman, *supra* note 43, at 238.

ago few would have disagreed with them, but ten years later, the Supreme Court has proved them wrong.

The modern jurisprudence on corporate political speech begins in *First National Bank of Boston v. Bellotti* (1978),[59] which struck down on First Amendment grounds (5-4) a Massachusetts statute forbidding business corporations from making campaign expenditures in referendum elections not "materially affecting any of the property, business or assets of the corporation."[60] The statute stipulated that referenda on personal income tax rates did not materially affect the operation of business corporations or banks (income tax referenda were in play in Massachusetts when the statute was passed).[61] The *Bellotti* Court did not base its holding on a conclusion about whether or not corporations "have" First Amendment rights.[62] Instead, the Court focused on the nature of the speech that the statute sought to forbid and concluded that it was the kind of speech—political speech on matters of public importance—that the First Amendment was intended to protect.[63] Because citizens had a right to, and an interest in, hearing speech about public referenda, corporate speech on such matters could not be forbidden.[64]

In 1986 in *Federal Election Commission v. Massachusetts Citizens for Life* (MCFL),[65] the Court (the whole Court, 9-0) struck down, as applied to non-profit corporations, a federal statute that tried to forbid corporate expenditures in connection with any federal election. MCFL was a non-profit corporation dedicated to opposing abortion through political advocacy. The Court focused on the fact that MCFL was not a business entity[66]: "Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status."[67] The *MCFL* Court ruled only that the statute at issue could not be applied to non-business associations formed for the purpose of engaging in political activity, and which did not accept contributions from business enterprises.[68]

59. 435 U.S. 765 (1978).

60. *Id.* at 768. Corporate expenditures in opposition to previous tax hike referenda had spurred the speech prohibition at issue in the case. *Id.* at 769.

61. *Id.*

62. *Id.* at 775–76.

63. *Id.* at 776.

64. *Id.*

65. 479 U.S. 238 (1986).

66. *Id.* at 263.

67. *Id.*

68. *Id.*

Four years later in *Austin v. Michigan State Chamber of Commerce*,[69] the Court (6-3) made good on the distinction it presaged in *MCFL* when it let stand a state statute forbidding corporations from spending money from the corporate treasury "in support of, or in opposition to, any candidate in elections for state office."[70] The statute did allow the use of segregated funds that were comprised of contributions by executives or individual stockholders, but the corporation could not spend its own money on campaigns.[71] Justice Thurgood Marshall wrote for the majority that it was permissible for states to regulate corporate speech in the interest of stemming "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."[72] Like MCFL,[73] the Michigan Chamber of Commerce was a non-profit corporation, but unlike MCFL, it was funded by for-profit corporations and was primarily concerned with advancing the business prospects of its members.[74] Whatever one thinks of the merits of the cases, it seems clear that *Austin* was at least in tension with *Bellotti*, although the two could be distinguished on the grounds that *Bellotti* only addressed corporate speech on referendum campaigns, while *Austin* dealt with corporate speech on behalf of or against specific candidates for office.[75]

In 2002 Congress enacted the Bipartisan Campaign Reform Act (BCRA) (also known as the McCain-Feingold law), which, inter alia, forbade corporations (both for-profit and non-profit) and labor unions from making expenditures or broadcasting ads in support of or against specific candidates for political office within thirty days of a primary election or sixty days of a general election.[76] The legislation did not limit campaign expenditures by natural persons.[77]

In 2007, in another 5-4 ruling, the Court in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL*)[78] turned to

69. 494 U.S. 652 (1990).
70. *Id.* at 654.
71. *Id.* at 655. On the limited viability of the segregated-fund gambit, see *infra* note 95.
72. *Austin*, 494 U.S. at 660.
73. *See supra* text accompanying note 66.
74. *Austin*, 494 U.S. at 656.
75. *Id.* at 654; First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).
76. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201, 203, 116 Stat. 81, 88–89, 91 (codified at 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2) (2006)), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).
77. § 203(c)(2), 116 Stat. at 91.
78. 551 U.S. 449 (2007).

BCRA's expenditure prohibition and held that while it was permissible for Congress to limit corporate expenditures expressly advocating a specific candidate, the First Amendment protected expenditures discussing, supporting, or opposing an "issue" that might be at stake in a given campaign for a specific office.[79] The Court upheld BCRA by reading the legislation to prohibit only expenditures which used "magic words" of express advocacy or opposition to a specific candidate, or words that were the functional equivalent of such express advocacy.[80] Chief Justice Roberts summarized the Court's opinion as holding that the BRCA forbade only speech that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[81] Extending the baseball cant he showcased in his "calling balls and strikes" explanation of judicial decision-making during his Senate confirmation hearings, Roberts wrote that when construing whether speech was express advocacy or not, "a tie goes to the speaker."[82]

In September of 2009 the Supreme Court reviewed the BCRA again in *Citizens United v. Federal Election Commission*.[83] Citizens United was a non-profit corporation that was funded in part by for-profit corporations.[84] The case concerned a feature-length film that the organization produced called *Hillary: The Movie*, which was critical of the political career of Hillary Rodham Clinton, who was

79. *Id.* at 470 (Roberts, C.J., concurring).

80. *WRTL*, 551 U.S. at 469–70. *See generally* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064 (2008) (critiquing the Roberts Court's emerging jurisprudence on campaign finance regulation).

81. *WRTL*, 551 U.S. at 470. Hasen predicted at the time that "[t]he new test will not pose a formidable obstacle for those corporations and unions that wish to run ads to influence elections, though it could potentially deter some spending on the most personal of attack ads. As a result, a significant rise in corporate election-related spending may occur." Hasen, *supra* note 80, at 1066.

82. *WRTL*, 551 U.S. at 474 (Roberts, C.J., concurring); *see* Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1, 45 & n.241 (2010) (discussing Roberts's "balls and strikes" comments). In baseball a "tie goes to the runner" when the ball and the runner reach the base at the same time. Although every sandlot baseball or backyard wiffle ball player knows this rule, it is actually a common law rule in baseball, as it appears nowhere in the game's official rulebook, which does not address the situation of "ties." *See* Steve Gilbert, *Baseball Rulebook Not Short on Nuance*, MLB.COM (Nov. 16, 2006), http://mlb.mlb.com/news/article.jsp?ymd=20061117&content_id=1742331&vkey=news_ari&fext=.jsp&c_id=mlb. With this example in mind, the judge-as-umpire analogy should be of limited comfort to those who would have judges merely apply the law as written.

83. 130 S. Ct. 876, 886 (2010).

84. *Id.* at 886–87.

then a senator of New York.[85] Citizens United wanted to show its film in theaters and make it available "on-demand" through cable television within thirty days of a primary election in which Senator Clinton was running to become the Democratic Party's candidate for president.[86] Fearing that their plans would leave them vulnerable to civil and criminal penalties under BCRA, Citizens United sought a declaratory judgment that BCRA could not legally be applied to them.[87] A three-judge district court panel held that the content of the film was susceptible to no reasonable interpretation other than as opposition to Clinton's candidacy, and thus, under the teaching of *WRTL*, was subject to BCRA's restrictions.[88]

The Supreme Court first heard oral arguments in *Citizens United* in March of 2009 which focused on an "as applied" challenge to BCRA.[89] In June the Court shocked the legal world by requesting additional briefing and a new oral argument on whether the Court should address the broader question of the facial constitutional legitimacy of the statute.[90] The Court itself answered this question in the affirmative when its decision finally came down in January of 2010. In a 5-4 ruling, the Court overruled *Austin* and held that the First Amendment forbids Congress from limiting independent expenditures by both non-profit and for-profit corporations in connection with campaigns for political office.[91]

One of the truly remarkable aspects of the *Citizens United* opinion is the absence of any critical inquiry by the Court into what a "corporation" is. The majority opinion, authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, took as its point of departure the idea that the First Amendment forbids Congress from regulating political speech based on the identity of the speaker, be that speaker a single natural person,

85. *Id.* at 887.
86. *Id.* at 887–88.
87. *Id.* at 888.
88. *Id.*
89. *Id.*
90. Richard L. Hasen, *The Supreme Court Gets Ready to Turn on the Corporate Fundraising Spigot*, SLATE (June 29, 2009), http://www.slate.com/id/2221753/ ("In a Supreme Court term that has had its share of surprises, the court saved one of the biggest for last. Rather than publish an opinion at the end of the term as expected in an obscure campaign finance case, *Citizens United v. FEC*, the court issued a rare order for reargument of the case in September . . . [when] the court will consider whether to overrule its two previous decisions that . . . upheld limits on corporate spending in federal elections.").
91. *Citizens United*, 130 S. Ct. at 913.

or an association comprised of many persons.[92] "The Court has . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.' "[93] Individuals have First Amendment rights to associative speech, and that speech cannot be abridged based on the nature of the association; therefore, it was not necessary for the Court to examine the nature of the corporate association.[94]

Justice Stevens' dissenting opinion similarly glosses over the question of what a corporation is, assuming both that it is obvious *and* that it is irrelevant. *Citizens United* is bereft of any citation to corporate theory until, seventy-six pages into his dissent, Justice Stevens drops a footnote assuring us that corporate theory is irrelevant to his view that corporate political speech *can* be regulated:

> Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, see, *e.g., Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819) (Marshall, C. J.), a nexus of explicit and implicit contracts, see, *e.g.,* F. Easterbrook & D. Fischel, The Economic Structure of Corporate Law 12 (1991), a mediated hierarchy of stakeholders, see, *e.g.,* Blair & Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999) (hereinafter Blair & Stout), or any other recognized model. . . . It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern. Cf. Hansmann & Kraakman[, The End of History for Corporate Law, 89 Geo. L. J. 439 (2001)] 441, n.5.[95]

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92. *Id.* at 900.

93. *Id.*

94. *Id.* at 898–99, 913.

95. *Id.* at 971–72 n.72 (Stevens, J., concurring and dissenting). Stevens claims that his arguments are applicable no matter what conception of the corporation one embraces. *See id.* But it is clear through much of his dissent that Stevens does have in mind a particular conception of the corporation, and that many of his arguments depend upon the conception he is deploying. For example, he insists that corporations are not "banned" from engaging in political speech because they may make use of Political Action Committees (PACs), which he insists "provide corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 942 (quoting McConnell v. FEC, 540 U.S. 93, 203 (2003), *overruled by Citizens United*, 130 S. Ct. 876). But corporate PACs can only solicit donations from shareholders, executives, and their families. *See* 11 C.F.R. 114.5(g)(1) (2010) (corporate PAC regulations). The only way that this is even

For Stevens in dissent, it is unnecessary to delve into the nature of what a corporation is—so long as its structure, wealth, and power threatens to distort or corrupt well-functioning political discourse, Congress has the power to regulate it.

Corporate law is thus wholly irrelevant both to the majority and the dissent in *Citizens United*. Nevertheless, since *Citizens United* stands for the proposition that government cannot insulate the political arena from the influence of corporations, *Citizens United* will prove quite relevant indeed to corporate law, or at least to normative corporate theory. Before turning to these corporate law implications, the following sub-sections will take a deeper look at arguments for and against the restriction of corporate political activity. The purpose of this inquiry is to help determine whether shareholder primacy is theoretically coherent because it *does* make sense to allow government to restrict corporate political activity, in which case what we have is merely a bad Supreme Court holding in *Citizens United*, or whether shareholder primacy is not even theoretically sound because its command for government restriction of corporate political activity is truly irreconcilable with free speech values.

B. Tempting-But-Ultimately-Bad Arguments for Regulating Corporate Political Speech

1. The State-Conferred Benefits Argument

Perhaps the most commonly heard justification for why corporate political speech can be restricted is that corporations are artificial creatures of law, bestowed with favorable attributes by the state, and can therefore be subject to regulation by the governments that created them and made them powerful in the first place.[96]

arguably a sufficient mechanism through which corporations can engage in expressive advocacy is if you consider the corporation to be an association of shareholders, or shareholders and high level executives. But the idea that corporations are the property of shareholders, or merely an association of shareholders, is completely rejected in modern theories of the corporation, which conceive of the corporation as a nexus of voluntary associations comprised of shareholders, creditors, workers, consumers, and communities. *See supra* text accompanying notes 3–4.

96. *See, e.g.*, J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 641 (1982). *Austin* itself embraced the state-conferred benefits justification. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990) ("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

For starters, note that this argument flies in the face of contemporary theories of the firm, which posit that the corporation is *not* an entity created by the state, but is rather a voluntary association of individuals, a nexus-of-contracts.[97] Still, let us assume that government does bestow concessions upon corporations in the sense of providing default rules, including limited liability to shareholders for both contract and tort creditors, and recognizing the indefinite life of firms with an ability to buy, hold, and sell property. A state-conferred benefits justification for restricting corporate political speech still cannot withstand scrutiny because it would open the door to a host of other speech regulation that would surely be incommensurate with First Amendment values, if the First Amendment is to mean anything at all. As Redish and Wasserman argued in their touchstone defense of corporate free speech:

> It is true . . . that corporations possess a number of statutorily granted economic advantages that may enable corporations to have a competitive edge over other speakers. . . . Similarly, inheritance laws ensure that heirs of large estates will retain most of the estate's corpus, capital gains laws economically benefit successful investors, and patent laws give investors artificially created monopolies, thereby effectively providing all three groups with potential economic advantages in the expressive marketplace if they choose to exercise them. . . . No one, to our knowledge, has seriously suggested that the expressive activity of these individuals or organizations can constitutionally be curbed as a result of their potential economic advantages.[98]

One might add to Redish and Wasserman's list the government-conferred benefits of individual bankruptcy, the use of the roads, the protection of the police, or the availability of courts to redress private and public grievances. Few would argue that because the state confers these advantages on natural persons the government should be able to regulate individuals' political speech, or that the government could condition these benefits on an individuals' willingness to subject their political speech to government regulation.

Moreover, many media entities are organized as corporations. For example, the New York Times, CNN (a subsidiary of Time-Warner, Inc.), and Fox News (News Corp.) are all publicly traded

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ideas."). Curiously, the majority in *Citizens United* did not directly address the state-conferred benefits argument.

97. *See supra* text accompanying notes 3–4.

98. Redish & Wasserman, *supra* note 43, at 284–85 (footnote omitted).

corporations. The government-conferred advantage argument would allow the state to regulate the political speech of the New York Times and like entities.[99] Even political organizations, such as the NAACP, NOW, and the NRA, are organized as non-profit corporations and enjoy state-conferred benefits, including limited liability to members for the debts of their organizations, the right to hold and sell property, and tax advantages. It would be a very small version—an unfamiliar version—of the First Amendment that would sanction the regulation of the media and political organizations on the grounds that they enjoy the benefits of state-conferred corporate status.[100]

In short, if one is unwilling to allow government to regulate the speech of individuals and non-profit associations that benefit from state-conferred advantages,[101] then some other principle must be found for justifying the regulation of corporate political speech.

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99. The BCRA purported to exempt "media corporations," a restraint the Court found unavailing. *Citizens United*, 130 S. Ct. at 905. I am not here tracking the particulars of the BCRA statute or the *Citizens United* opinion, but am reviewing the cogency of arguments for and against corporate political speech regulation generally.

100. One might argue that there is a special protection for "the press" in our constitutional "scaffolding," but the Court has rejected this view doctrinally, *id.*, and conceptually the argument provides no way to distinguish regulation of corporate "press" speech from other kinds of corporate speech in the era of conglomerate news and entertainment industries, and the proliferation of widespread gonzo journalism through the Internet.

101. If one were willing to grant speech rights only to individuals and not to associations, then that would provide a way of restricting corporate political speech. But that would be a very narrow view of free speech rights, one which few would countenance. As Justice Scalia put it in his *Citizens United* concurrence:

> All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

Id. at 928 (Scalia, J., concurring). Political action at the organization level is important because it can avoid the free-rider problem besetting individual action, i.e., the mismatching of individual costs and benefits arising as a consequence of the fact that the objects of politics are often public goods. When a group undertakes political activity, the costs, as well as benefits, are shared proportionately by all members, and the optimal level of action can be achieved. Critics of free speech for corporations would withhold these important organizational advantages from corporate associates. *See* Redish & Wasserman, *supra* note 43, at 237 ("One should view corporate speech, then, as a form of indirect or catalytic self-realization, no less valuable than the more obvious and direct modes of self-

2. The Distortion Argument

One of the arguments for the regulation of corporate political speech that was countenanced in *Austin* and rejected by the Court in *Citizens United* is the "anti-distortion" justification.[102] The anti-distortion argument can be understood as a variation on the "state-conferred benefit" justification. The anti-distortion argument insists that corporations, by virtue of their legal status and structure, are capable of deploying resources in support of their political positions with a force that projects into political discourse an impression of support for its views that is greater than the actual sum of support for those positions among natural persons in the voting public as a whole.[103] The disparity between the prominence of the corporation's expressed views and actual support for such views among the people distorts political discourse, elections, and governance.

This is a bad argument for a number of reasons. First, it is hard to see, at least from the perspective of shareholder primacy theory, how a corporation's political speech does not accurately reflect support for the views it expresses. Corporate law requires firms to pursue shareholder value. In contemporary capital markets, shareholders can enter and exit firms with the click of a mouse. They invest in firms precisely because they believe that directors will be able to accomplish shareholder goals more capably than the shareholders could if they maintained control of their capital.[104] Sometimes that directorial accomplishment takes the form of giving the green light to

development, and thus fully consistent with the purposes served by the constitutional protection of speech.").

102. *Citizens United*, 130 S. Ct. at 908 (majority opinion). Apparently grasping the implausibly of the anti-distortion argument, the government argued for keeping *Austin's* holding alive but did not rely on the anti-distortion rationale on which *Austin* rested. "For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance." *Id.*; s*ee also id.* at 923 (Roberts, C.J., concurring) ("The Government concedes that *Austin* 'is not the most lucid opinion,' yet asks us to reaffirm its holding." (quoting Transcript of Oral Argument at 62, *Citizens United*, 130 S. Ct. 876 (No. 08-205))). In his dissent Justice Stevens insists that "anti-distortion" and "anti-corruption" are really two sides of the same justificatory coin: "*Austin*'s antidistortion rationale is itself an anticorruption rationale . . . . Understood properly, 'antidistortion' is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process." *Id.* at 970 (Stevens, J., concurring and dissenting). I break the anti-distortion and anti-corruption arguments into two categories for the sake of exposition, but like most of the categories in this sub-section, there is obviously considerable overlap between them.

103. *See* Redish & Wasserman, *supra* note 43, at 264–68 (discussing the "anti-distortion" argument for the restriction of corporate political speech).

104. *See id.* at 254.

a new production line; other times it involves supporting the candidacy of a politician who will support a favorable regulatory atmosphere for the product. If shareholders do not agree with the political positions that are necessary to maximize return on a particular investment, they are perfectly free to divest and re-invest in a different industry with countervailing political needs, or in a firm in the same industry that is determined to carry on its operations with a different political strategy.[105] Far from a distortion of the political views of their shareholders, then, corporate speech would seem to be a reliable expression of it. In this sense, it is certainly true that successful corporations *concentrate* the political voice of their shareholders, but it does not distort their voices.

This same dynamic is witnessed in the context of non-profit corporations and political associations. Individuals turn membership dues over to the ACLU, the NAACP, or the NRA in part because they believe those organizations will be able to use such resources in contribution to political discourse more effectively, more clearly, or with greater amplification than could the members deploying their resources themselves.[106] This is good thinking, as the economies of scale and specialization of labor attendant to pooled resources will undoubtedly allow people with common interests to speak more effectively as a group than could be gained by the sum of their individual expression.[107] It is undoubtedly the case that the ACLU from time-to-time supports particular political positions with which individual members disagree.[108] Members surely anticipate that this will be the case when they decide to become members of the group but figure that the gains they realize from positions they share with the group will more than offset losses associated with the group's advance of positions they oppose.[109] Of course, if members get fed-up with the ACLU they can quit the organization and stop paying dues, although, unlike shareholders in publicly traded corporations, they do not have the option of cutting their losses by alienating their shares in the enterprise to a willing buyer.[110]

105. *Id.* at 275.
106. *See id.* at 272, 274.
107. *See id.* at 254.
108. *See id.* at 273.
109. *See id.*
110. ACLU memberships are not alienable. E-mail from Kitt Abad, Assoc. Manager, Member Servs., ACLU, to David G. Yosifon, Assistant Professor of Law, Santa Clara Univ. Sch. of Law (Mar. 2, 2010) (on file with the North Carolina Law Review); *see* Redish & Wasserman, *supra* note 43, at 274.

If one were to compare the ease with which a person can invest or divest in a corporation to the opportunity costs involved in, say, working a phone bank in support of a candidate for office, it would seem that those who manage to get involved in a phone bank are far more likely to be contributing a quantum of discourse to overall political exchange that is out of proportion to actual support for their positions than does corporate speech. It is widely known, for example, that retirees have a great deal more time at their disposal than do full-time laborers and parents, and so are able to inject their views into political discourse in a manner disproportionate to the likely actual level of support for such ideas among the electorate. Yet few would argue that Congress could ban phone banking by the elderly because it distorts political discourse in this way. Even if distortion were a legitimate ground on which to base speech regulations, then one would still want for a justification for singling out corporations for distortion-based regulation.

3. The Corruption or Appearance-of-Corruption Argument

It is illegal for citizens to sell their votes or for politicians to peddle their influence.[111] The Supreme Court has permitted Congress to place limitations on individual campaign contributions as a prophylactic against such corruption.[112] Such contribution limits are applied to both individuals and corporations.[113] Whatever one thinks of caps on campaign contributions, the corruption justification must at some point be limited by a definitional assertion about what counts as genuine democracy. For example, if politicians were overtly, specifically coordinating policy favors on behalf of third parties in connection with those parties' independent expenditures, then there may be a "too cute" justification for looking past the form of independent expenditure to the substance of influence peddling. But if the government could make it illegal for individuals or groups to knock on doors, attend rallies, or print and distribute their own handbills in support of a political candidate out of a concern that such

111. *See generally* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1324 n.1 (2000) (cataloging federal and state prohibitions on vote buying).

112. For example, *Buckley v. Valeo*, 424 U.S. 1, 23, 28–29 (1976) (per curiam), allowed for limitations on campaign contributions in order to prevent "corruption," but the legislation it allowed did not distinguish between corporate and natural person contributions.

113. *See* Chip Nielson & Jason D. Kaune, *Overview of Federal Campaign Finance: Contribution and Expenditure Limitations*, *in* CORPORATE POLITICAL ACTIVITIES 2008, at 13, 30–36 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1689, 2008) (summarizing limitations on political contributions by both individuals and corporations).

activity would "buy" a politician's commitment to pass legislation favored by such groups or individuals, then it would seem that the corruption justification would allow Congress to outlaw democracy itself.

A curious subsidiary version of the prevention of corruption argument focuses not on corruption itself but on the "appearance" of corruption. The argument here is that even if third-party expenditures do not actually corrupt the democratic process, they may nevertheless leave citizens with the impression that corruption abounds, which may lead people to lose their faith in democracy, which would cause them to stop participating in democracy, which would undermine democracy.[114] The word "cynicism" is sometimes used in connection with this justification for regulating third-party expenditures: "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.' "[115] What is weird and suspicious about this argument is that it would purport to allow Congress to regulate the speech of some parties because of other people's *misapprehension* about the meaning and consequence of the speech. The reason that "cynicism" is thought to be a vice is because the cynic has an *unduly* negative view of the motives of other people.[116] To restrain the speech of some parties because of other people's mistaken belief about the

114. *See* Redish & Wasserman, *supra* note 43, at 264–68, 285–88 (discussing anti-corruption argument). *See generally* Marlene Arnold Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 994–99 (1980) (reviewing corruption and appearance-of-corruption arguments for restricting corporate political speech); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377 (1985) (same).

115. Citizens United v. FEC, 130 S. Ct. 876, 963 (Stevens, J., concurring and dissenting) (quoting McConnell v. FEC, 540 U.S. 93, 144 (2003), *overruled by Citizens United*, 130 S. Ct. 876 (2010)); *id.* at 974 ("When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders 'call the tune' and a reduced 'willingness of voters to take part in democratic governance.' " (quoting McConnell v. FEC, 540 U.S. 93, 144 (2003), *overruled by Citizens United*, 130 S. Ct. 876 (2010))).

116. *See* THOMAS HURKA, VIRTUE, VICE, AND VALUE 94 (2001) ("A more subtle pure vice is cynicism. A cynic believes the world and people's lives are less good than they are commonly taken to be, and, let us assume, actually are. . . . [The cynic] claims that people are less virtuous and more prone to vice than in fact they are.").

consequences of such speech would seem to patronize cynicism, rather than ameliorate it.

In any event, there is nothing in the corruption or appearance-of-corruption justifications that would legitimate a regulation that singles out corporate speech and leaves untouched cynicism-inducing speech by other wealthy individuals or groups.

4. The Narrow Pursuit of Profit Argument

Some people[117] argue that political speech by for-profit business corporations should not enjoy First Amendment protection because such speech is calculated only to make profit, not to advance the operation of democratic processes, or individual expression and self-realization, which these same folks view as the central purposes of the First Amendment.[118]

This justification also cannot withstand scrutiny. A great deal of political speech by natural persons is undertaken, at least in part, to make a profit. Indeed the profit motive is often the "but-for" cause of political speech, in that many authors would not write books or articles, or speakers give keynote addresses at conferences, unless there was money in it. As Dr. Johnson put it with slight, but not constitutionally significant, exaggeration: "No man [or woman] but a blockhead ever wrote, except for money."[119] Most politicians above the very local level are paid to serve in their posts and thus seek to profit from their own political speech. The New York Times, again, is a for-profit corporation.

One might argue that even if profit is a "but-for" cause of much speech by political writers and speakers, politicians, and the New York Times, it is not the *sole* motivation. But neither is profit the sole motivation of corporate speech. Corporate law requires that shareholder profits predominate in the minds of the directors, but it does not completely forbid the presence of all other considerations, such as regard for the interests of other corporate stakeholders, or morality, ethics, and the health of the polity generally.[120] Further, the

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117. And by people of course I mean, among others, the late, great First Amendment scholar C. Edwin Baker.

118. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989).

119. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 529 (David Womersley ed., Penguin Books 2008) (1791).

120. *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763–76 (2005) (reviewing the latitude that corporate directors enjoy, at the margins, to adopt profit-sacrificing corporate policies, including "operational restraint" and charitable giving).

federal securities laws today provide shareholders with a "proposal" mechanism through which they can author, and have put to a shareholder vote, proposals for the reform of corporate operations that bear on ethical or moral aspects of the firm and which have nothing to do with profit.[121] The speech of publicly-traded firms, therefore, cannot be characterized as exclusively profit-seeking, even if it is predominately so.

In any event, even if all corporate speech were directed at profit-making, would not the restriction of such speech amount to viewpoint discrimination? Many respectable thinkers have argued that the profit motive and the pursuit of profit is the surest way of stoking individual, communal, and civic flourishing.[122] For-profit corporate political speech is the embodiment and voice of this view of how society gets good. Shareholders who invest in profit-maximizing firms presumably embrace the pro-profits discourse in corporate political speech acts, and their viewpoints would be discriminated against if corporate speech were restricted because of the substance—the pro-profit orientation—of their speaking agenda.

Unless one is willing to allow the government to regulate individual or non-profit speech because it was wholly or partly motivated by a desire to make profits, or because it had only one point, then some other principle must be found that would justify the regulation of corporate political speech.[123]

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121. *See* Yosifon, *supra* note 2, at 311–12 (discussing the shareholder proposal mechanism).

122. *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS 9–10 (Harriman House 2007) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."); *see also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 87 (2007) ("[T]he corporate form can be viewed as a type of 'catalytic self-realization' that facilitates individuals' efforts to realize both their goals and their potential.").

123. "[T]he difficulty . . . [in] opposing corporate participation in political campaigns is . . . how to derive a reasoned distinction for prohibiting the expenditures of business corporations but not those of other organized interests." Romano, *supra* note 15, at 1000. Redish and Wasserman argue that the profit-motive justification for restricting corporate political speech cannot be right because "[u]nder well-accepted First Amendment doctrine . . . a speaker's motivation is entirely irrelevant to the question of constitutional protection." Redish & Wasserman, *supra* note 43, at 269. That is not an entirely accurate characterization, given that untruthful speech even about a political figure that is made with "malice" on the part of the speaker is unprotected under *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964), whereas false speech made without malice is protected (so long as it is not reckless). *Id.* I think it suffices to note that the profit motive is not considered sufficient justification to limit speech by other actors, partnerships or entities, and thus that it does not suffice as a justification to limit corporate speech.

5. The Shareholder Protection Argument

Some people argue that the state's interest in protecting shareholders justifies state restrictions on corporate political speech.[124] From a corporate law perspective, this argument makes little sense.

Corporate law presumes that directors, not shareholders, control corporate operations and decide how to deploy corporate resources.[125] Shareholders who disagree with directors on business, moral, or political grounds have very few options. They can mount an extremely expensive campaign to oust incumbent directors; they can mount an extremely-unlikely-to-succeed shareholder proposal campaign through the federal securities laws seeking to change corporate policy; if they are rich enough, they can buy out the company outright; or, as is the usual course for disgruntled shareholders, they can sell their stock. Business law typically does not micromanage decisions about deploying corporate resources. Corporate law typically has no interest in protecting idiosyncratic shareholders from having their moral or political ideologies undermined by corporate operations. It would be anomalous and destructive of the power of directorial authority in firm governance to start down that road in connection with political speech. There is nothing special about corporate political speech that distinguishes it from other opportunities directors have to engage in conduct that differs from the social, moral, or political interests of individual shareholders. It would be incongruous at best to argue that shareholders need no protection against corporate decisions to drill for oil in the oceans, distribute pornography, invest in sub-prime mortgages, or purchase luxury boxes for professional sporting events, but that they need protection against corporate decisions to spend money endeavoring to influence the political process that makes rules and regulations bearing on the operations and profitability of the firm.

Sometimes this argument is framed as a loyalty problem, with the claim being that directors seek to advance their own ideological interests through corporate political speech rather than the interests of the firm.[126] Where directors engage in such disloyal conduct,

124. *See, e.g.*, Sitkoff, *supra* note 43, at 1113–23 (reviewing shareholder protection arguments for limiting corporate political speech and collecting citations).

125. *See* DEL. CODE ANN. tit. 8, § 141 (2001) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . .").

126. *See* Sitkoff, *supra* note 43, at 1113–23.

corporate law has a ready remedy through breach of fiduciary duty claims.[127] That it may sometimes be difficult to distinguish between self-aggrandizing and faithful corporate decisions is not a problem that is unique to political speech—it is also hard to tell whether luxury boxes at ball games are really good for shareholders or just good for directors. Still, where directors spend on behalf of candidates who are family members or friends, or on behalf of causes that are pet projects, especially where such candidacies or projects are wholly irrelevant to or at odds with the corporate purpose, then corporate law provides a remedy through shareholder derivative suits that put the onus on directors to demonstrate that "interested" transactions were entirely fair to the corporation and its shareholders.[128] But the going view in mainstream corporate theory is that robust equity markets, competitive labor and consumer markets, and social norms among directors more or less effectively control such opportunistic conduct.[129] If directors were able to regularly appropriate corporate assets to serve their own, rather than the firm's, political agenda, then we would likely see Delaware, or some state that would like to steal away Delaware's largess in incorporation fees, promulgate an incorporation statute that made political speech ultra vires. The fact that we do not see such statutes or widespread shareholder antagonism for the adoption of similarly restricting bylaws suggests that corporate political speech tends to benefit shareholders, not harm them. In the wake of *Citizens United*, some scholars have argued that shareholders should be allowed to vote to strip directors of the power to spend on politics, or else that the default rule should be that directors do not have the power to spend on politics unless shareholders affirmatively vote them that power.[130] I think it is implausible to think that the shareholders of any one firm, or shareholders as a class, would be interested in so binding their principals' hands (or tongues, as it were).

It is worth noting that the disciplining power of highly liquid capital markets witnessed in the for-profit corporate world is not

127. JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS § 10.09, at 202–05 (2d ed. 2003) (summarizing corporate directors' duty of loyalty).

128. *See id.* §§ 10.09–10.12, at 202–15 (reviewing corporate law frameworks for enforcing directors' loyalty obligations).

129. *See* BAINBRIDGE, *supra* note 3, at 73–155; *see also* Romano, *supra* note 15, at 996 ("[T]he disciplining power of markets aided by appropriate incentive contracts restrains managers from consistently engaging in political activities adverse to shareholder interests.").

130. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 97–105 (2010).

similarly available to constrain the opportunistic conduct of high-ranking officers of non-profit membership associations, and yet few would sanction restricting the political speech of such associations on those grounds.[131]

6. The Foreign or Non-Resident Influence Argument

To the extent that national or sub-national political boundaries are legitimate, then it may also be legitimate for national and sub-national political entities to restrain outsiders from influencing their politics or elections. Because publicly-traded corporations may be held in part by foreign individuals or foreign corporations, one might argue that Congress should be able to restrict corporate political speech in order to keep out the influences of such foreign interests. In his *Citizens United* dissent Justice Stevens' emphasized the foreign-agent angle:

> Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. . . . Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.[132]

The trouble is that if one were to embrace this position, there is again nothing in the argument that distinguishes corporations from other associations. The Catholic Church, for example, and the Anti-Defamation League, both receive funding from foreign sources, with literally universal agendas, and both participate broadly in American political discourse. What's sound regulatory sauce for the international corporate goose is sound regulatory sauce for the international associational gander.

Further, if one takes a very broad view of listener interests in political speech, then it is hard to see what legitimate interest governments could have in restricting foreign speech. If more speech

131. *See* Nicole Gilkeson, *For-Profit Scandal in the Nonprofit World: Should States Force Sarbanes-Oxley Provisions onto Nonprofit Corporations?*, 95 GEO. L.J. 831, 832 (2007) (reviewing widespread problem of disloyal agency in non-profit associations).

132. Citizens United v. FEC, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring and dissenting); *see also id.* at 947 ("Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. See, *e.g.,* 2 U. S. C. §441e(a)(1).").

is always valuable to listeners, then citizens should simply be able to hear speech from foreign persons, groups, or countries, discount such speech as appropriate considering the foreigner's foreign interests, and go about forming their own opinions within the marketplace of ideas.

C. Sound-But-Ultimately-Scary Arguments for Regulating Corporate Speech

While none of the arguments so far analyzed seem to this author to stand up to scrutiny, there is at least one argument for restricting political speech which I believe is sound and unavoidable. The argument is inescapable, but it is also frightful in its implications.

Humans are finite creatures. We have limited cognitive capacity and a limited time on earth.[133] We can only take in and make sense of a limited amount of stimuli around us.[134] We are vulnerable to drown-out and overwhelmance if one speaker or group of speakers can dominate a discursive space or time for speaking and listening.[135] The First Amendment was made for humanity, not humanity for the First Amendment.[136] The point (or points) of the First Amendment is to enable individual and group expression and to engender the robust production and circulation of ideas that are useful to people generally and to the well-functioning of a free and democratic society in particular. Given the scarcity of the human condition, our limited faculties and time, these interests can only be served if speech can be restricted so that some speakers cannot drown out other speakers and overwhelm listeners.

While most of his long dissent in *Citizens United* is focused on the kinds of arguments dismissed in the previous sub-sections, Justice Stevens is on his firmest footing when he finally turns late in his opinion to the predicament of human scarcity: "All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, 'that there is no such thing as too much speech.' "[137] He drops a footnote: "Of course,

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133. *See generally* Hanson & Yosifon, *supra* note 9 (analyzing the implications of human cognitive limitations for legal theory and policymaking).

134. *Id.*

135. *Id.*

136. With apologies to *Mark* 2:27 ("The Sabbath was made for humanity, not humanity for the Sabbath.").

137. *Citizens United*, 130 S. Ct. at 975 (Stevens, J., concurring and dissenting) (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 695 (1989) (Scalia, J., dissenting)).

no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally."[138] His text then continues:

> If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; . . . then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.[139]

First Amendment law in a few narrow places is responsive to the problem of scarcity and drown-out. For example, the Court allows states to limit ballot access to candidates with a bona fide chance of winning an election and allows state-run television to broadcast campaign debates that allow only candidates with substantial support to take the stage.[140] First Amendment theory in general, however, does not yet have a cogent response to the drown-out, overwhelmance, or human limitations argument.[141] A coherent theory of free speech must recognize that the analytic escape hatch of solving all speech-related problems with appeals to "more speech" ultimately leads to a dead end.[142]

Our concept of free speech cannot rest on unreliable fantasies about what kind of species we are. Professor Redish has argued, unpersuasively, that

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138. *Id.* at n.74.

139. *Id.* at 975–76.

140. Justice Stevens emphasizes these cases in his *Citizens United* dissent. *See id.* at 946 (citing Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (upholding restrictions allowed on televised debates); Burson v. Freeman, 504 U.S. 191 (1992) (upholding restrictions on electioneering near polling stations)). The Court has also limited speech where the listeners or readers are unable to easily avoid the speech. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient.").

141. *See Citizens United*, 130 S. Ct. at 972 ("I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above [which may be read to include drown-out problems], and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. See, *e.g.*, *Randall* [v. Sorrell], 548 U.S., at 273 [2006] (dissenting opinion).").

142. The *Citizens United* majority offers blithe abstractions but never confronts directly the real problem of drown-out: "Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false." *Id.* at 907 (majority opinion). "[I]t is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 911.

> [o]ne cannot construe the First Amendment to allow the government conclusively to determine either how citizens process information or when the fear of an information overload dictates a need for governmental intervention. Society can never be sure that such a point ever exists, much less that citizens have, in fact, reached it. The commitment to the free speech concept clearly implies that too much information—if, indeed, there could ever be such a thing—always is preferable to too little.[143]

Redish asserts that the First Amendment cannot countenance government adopting a specific view of human information processing.[144] His position, however, requires us to adopt a view of humanity that is not only specific but false, and that is a view of humans as capable of processing any amount of speech. To establish a coherent and defensible theory of free speech, theorists must begin in precisely the place that Redish considers off-limits: a realistic conception of the human mind.[145]

The drown-out justification is a sound and necessary basis for regulating political speech, but its implications are troubling. While we do know as a biological fact that humans can only process so much speech, how to quantify the limit or the latitude that government should be entitled to in regulating on the basis of that limit is extremely difficult to figure. Moreover, if we are to take this justification seriously we must look beyond the quantum of speech and also consider its persuasiveness. If an articulate speaker can occupy as much of a listener's imagination with 100 words as an inarticulate speaker could with 1000 words, should then government be entitled to, on the basis of the drown-out justification, limit the articulate speaker to 100 words while providing the inarticulate speaker 1000 words? And there is the question of making space in the discursive arena for highly marginal ideas or speakers. Given our cognitive limitations, should Congress be permitted to restrain the speech of those proponing widely held views in order to make time and space available for new or obscure perspectives? These are challenging, scary questions, but we will not have a complete or coherent policy of free speech until we are able to answer it.

This Article does not endeavor to solve this problem. It rests instead on the simpler provisional conclusions that drown-out, while a

143. Redish & Wasserman, *supra* note 43, at 290.
144. *Id.* at 290–91.
145. *See* David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 599–601 (2006).

good reason to limit speech generally, is not a sufficient reason to limit corporate speech in particular. After all, many individuals in our society are wealthier than many corporations and can drown out the speech not only of other natural persons, but of small, poor corporations as well.[146]

D. Practical Impediments to Regulating Corporate Speech

Even if one could come up with a normative justification for why corporate speech should be subject to greater government restriction than other associational speech, and even if the Supreme Court were to sanction such a view under the First Amendment, it would still remain practically impossible to restrict corporate speech in a manner that would solve the public choice problem in the shareholder primacy theory of corporate law.

If regulation of campaign donations and expenditures were allowed, there would still be myriad ways corporations could influence the political process that would prove even more difficult to regulate. For example, suppose a corporation, forbidden from making any direct campaign contributions or expenditures, decided that it was going to increase the salary of its top management by exactly the amount of money that it would have spent on political campaigns, and that management donated or expended such money on political campaigns they thought would benefit their firms. Suppose this was the practice among all corporations in a particular industry and that the market for corporate management came to efficiently price wages in terms of the political contributions that they made. Surely it would not be permissible for the government to regulate the private campaign expenditures of corporate managers, unless we are going to permit a much broader kind of political speech regulation in our society.

The foregoing analysis makes clear that what is at issue in *Citizens United* is not really the disproportionate or corrosive

146. In *Bellotti* the Court rejected Massachusetts' argument that corporate spending threatened to "drown out" other speech on referenda, concluding that such a concern was purely speculative, unsupported by empirical findings. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 789–90 (1978). While *Bellotti* could in this sense be read to mean that the government may regulate on a drown-out theory if it can prove drown-out empirically, nothing in such a principle would distinguish corporate drown-out from drown-out by other kinds of speakers. In any event, it seems unlikely that, even with evidence, *Bellotti*-type legislation could be sustained under a drown-out theory, given the Court's statement elsewhere in the case 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." *Id.*

influence of corporations as compared to natural persons in our politics, but rather the disproportionate influence of wealthy and powerful natural persons over the relatively poor and powerless in our politics. Focusing on the limited viability of justifications for limiting corporate speech reveals that talking about the power of corporations has obfuscated the much more profound problem that is at the heart of motivations for limiting corporate speech: the desire for equality and justice in the political domain. Political efforts to restrain corporate speech are really efforts to restrain a powerful interest group in order to allow other interest groups to have more influence in government. Because the Supreme Court has told us that we cannot keep corporations out of our democracy, then the next best way to accomplish the goals motivating such legislation is to bring more democracy into our corporations.

III. SOLVING THE PUBLIC CHOICE PROBLEM IN CORPORATE LAW

One of the strange things about Justice Stevens' dissent in *Citizens United*, and widespread political and popular opposition to the case, is the implicit assumption that the only thing Congress can do to protect democracy from being undermined by corporate power is to stop corporate political activity. This is plainly not the case. If the problem is that corporations are too powerful, Congress has a number of avenues available to it other than speech regulation to solve that problem. Congress could forbid corporations altogether. Or Congress could forbid those elements of the corporate nexus that make them powerful—for example, the separation of ownership and control. Or Congress could tax corporate operations until capital, labor, and consumers prefer to deal with each other in small partnerships rather than make use of the onerous corporate form.

The problem with such corporation-weakening responses to the public choice problem in corporate law is that we would lose the great efficiencies—the economies of scale that create new jobs and better products—that corporate organization provides. This kind of approach to the problem of corporate political speech would be slitting the throat of the golden goose; it would silence its troublesome political squawks to be sure, but at the cost of losing its socially useful golden eggs. Far better, I will argue in this Part, to retain (switching metaphors) the promising baby of the corporate form, but to drain away the polluting bathwater of the shareholder primacy norm in corporate governance, replacing it with the enlivening wash of stakeholder-oriented governance.

If we cannot rely on contract or external regulation to protect the interests of non-shareholders, then shareholder primacy must be altered in favor of a system that requires corporate directors to attend to the interests of non-shareholding stakeholders at the level of firm governance. When we say presently that directors are "fiduciaries" of shareholders we mean, in the words of Easterbrook and Fischel, that directors must "work hard and honestly"[147] to advance shareholder interests. To make directors fiduciaries of workers and consumers, then, would be to say that because contract is insufficient to protect consumer interests and because the backstop of government regulation is implausible under shareholder primacy, directors must consider it their duty to "work hard and honestly" not only to advance shareholder interests, but worker and consumer interests as well.

Corporate law has nothing substantive to say about what constitutes "work[ing] hard and honestly."[148] The business judgment rule provides directors with complete discretion to determine what kinds of business operations are in the best interests of their principals.[149] While unrepentantly agnostic on substance, however, corporate law is much more confident enforcing procedural obligations on fiduciaries.[150] In order to gain the protective cover of the business judgment rule, directors must be informed, and they must deliberate.[151] Satisfying this obligation may take different forms in different circumstances, from reading reports, to hearing presentations, to engaging in discussion and debate. To require directors to attend as fiduciaries to the interests of workers and consumers at the level of firm governance would thus also provide workers and consumers with the benefits of the process obligation. This obligation constitutes a discursive occasion in which multiple-stakeholder interests and vulnerabilities implicated in particular corporate decisions, or broad corporate strategies, would be voiced, heard, and considered.[152]

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147. EASTERBROOK & FISCHEL, *supra* note 5, at 91.

148. *Id.*

149. *See* COX & HAZEN, *supra* note 127, § 10.01, at 184–86 (summarizing the business judgment rule).

150. *Id.* at 185.

151. *See* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (explicating this process obligation).

152. For further examination of how multi-stakeholder governance might be operationalized on the board of directors, see David G. Yosifon, *Discourse Norms As Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH

Multi-stakeholder governance will help to solve the public choice problem inherent in the shareholder primacy system, a problem that will only be exacerbated after *Citizens United*. Under shareholder primacy, directors have the incentive and the opportunity to appropriate value from workers and consumers on behalf of shareholders. Under a stakeholderist corporate governance regime, directors are restrained by the golden yoke of fiduciary obligation from engaging in the kind of exploitation of non-shareholders that is impelled by the current system. Thus, under a multi-stakeholder regime, non-shareholders have less need for external government regulation because they are receiving greater attention within firm governance. Further, to the extent that corporations continue to engage in political activity under a multi-stakeholder system, they will do so on behalf of numerous stakeholders, rather than for shareholders alone.

Multiple stakeholder governance would have to be implemented by statutory reform. Some readers of drafts of this Article and related work have suggested that the same public choice problems that I emphasize in critiquing the social utility of shareholder primacy norm would also preclude the implementation of the multi-stakeholder regime that I advocate, given that shareholders would prefer the status quo and shareholder primacy corporations would work to maintain it. I have two basic responses. First, this Article is primarily concerned with assessing the coherence of corporate theory. My argument is that shareholder primacy is not viable unless one is prepared to allow government to restrict corporate political activity, which I argue would be unprincipled, unwise, and, according to the Supreme Court, unconstitutional. Multi-stakeholder governance, on the other hand, is coherent without requiring restrictions on corporate political activity. So if you were trying to decide, from the proverbial original position behind the "veil of ignorance,"[153] whether to start a society with either shareholder primacy or multiple-stakeholder firms, then you would choose the latter.

Second, from a more practical perspective, political theorists argue that ordinary public choice dynamics are altered in times of heighted political sensitivity or activity. When a public policy issue becomes highly salient, dispersed groups with diverse interests can for

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MATRIX (forthcoming 2011) (manuscript at 27–34) (on file with the North Carolina Law Review).

153. *See* JOHN RAWLS, A THEORY OF JUSTICE 10–15 (rev. ed. 1999) (arguing that legal rules should be developed from behind a hypothetical veil of ignorance in which one does not know the class position or set of individual skills that one would have in the regime).

a hot moment come together to overcome the advantages that smaller, more focused groups typically enjoy in the competition for regulatory favor.[154] The somewhat dramatic kind of corporate governance reform that I am exploring could be implemented in such a moment. The purpose of this Article is to make the case that this kind of change is worth pursuing when that kind of occasion emerges. Hot political moments also would present the possibility of developing more robust external regulation favoring workers, consumers, or communities, but once there is a return to politics as usual, then shareholder primacy firms' collective action advantage re-emerges to once again undermine and evade such external regulation. That pernicious dynamic is curbed when the hot political moment is instead used to implement basic and desirable changes to the internal structure of corporate governance.

A. Institutionalizing Multi-Stakeholder Corporate Governance

1. Conventional Account of Why Multi-Stakeholder Governance Cannot Work

This Part explores the plausibility of formalizing and institutionalizing multi-stakeholder corporate governance. Most corporate law scholars believe that shareholder primacy in firm governance is in the best interest of all corporate stakeholders, and therefore few find it necessary to reach the question of the feasibility of a multi-stakeholder regime.[155] When shareholder primacists do examine the plausibility of multi-fiduciarism, they conclude that it is not operationally plausible.[156]

A multi-stakeholder regime could conceivably be structured on a corporate board of directors through either an "unclassified" or a "classified" form. In an unclassified system each director would be

154. *See, e.g.*, James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 675 (2007) ("Many commentators have observed that there is a relationship between the business cycle and the production of securities regulation. During boom times, industry has more influence, there is less public demand for regulation, regulators tend to be more cautious, and less new regulation is produced. Busts tend to reveal scandals that cause public outrage, reducing industry influence, emboldening regulators, and leading to the passage of more restrictive laws. An example of such a law is the Sarbanes-Oxley Act, which Congress passed in response to public pressure after the collapse of Enron. These arguments can be seen as a form of public choice theory, which has long been an influential framework for explaining the production of regulation." (citing, inter alia, Joseph A. Grundfest, *Punctuated Equilibria in the Evolution of United States Securities Regulation*, 8 STAN. J.L. BUS. & FIN. 1, 1 (2002))).

155. EASTERBROOK & FISCHEL, *supra* note 5, at 38.

156. *Id.*

responsible for attending to the interests of multiple stakeholders. According to conventional accounts, an unclassified multi-stakeholder regime is impossible because a director asked to serve more than one master has been "freed of both and is answerable to neither."[157] Such a director, shareholder primacists insist, can pursue her own interests rather than her principals' because she can always rebuff any stakeholder complaint of directorial malfeasance by arguing that the conduct was meant to advance the interests of some other stakeholder, and thus was in accord with the directors' duties.[158] Shareholder primacists further insist that even the loyal multi-stakeholder director would be forever paralyzed, never knowing whether to privilege the interests of one as opposed to another stakeholder in a given corporate decision or set of decisions.[159]

The other way to structure a multi-stakeholder regime would be through a classified board in which individual directors would be charged with representing the interests of particular stakeholders—a director for shareholders, a director for workers, one for consumers, etc. While the two-masters problem might be mitigated with such an approach, critics insist that a classified multi-stakeholder board would result in disastrously cacophonous dynamics on a decision-making body that requires cooperation.[160] A classified board would result in "gangsterism" in which each director tries to maximize return to his own charges at the expense of the other groups, and of the enterprise as a whole.[161]

In light of the market manipulation and public choice problems analyzed above, these conventional arguments against multi-fiduciarism must be re-examined. I have argued that the public choice problem in corporate law is caused in part by the strength of the corporate organizational form. In what follows I will again focus on the power of corporate design, this time to argue that multi-fiduciarism in firm governance is more plausible than its critics have presumed. I argue that the true "genius"[162] of our corporate law lies in

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157. *Id.*

158. *Id.* at 37–39.

159. *Id.*

160. *See, e.g.*, Alfred F. Conrad, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 950 (1977) ("To most executives, the vision of a board of directors composed of advocates of competing objectives would be a nightmare.").

161. Beardsley Ruml, *Corporate Managers As a Locus of Power*, *in* 3 SOCIAL MEANING OF LEGAL CONCEPTS: THE POWERS AND DUTIES OF CORPORATE MANAGEMENT 219, 234 (Edmond N. Cahn ed., 1950).

162. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW, at ix (1993) (celebrating the "genius" of American corporate law).

its hierarchical decision-making structure, not in its singular governance maxim, and that this structure can be deployed to ameliorate the purported problems with an *unclassified* multi-stakeholder governance regime.

2. The Essential Submission to Board Dominance

Corporations are associations of numerous individuals and groups, all of whom stand to gain from trading among what each of them brings to the table—capital, labor, credit, and consumption. Left to their own devices, these stakeholders would encounter huge costs in trying to effectively coordinate their contributions and huge costs in fighting over the gains to the trades in which they engage. The brilliance of the corporate board of directors is that it imposes a rule by fiat that cheaply overcomes these potentially paralyzing problems of coordination and rent-seeking. Professor Bainbridge argues that the real beauty of American corporate law is this decision-making mechanism that it provides to help overcome coordination and distribution problems: "The chief economic virtue of the public corporation is not that it permits the aggregation of large capital pools, but rather that it provides a hierarchical decision-making structure well-suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs."[163]

In corporate law the board is final not because it is infallible; it is final because finality is an enormously effective mechanism for achieving social organization.[164] To give any person, group, or institution the power or authority to review the substance of board decisions would be to replace the board with such a person, group, or institution, which would itself need to be given final authority, or would have to be reviewable in still some other way.[165] Given that some group must have final authority, and since corporate directors are likely to make better business decisions than are jurists, administrative agencies, or legislatures, it is better to make the board itself the final arbiters of what is in the firm's best interest.[166]

Of course fiat could be more cheaply and decisively accomplished by a single authoritarian executive than by a board of

163. BAINBRIDGE, *supra* note 3, at 233.
164. *Id.* at 42.
165. Bainbridge is informed by the logic of "collective action," as espoused by Kenneth Arrow and the teachings of contemporary economics and social science. *See id.* at 46–47, 56–57.
166. *See id.*

directors. If just one person were in charge of the corporation, it would be easier to reward accomplishment and punish failure.[167] Bainbridge argues that corporate law sacrifices the simplicity and certainty of despotism in order to take advantage of the greater performance that group decision-making by boards can provide.[168] Although individuals perform better than groups when working on creative endeavors, groups outperform even their strongest individual members when engaging in evaluative judgment and problem-solving, which is the kind of work that boards undertake.[169] Having a board of directors multiplies the number of backgrounds, perspectives, and connections that can be brought to bear on behalf of the corporate enterprise. Finally, and crucially, the board provides a "cloud of witnesses" for the behavior of each individual board member.[170] Knowing that their fellow board members are watching keeps each director working hard, honestly, and in conformance with widely shared moral and ethical standards.[171]

Bainbridge's "director primacy" theory presupposes that the shareholders on whose behalf the firm is managed will have divergent interests.[172] For instance, the "interests of large and small investors

167. Bainbridge emphasizes the problem of "social loafing." *Id.* at 81. When people working in groups know that it will be difficult for those evaluating the group to distinguish the contributions of individual members, then individual group members tend to put in less effort than they do if working, and being observed, alone. *Id.* Bainbridge cites to social science demonstrating this effect. *Id.* The explanation for this effect is that in group-work conditions people selfishly believe they can free-ride on the efforts of others; they also know rationally that if they put in greater efforts than their cohort they will not be rewarded for their efforts, which will be attributed to the group. *Id.*

168. *Id.* at 77–104.

169. *Id.* at 89–94, 101–03.

170. *Id.* at 102.

171. *Id.* at 101–03.

172. There is some terminological messiness in corporate law scholarship that could bear tidying up. The term "shareholder primacy" is sometimes used to refer to the principle *purpose* of corporate governance, i.e., "shareholder primacy" as the maximization of shareholder value, but at other times "shareholder primacy" is used with reference to the very different issue of the *mechanics* of corporate governance, i.e., "shareholder primacy" as a mode of organization that embraces significant shareholder influence in corporate operations. *See id.* at 53–57. Bainbridge refers to his own theory of corporate governance as "directory primacy" because it privileges the importance of directorial discretion and marginalizes the potential for shareholder interference in board decision-making. *Id.* at 233–35. But his "director primacy" in organization still embraces "shareholder primacy" as its governance goal. *Id.* Because there is more widespread agreement in mainstream scholarship on corporate purpose than governance design, I use the term "shareholder primacy" to refer to corporate purpose. Because Bainbridge's work on "director primacy" is so influential I use his term "director primacy" to refer to the structural claim that directors should dominate the governance of the firm. But I prefer to call the view that shareholders should be heavily involved in firm governance

often differ."[173] Additional divergence is seen between shareholders who are highly diversified (and want risk-preferring activity) and those who are not (and would prefer more risk-averse strategies), and between shareholders who need short-term gains (like the elderly or sick) and those who are seeking long-term profitability (like the young and healthy).[174] Rent-seeking by these disharmonious shareholders would undermine the efficiency of corporate operations, decreasing the size of the pie that would otherwise be available for all to share. Because of their divergent interests, Bainbridge argues, shareholders cannot be given substantial influence in corporate governance; instead the insulated, collegial body that is the board of directors must be given the authority to run the firm as they see fit.[175] Directors do not pursue the interest of large shareholders over small, or small over large, or short-term over long-term, or the reverse, but rather directors balance the interests of these groups with the hopes of assuring that they are all reasonably satisfied, such that the corporation may successfully carry on its socially useful operations.

Bainbridge's arguments for the institutional competency of the independent corporate board are so rich that they reveal the poverty of his and other scholars' arguments against the plausibility of multi-stakeholder obligation in firm governance. Taking the prospect of employee representation as his foil, Bainbridge goes after multi-fiduciarism with a logician's precision: "[F]or consensus to function . . . two conditions must be met: equivalent interests and information. Neither condition can be met when both employee and shareholder

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"shareholderism," or shareholder democracy, rather than the unnecessarily confusing "shareholder primacy." This Article rejects shareholder primacy as a goal and argues that a multi-stakeholder regime can be empowered through director primacy in firm governance.

173. *Id.* at 228.

174. Other than solving dual class dilemmas in favor of "common stock" interests, the Delaware courts have ducked the other conflicts between shareholders, though at times it has been heard to mumble about the obligation to pursue "the long-run interests of the shareholders." Katz v. Oak Indus., 508 A.2d 873, 879 (Del. Ch. 1986). Courts do not appear to be serious about the "long-term" proposition, citing the board's discretion about when to pay dividends as the essence of the directors' exclusive prerogatives, for example. *See, e.g.*, Kamin v. Am. Express, 383 N.Y.S.2d 807, 810–12 (Sup. Ct.) (providing touchstone statement of the broad protections provided to the board of directors under the business judgment rule), *aff'd*, 387 N.Y.S.2d 993 (App. Div. 1976). *See generally* Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75 (2004) (cataloging conflicts faced by directors and analyzing court treatment of conflicts between the duty of loyalty and the duty of care across stakeholders and finding the loyalty obligations are privileged in such conflicts).

175. BAINBRIDGE, *supra* note 3, at 37–44, 53–57.

representatives are on the board."[176] But this argument contradicts his initial claim that the board is necessary because shareholders *do not* have "equivalent interests"—some are seeking long-term gains, others short-term gains, some are diversified, others are not. Bainbridge never doubts that directors, freed from the narrow interests of specific groups of shareholders, will be able to balance their interests in the boardroom.[177] This is the same dynamic that would be realized under a multi-stakeholder system. It turns out that a person, or a board, may serve more than one master, as long as the masters cannot second guess or meddle in the servant's decision. Thus does the strength of Bainbridge's director primacy position undermine his opposition to multi-fiduciarism in board governance.

This argument illustrates both that board independence makes multi-fiduciarism possible, and that board independence is necessary in order for multi-fiduciarism to work. Progressive scholars have tended to advocate greater stakeholder involvement in corporate governance, but the present analysis emphasizes that it is director primacy that makes multi-fiduciarism possible.[178]

Finally, it is not true, as shareholder primacists claim, that a multi-stakeholder regime necessarily frees the director to pursue her own interests at the corporate expense. As Bainbridge and others make clear, capital, labor, and product markets; duty of loyalty claims;[179] and norms, ethics, and values all operate to constrain directorial self-interest.[180] Indeed, Bainbridge is so committed to director primacy that he insists that directors must have broad authority even to develop "poison pills" and other structural defenses that can repel hostile takeovers.[181] Many legal economists believe that a robust market for control is necessary to keep directors working hard and honestly for fear that some corporate raider will see that there is money to be made by acquiring under-performing firms and replacing malingering directors.[182] Bainbridge fears that forbidding

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176. *Id.* at 46; *see id.* at 47–49.

177. *See id.* at 82–104.

178. *See generally* PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) (collecting seminal stakeholderist scholarship).

179. The business judgment rule precludes judicial review of the prudence of ordinary business decisions, but where self-interest is implicated, directors bear the burden of proving to a jurist that a challenged transaction was entirely fair to the firm. *See* Bayer v. Beran, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944) (providing classic statement of the analytic framework applicable to duty of loyalty claims).

180. BAINBRIDGE, *supra* note 3, at 100–04, 160–75.

181. *Id.* at 134–54.

182. *See generally, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981)

directors from developing structural defenses invites a crack in the armor of director primacy that will only result in harmful second-guessing of more and more decision-making by incompetent judges and shareholders.[183] The Delaware courts are largely in accord with Bainbridge, as directors are indeed given substantial latitude even when erecting defenses to hostile takeovers.[184] This leaves the market for control relatively limp and puts ever greater reliance on the power of ethics, norms, and honor to keep directors working hard and honest. If these mechanisms are sufficient to keep directors honest under shareholder primacy, then they should be equally sufficient to keep them honest under a stakeholderist regime.[185]

(emphasizing the disciplining power that a robust market for control exerts on incumbent management teams and arguing that allowing incumbent boards to erect structural defenses to hostile takeovers undermines such disciplining power).

183. For example, suppose directors of a firm rich with real assets started selling off those assets and paying high dividends to shareholders. To some this might seem like an ordinary business decision, protected from scrutiny by the business judgment rule. Others, however, might interpret such a move as a kind of a "structural defense" designed to make the firm look less attractive to raiders. If courts or shareholders were empowered to review such decisions on the grounds that directors were obstructing the market for control, then virtually any decision by directors could be subject to review on such grounds, thus destroying the power of director primacy. *See* BAINBRIDGE, *supra* note 3, at 149–52.

184. *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154–55 (Del. 1994) (board may erect structural defenses to hostile tender offer that is not structurally coercive in order to vindicate incumbent board's long-term vision for the company); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (applying "enhanced business judgment" rule to defenses adopted by incumbent board and allowing board to adopt structural defense against structurally coercive hostile tender offer which offered shareholders substantial premium over market price); *see also* Leo E. Strine, Jr., *The Professional Bear Hug: The ESB Proposal As a Conscious Effort to Make the Delaware Courts Confront the Basic "Just Say No" Question*, 55 STAN. L. REV. 863, 864 (2002) (arguing that on the question of structural defenses, Delaware "has displayed a studied ambivalence . . . recognizing the need for heightened scrutiny when boards use pills, but hesitating to override the judgment of independent directors to block acquisition offers").

185. One way corporate practice aligns shareholder and directorial incentives is to pay directors partly in salary and partly in the firm's stock, or to require them to purchase a substantial stake in the firm. BAINBRIDGE, *supra* note 3, at 167–70. Such practices have been correlated with better corporate performance. *Id.* at 170. This ties directors' interests both with those of workers and those of shareholders. A similar association could be accomplished by requiring corporate directors also to maintain some consumption stake in the firm. Another step in this direction would be to require directors either to live or to spend significant parts of the year living in a community in which the firm's operations have disproportionate impact.

3. The Limits of Submission: Consumer Participation in Firm Governance

Stakeholder voting has a limited role to play in corporate governance. "While notions of shareholder democracy permit powerful rhetoric, corporations are not New England town meetings. Put another way, we need not value corporate democracy simply because we value political democracy."[186] But neither must we entirely give up on democracy where the model of the New England town meeting would not work. In contemporary society, democratic values are realized in myriad ways more modern and manageable than the romantic or stylized idea of the town meeting. Because of the collective action problems that make it useful for activity to be organized through firms to begin with, it is certainly true that stakeholder voting must be, as Bainbridge argues with respect to shareholder suffrage, "not an integral aspect of the corporate decision-making structure, but rather an accountability device of last resort to be used sparingly, at best."[187] Similarly, board dominance in a multi-fiduciary regime does not necessarily mean that there should be no involvement by stakeholders in the selection of the board. Limited participation of multiple stakeholders in corporate elections may be needed to give teeth to the stakeholder governance regime, just as some limited voting by shareholders is presently needed to supply some accountability to the shareholder primacy norm.

The mechanics of extending corporate suffrage would be complicated, but not insurmountable. When shareholders buy stock they get a claim on residual profits and a vote proportionate to their equity stake in the firm. Employees presently receive in exchange for their labor a mix of salary, working conditions, and benefits. To these might be added a proportion of votes in corporate elections. When consumers turn over their cash to the firm they receive corporate goods with varying attributes, sometimes including warranties or ongoing service. The consumer might also gain with her purchase a quantum of voting rights in corporate operations. Many corporate consumers today have membership codes or identification numbers which track their purchases and calculate "miles" or "points" that can

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186. *Id.* at 143. Indeed, as Bainbridge describes, not entirely tongue-in-cheek, "[b]oard of director elections usually look a lot like old Soviet elections—there is only one slate of candidates and the authorities know how each voter voted." *Id.* at 180.

187. *Id.* at 235.

be exchanged for prizes or rebates.[188] The same technology could be deployed to tally the accumulation of voting rights with frequent purchases. These groups might elect their own directors—workers voting for worker directors, consumers for consumer directors, etc. But a better approach would undoubtedly be for each of the groups to elect directors who would then be obliged to serve all corporate stakeholders in unclassified fashion, as the unclassified form would seem better placed to exploit the authoritative latitude of the directory primacy model of firm governance.[189]

The fact that markets are international, but politics local, means that when contract is insufficient to safeguard work and consumer interests those groups must presently appeal to national or sub-national governments for redress of grievances relating to international corporate operations. Allowing these groups meaningful participation in corporate governance would provide important, perhaps the only, access that ordinary people have to actively participate in international politics.[190] International firms are already subject to international governance through shareholder suffrage, so adding workers and consumers into the mix would only alter the line-drawing among stakeholders where national political boundaries have already been breached.

CONCLUSION

In American history, corporations have, in their better uses, advanced both individual liberty and social organization. The colonial corporations of the seventeenth and eighteenth century provided a mechanism through which communities thrived in the New World, where individuals could never have made it alone.[191] In the nineteenth century, Jacksonians demanded the widespread availability of the corporate form in order to crush monopoly and democratize

188. *See generally* Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, COMPETITION POL'Y INT'L, Autumn 2005, at 115 (summarizing widespread use of consumer loyalty programs in retail markets).

189. *See* Yosifon, *supra* note 2, at 302–12 (exploring the mechanics of expanding corporate voting).

190. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 599 (2004) (discussing Ann-Marie Slaughter's historical account claiming that the progenitors of international trade-liberalizing legislation initially expected the development of international political organs to help manage the new economic landscape that their reforms would bring forth).

191. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 17 (2003) (noting that Massachusetts and Virginia both came into being as chartered corporations).

economic opportunity and its attendant political advantage.[192] The twentieth century saw the expansion of corporate democracy through the development of robust and fluid capital markets and the emergence of institutional shareholders. The strength of these developments, even while advancing individual and collective well-being, have eclipsed other institutions traditionally devoted to safeguarding human flourishing, including families, communities, voluntary associations, and government.[193] Corporate law's task in the twenty-first century must be the expansion of corporate governance concerns and the corporate franchise to all corporate stakeholders who, after *Citizens United*, can no longer rely exclusively on external regulatory institutions to safeguard their interests, but must instead look to the corporation—an association in which, our best corporate theory informs us, they are already essential participants.

192. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 2 (1991) ("The modern business corporation had its origin in the general corporation acts [of the Jacksonian era], one of the most important legal accomplishments of a regime bent on democratizing and deregulating American business.").

193. *See* Hansmann & Kraakman, *supra* note 5, at 451–53 (reviewing expansion of equity holding class in the twentieth century).