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THE MODERN CORPORATION AND CAMPAIGN FINANCE: INCORPORATING CORPORATE GOVERNANCE ANALYSIS INTO FIRST AMENDMENT JURISPRUDENCE

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The Business Leadership Trust [(BLT)] is geared towards those in the business community who enjoy smaller, more personal events with congressional leadership that are conducive to frank participation and discussion. The BLT meets quarterly for lunch with congressional leadership, are included in the annual NRCC [National Republican Congressional Committee] Superbowl event, have VIP Convention Benefits at the Republican National Convention of 2000 and are automatically enrolled as members in all other NRCC support groups.

Membership

Dues are $100,000 per year.[1]

I. INTRODUCTION

The U.S. Supreme Court treats campaign contributions as protected political speech under the First Amendment.[2] When business corporations rather than individuals make such contributions, should they be treated differently under the First Amendment?

While much of modern American law recognizes distinctions based on institutions and other real-world categories,[3] First Amendment doctrine has

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1. National Republican Congressional Committee, *NRCC Business Leadership Trust*, *at* http://www.nrcc.org/contribute/donor-programs/blt.htm (last visited Mar. 28, 2001). The NRCC website describes the Business Leadership Trust (BLT) as a "Corporate" program, as distinguished from the Committee's "Individual" programs. *See id.*

The similar "Team 2000" program of the Democratic Congressional Campaign Committee (DCCC) is "specifically designed to work with the leading Democratic supporters nationwide and strategically plan how we, as a party, achieve our goals." Bob Hohler, *Kennedy Compound Doors Open to $100,000 Democratic Donors*, BOSTON GLOBE, Apr. 6, 1999, at A3 (quoting brochure co-signed by Representatives Patrick Kennedy and Richard Gephardt). Team 2000 does not explicitly target business corporations, but its membership fee, like the BLT's, is $100,000. *Id.* Members are invited to a weekend retreat at the Kennedy's family compound in Hyannisport, Massachusetts. *Id.* The Democratic Party has also created a "Platinum Circle" for $500,000 contributors, while the Republican National Committee introduced a $250,000 "Republican Regents" group. *See* John Kruger, *Mega-Donors Get Mega-Perks in Funding War,* THE HILL, May 10, 2000, at 10.

2. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976).

3. Frederick Schauer cites, for example, the fracturing of monolithic "contract law" into specialized bodies of doctrine for contracts involving insurance, securities, and, it might be added, sales and intellectual property. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 199 (1998). Professor Schauer identifies Karl Llewellyn as a proponent of this view. *See id.* (citing KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 302-40 (1985) (explaining Llewellyn's approach to the Uniform Commercial Code)).

stubbornly refused to do so.[4] Anglo-American jurisprudence has traditionally assumed that judicial decision making should be based on judicial categories (that is, legal concepts) rather than prelegal, empirical categories (that is, practical, real-world concepts).[5] This tendency is especially pronounced in First Amendment jurisprudence. As Frederick Schauer has argued, "American free speech doctrine has never been comfortable distinguishing among institutions. Throughout its history, the doctrine has been persistently reluctant to develop its principles in an institution-specific manner, and . . . to take account of the cultural, political, and economic differences among the differentiated institutions that together comprise a society."[6]

The Supreme Court has displayed this tendency by failing to consider the institutional peculiarities of business corporations when applying constitutional law to them. The Court has pursued the opposite extremes of awarding corporations rights as if they were human beings and insisting that the state has power to regulate corporations by fiat. The former approach completely ignores the institutional nature of corporations. The latter assigns too much importance to the legal category of "corporation" without explaining why the legal distinction should make a constitutional difference. In pursuing each of these approaches, the Court has relied on outdated, metaphysical concepts of the corporation and has failed to consider the ways in which corporations actually operate as organizations. Using the example of campaign finance jurisprudence, this Article argues that courts applying constitutional law to publicly traded business corporations should take into account the effects of the corporate governance regime on the corporate decision making process.

Federal law and many state laws regulate corporations' election-related spending more closely than that of individuals.[7] Federal law currently prohibits business corporations from contributing directly to federal candidates.[8] The loophole known as "soft money," however, has enabled

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4. The most pointed example of this tendency is the Supreme Court's consistent refusal to recognize a doctrine of freedom of the press distinct from freedom of speech, despite the existence of the First Amendment's Press Clause. *See* Schauer, *supra* note 3, at 84.

5. *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 376 (1997); Schauer, *supra* note 3, at 84, 108. *But see* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 475 (1897) ("If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.").

6. Schauer, *supra* note 3, at 84. *See also* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735 (1995) (arguing that the Court's jurisprudence regarding individual speech does not apply to the speech of "institutions" that is not attributable to individuals).

7. *See infra* Part II.

8. *See infra* Part II.B.1.

corporations to evade this restriction.[9] As this Article goes to press in April, 2001, the U.S. Senate has passed a bill that would further affect corporate spending in federal elections in two significant ways. Senate Bill 27, popularly known as the McCain-Feingold bill, would ban soft money.[10] In addition, it would prohibit corporations from purchasing certain kinds of advertisements immediately before an election.[11] If the bill becomes law, it will almost certainly be challenged in court on constitutional grounds.[12]

This Article argues that the First Amendment analysis of corporate campaign finance regulations, such as those in Senate Bill 27, should recognize the institutional peculiarities of business corporations. Courts have sometimes treated business corporations as if they were identical to individuals for constitutional purposes. But political spending by corporations should be distinguished from the political spending of individuals (and from that by labor unions and nonprofit organizations). Despite the tendency to treat corporations like individuals, courts have at other times upheld special restrictions on corporations based on the naked assertion that states have special power to regulate corporations. The First Amendment analysis of corporate campaign finance regulation should be firmly grounded on corporate institutional characteristics and avoid the tendency toward conclusory reasoning.

Although the Supreme Court has been suspicious of legal restrictions on election-related spending by individuals,[13] it has upheld some such restrictions on corporations[14] and struck down others.[15] The Court's reasons for distinguishing corporate expenditures from individual expenditures in the latter cases, however, are murky and inconsistent. The Court has failed to present a coherent theoretical foundation for the distinction. Given the uncertain basis for the distinction, any legislative attempts to restrict corporate expenditures or indirect contributions are almost certain to face First Amendment challenges. This Article argues that reduced constitutional

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9. *See id.*

10. S.27, 107th Cong. § 101 (2001). For the vote on the bill, passed April 2, 2001, see U.S. Senate, *U.S. Senate*, *at* http://www.senate.gov/legislative/vote1071/vote_00064.html (last visited May 5, 2001).

11. S.27 § 203.

12. Even before the bill passed the Senate, Senator Mitch McConnell (R-Ky.), an ardent foe of campaign finance restrictions, announced his intent to mount a legal challenge. *See* Charles Lane, *A Legal Battle on the Horizon: Court Challenge is Likely if Campaign Bill Becomes Law*, WASH. POST, Apr. 3, 2001, at A4.

13. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 48-50 (1976).

14. *See, e.g.*, Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 667-69 (1990).

15. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 265 (1986); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978).

protection of election-related spending by publicly traded business corporations is both justifiable and desirable. Corporate election-related spending is not an exercise of individual expressive rights because business corporations have special characteristics that are shaped by the law of corporate governance. This legal regime seeks to maximize business efficiency by concentrating corporate decision-making authority in management. Because corporate election-related spending decisions are not made in consultation with a corporation's shareholders or other constituents, such spending does not constitute individual expression. Thus it does not deserve the same First Amendment protection enjoyed by individual political spending.[16]

This Article is composed of eight Parts. Part II describes the extent of permissible corporate election-related spending under current campaign finance law. Despite a nominal prohibition on corporate spending in connection with federal election campaigns, business corporations have many legal methods of financial participation in federal, state, and local elections. Part III summarizes Supreme Court case law on the constitutionality of regulating corporate election-related spending under the First Amendment. The Court has declared that election-related spending by individuals is protected under the First Amendment, although some state regulation of election-related spending may be justified by the need to combat political corruption.[17] Part IV argues that the Court has justified both its proregulatory and antiregulatory decisions with the unconvincing, conclusory logic of various traditional theories of the corporation. Part V argues that the Court should abandon these hoary models. Instead, the Court should integrate into its First Amendment campaign finance jurisprudence a

16. This Article is about the types of spending described in Part II, particularly contributions to federal candidates and to national political parties, as well as independent expenditures (such as issue ads) designed to influence voting in elections. Some might argue that allowing regulation of corporate election-related spending may lead down the slippery slope to state censorship of editorializing by media enterprises that do business in the corporate form. However, such corporations can be distinguished because their shareholders, compared to those of most other corporations, can be more accurately described as having authorized the use of corporate resources for political speech. Editorializing is the very business of the media. Shareholders in media corporations are aware of this fact. Detailed discussion of this issue is beyond the scope of the current Article, but other commentators have explored it. *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 290-92 (1981); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free,* 83 IOWA L. REV. 995, 1057-64 (1998). *But see* Schauer, *supra* note 3, at 84 (noting the Supreme Court's unwillingness to distinguish "freedom of the press" from "freedom of speech").

17. *See Austin,* 494 U.S. at 658-60. As noted in Part I, the Court has sometimes suggested that corporate election-related spending is entitled to the same First Amendment protection as individual spending, and has sometimes held that it is not.

modern view of publicly traded business corporations as complex institutions made up of rival constituents and shaped by legal and economic forces. Part VI explains the complex realities of corporate governance and how these realities affect corporate decision making about election-related spending. Under the existing corporate governance regime, large business corporations are not—nor are they intended to be—instruments of individual expression. Part VII suggests ways in which the Court should integrate insights about corporate governance into its First Amendment campaign finance jurisprudence.

II. STATE AND FEDERAL REGULATION OF CORPORATIONS' ELECTION-RELATED SPENDING

As a preliminary matter, it will be helpful to introduce two terms of campaign finance jargon, "contributions" and "expenditures". The Supreme Court's election law jurisprudence defines them as mutually exclusive categories. In the Court's typology, a source of money makes a "contribution" to a candidate's campaign when it gives money or some other thing of value over to the control of the candidate, who decides how it is spent or used.[18] In contrast, a source makes an "expenditure" when the source itself determines and controls how the money is spent.[19]

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18. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("[T]he transformation of contributions into political debate involves speech by someone other than the contributor."). The Federal Election Campaign Act (FECA) uses the terms "contributions" and "expenditures" differently, though the precise difference between judicial and legislative definitions is not entirely clear because the definitions overlap considerably. Except where otherwise indicated, this Article will follow the Court's definitions of these terms. To refer collectively to expenditures and contributions, this Article will, for want of a more elegant phrase, use the term "election-related spending." In FECA, both categories include any "loan", "advance", "deposit", or "gift". 2 U.S.C. §§ 431(8)(A)(i), (9)(A)(i) (2000). "Expenditure" further includes any "purchase," "payment," or "distribution," as well as a written agreement to make an expenditure. *Id.* § 431(9)(A)(ii). The definition of "contribution" also includes "subscriptions", which are not mentioned in the definition of "expenditures", though this is not a significant difference. *Id.* § 431(8)(A)(I) (defining the term "contribution"). Thus "contribution" seems to refer to money given to a campaign, while "expenditure" appears to include any use of money to influence an election, including but not limited to "contributions".

FECA originally placed limits on all election-related expenditures from all sources. *See* 2 U.S.C. § 608(C) (1976), *reprinted in Buckley*, 424 U.S. at 190-93 (appendix). In *Buckley*, however, the Supreme Court invalidated the Act's limits on expenditures (in the narrow sense) as applied to individuals and political committees. 424 U.S. at 45. The Court held that such entities have the right to make expenditures in unlimited amounts as long as those expenditures are "independent" of the candidate's campaign. *Id.* at 45-48. *Buckley* did not involve spending by business corporations.

19. *See Buckley,* 424 U.S. at 19-20. Expenditures so defined are dominated by political action committees (PACs), described *infra* at Part II.B.2. The Federal Election Commission (FEC) requires reporting of expenditures. *See* 2 U.S.C. § 431. PACs are responsible for over ninety-five percent of reported expenditures. *See* Frank J. Sorauf, *Political Action Committees: Introduction*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK 123, 126 (Anthony Corrado et al. eds., 1997).

Federal law has prohibited corporate contributions to federal election campaigns since 1907, when Congress passed the Tillman Act[20] in response to the controversy generated by corporate contributions to Theodore Roosevelt's 1904 presidential election campaign.[21] Currently, the Federal Election Campaign Act (FECA) prohibits contributions as well as expenditures "in connection with" any election for federal office from national banks, state or federally chartered corporations, or labor organizations.[22] At first glance, FECA may seem to shut corporations out of campaign finance entirely. However, corporations have many legal methods of indirect financial participation in federal elections. Moreover, FECA places no restrictions on corporations' participation in state elections.

A. State Elections

FECA prohibits corporate contributions and expenditures in connection with federal elections only. A slight majority of states, however, permit election-related spending by corporations.[23] Some of these states impose no

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20. Act of January 26, 1907, Pub. L. No. 36, 34 Stat. 864, 864-65, which stated:

> That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

Id.

21. *See* Adam Winkler, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1246 (1999).

22. 2 U.S.C. § 441b(a) (1997). National banks and federally chartered corporations are further prohibited from making contributions or expenditures in connection with any election for political office, primary, convention, or caucus. *See id.* § 441b(a). Other than national banks, business corporations are predominantly state-chartered. Federally-chartered corporations are beyond the scope of this Article, which will use the term "corporation" to refer to state-chartered corporations.

In addition to corporations, national banks, and unions, the Act prohibits contributions and expenditures from federal contractors, 2 U.S.C. § 441c (1997), foreign governments, political parties, corporations, and individual foreign nationals (other than permanent U.S. residents). *Id.* § 441e. To prevent prohibited sources from making surreptitious contributions through permitted sources, the Act further prohibits contributions from any source that are contributed in the name of a person other than the actual source. *Id.* § 441f.

The Supreme Court has carved out an exception to the corporate prohibition with respect to ideologically based nonprofit corporations. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 661-65 (1990) (clarifying limits on the scope of the exception); FEC v. Mass. Citizens for Life, 479 U.S. 238, 258-64 (1986).

23. *See* EDWARD D. FEIGENBAUM & JAMES A. PALMER, CAMPAIGN FINANCE LAW 2000: A SUMMARY OF STATE CAMPAIGN FINANCE LAWS WITH QUICK REFERENCE CHARTS, chart 2-A (2000), *available at* http://www.fec.gov/pages/cflaw2000.htm and http://www.fec.gov/pages/cfl00chart2A.htm (last visited Mar. 6, 2001).

ceilings on such spending.[24] In addition to candidate elections, many states hold elections on policy issues. For example, twenty-four states and the District of Columbia use the initiative process, in which votes are cast on voter-proposed legislation.[25] These states permit corporations to make expenditures related to initiative campaigns.[26] Thus, corporate contributions and expenditures are potentially very important in these states.

State corporations codes do not specifically restrict corporate election-related spending. Delaware law, for example, empowers corporations to "make donations for the public welfare or for charitable, scientific, or educational purposes,"[27] which may be interpreted to permit political spending. The Model Business Corporations Act (MBCA) includes identical language in section 3.02(13).[28] MBCA section 3.02(15) further empowers corporations "to make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation."[29] The Official Comment to MBCA section 3.02(15) states: "This clause, which is in addition to and independent of the power to make charitable and similar donations under section 3.02(13), permits contributions for purposes that may not be charitable, such as for political purposes *or to influence elections*."[30]

24. *See id.* As of December 31, 1999, Illinois, Missouri, New Mexico, Oregon, and Virginia had no ceilings on corporate election-related spending. *See id.* Utah restricted only contributions by insurance corporations. *See id.* Until recently, California allowed unlimited corporate contributions except in rare "special elections" held to fill offices vacated between regular elections. In November, 2000, California voters approved Proposition 34, which imposed ceilings on contributions to candidate elections by all "persons", including corporations. Under Proposition 34, contributions to candidates for the legislature are capped at $3,000, while contributions to candidates for governor are capped at a generous $20,000. *See* CAL. GOV'T CODE § 85301 (West 2000); *see also* California Fair Political Practices Commission (FPPC), *Proposition 34: Changes to California Campaign Finance Law*, *available at* http://www.fppc.ca.gov/News/prop34chart.htm (Nov. 2000).

25. *See* PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE 27-28 (2000). In some cases, voters may also vote on other kinds of policy questions, such as the approval of legislation passed by the legislature, or on state constitutional amendments. *See id.* at 7. The term "referendum" is sometimes used to refer generically to all types of public votes on policy issues. *See id.*

26. *See id.* at 191.

27. DEL. CODE ANN. tit. 8, § 122(9) (1999).

28. MODEL BUS. CORP. ACT § 3.02(13) (rev. ed. 1999).

29. *Id.* § 3.02(15) (1999). More than 20 states have enacted MBCA sections 3.02(13) and (15) or similar provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-302 (West 2000); COLO. REV. STAT. ANN. § 7-103-102 (West 2000); FLA. STAT. ANN. § 607.0302 (West 2000); GA. CODE ANN. § 14-2-302 (2000); IND. CODE ANN. § 23-1-22-2 (West 2000). This broad grant of power may be narrowed by the state's campaign finance laws. *See* FEIGENBAUM & PALMER, *supra* note 23 (summarizing state laws).

30. MODEL BUS. CORP. ACT § 3.02(15) off. cmt. (emphasis added). Of the states that have incorporated §§ 3.02(13) and (15) into their corporations codes, Idaho, North Carolina, and South Carolina also append to their relevant code sections the quoted language from the Official Comment. IDAHO CODE § 30-1-302 (Michie 2000); N.C. GEN. STAT. § 55-3-02 (1990); S.C. CODE ANN. § 33-3-102 (Law. Co-op. 1990). The "Code Revision Committee Comment" to the Colorado code includes

Some non-MBCA states also have statutory language which, if broadly construed, might be interpreted to authorize political contributions or expenditures. For example, California, Louisiana, Maryland, Minnesota, Missouri, New York, and North Dakota authorize corporate donations for "civic purposes."[31] Several states specifically authorize donations that do not benefit the corporation.[32] In addition, the Massachusetts Corporations Code does not, by itself, give corporations the power to make political contributions. Instead, it allows a corporation to authorize directors or officers to do so by articles, by-laws, or by a vote of stockholders.[33]

B. Federal Elections

Corporate funding plays an important role in federal elections as well as state elections, FECA notwithstanding. The primary mechanisms for corporate involvement in federal elections are "soft money" and political action committees (PACs).

1. Soft Money

The Federal Election Commission (FEC), which administers FECA, has taken a permissive stance toward the role of so-called "soft money" in federal elections. "Soft money" refers to political party funds made up of contributions that do not conform to the "hard" rules of FECA, including contributions from corporations.[34] The regulation of soft money is the centerpiece of the current campaign finance reform movement.[35] In 1999-2000, the two major political parties raised nearly $500 million in soft

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the quoted language but omits the italicized clause. COLO. REV. STAT. § 7-103-102 (West 2000).

31. CAL. CORP. CODE § 207(e) (West Supp. 1990); LA. REV. STAT. ANN. § 12:41 (West 1969): MD. CODE ANN., CORPS. & ASSN'S § 2-103(13)(ii) (1985); MINN. STAT. § 302A.161(11) (West 1985); MO. REV. STAT. § 351.385(15) (West 1990); N.Y. BUS. CORP. LAW § 202(12) (McKinney 1986): N.D. CENT. CODE § 10-19.1-26(11) (1985).

32. *See, e.g.*, CAL. CORP. CODE § 207(e) (West 2000); MINN. STAT. ANN. § 302A.161 (West 2000); N.Y. BUS. CORP. LAW § 202 (McKinney 2000).

33. MASS. GEN. L. ANN. ch. 155, § 12C (West 2000).

34. "Soft money" also includes union contributions and individual contributions in excess of FECA limits. Using FEC data, the Center for Responsive Politics identified 1,008 organizations that made soft money contributions of $100,000 or more in 1999-2000. This includes contributions by individuals affiliated with the organizations, but the website also breaks down "organization" totals into organization and individual contributions. *See* Center for Responsive Politics Website, *List of Top Soft Money Donors*, *available at* http://www.opensecrets.org/parties (last visited Apr. 30, 2001). Although unions are prominent among the largest contributors, businesses, many if not most of which appear to be corporations, dominate the list. *See id.*

35. *See* S. 27, 107th Cong. (2001).

money.[36] The Republican Party raised 74% more than in the previous presidential election cycle, and the Democrats raised 85% more.[37] FECA regulations require political parties to maintain separate "federal" accounts that may not contain soft money.[38] Soft money is thus sometimes referred to as "nonfederal" money.[39] In theory, political parties may use only federal money in connection with federal elections. In reality, however, soft money plays an important role in federal elections.

Despite FECA's nominal ban on corporate contributions in connection with federal elections, FECA regulations allow parties to use soft money to pay part of the costs of activities characterized as benefiting *both* federal and nonfederal candidates.[40] As a result, even party committees clearly intended for the benefit of federal candidates, such as the Democratic Congressional Campaign Committee and the National Republican Congressional Committee, openly solicit corporate soft money contributions.[41]

Soft money originated as an exception that has grown to swallow much of the rule against corporate contributions to federal campaigns. Following the 1976 presidential election, leaders of both parties complained that FECA restrictions had curtailed "party-building" activities and had thus reduced the role of party organizations in the election.[42] In response, Congress amended FECA in 1979 to allow political parties to expend unlimited amounts for such party-building activities as voter identification and registration, voter turnout, and certain campaign materials, as long as the money was raised in accordance with FECA guidelines.[43]

As Congress lifted restrictions on party spending, the FEC carved out exceptions to FECA that allowed the parties to use nonfederal funds for an increased range of activities. In 1976, the FEC stated that parties may use nonfederal funds to finance a portion of their administrative and overhead

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36. *See* News Release, Federal Election Commission, Party Fundraising Escalates, *available at* http://www.fec.gov/press/pty00text.htm (Nov. 3, 2000).

37. *Id*.

38. *See* 11 C.F.R. § 102.5 (2000).

39. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17.

40. *See* Note*, Soft Money; The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1326-27 (1998) (citing 11 C.F.R. § 106.5(b)(1) (1999)). National party committees must pay for sixty-five percent of such costs with hard money in presidential election years, and sixty percent in nonpresidential election years. 11 C.F.R. § 106.5(b)(2) (1999). The parties can meet the remaining thirty-five or forty percent of the costs with soft money.

41. *See, e.g.*, Susan B. Glasser, *Democrats' Fast Track is 'Soft Money'*, WASH. POST, Oct. 17, 1999, at A1.

42. *See* Anthony Corrado, *Party Soft Money: Introduction, in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 19, at 167, 170.

43. *Id*. at 170-71.

costs.[44] Because such spending benefited both federal and nonfederal candidates, the FEC allowed parties to allocate the costs between federal and nonfederal funds according to the number of state and federal candidates in that year's elections.[45]

In the same opinion, the Commission prohibited the use of nonfederal funds to pay for a portion of voter registration drives and other election-related activities that would benefit both federal and nonfederal candidates.[46] Just two years later, however, the FEC reversed itself and extended the allocation logic to a state party's voter drive.[47] Although this 1978 opinion referred to a state party's use of nonfederal funds, the allocation rule applied to national parties as well. Thus, national party organizations were soon raising large amounts of nonfederal funds.[48] The FEC's approval of the use of nonfederal funds, combined with Congress's removal of restrictions on party-building expenditures, restored political clout to corporations, unions, and other funding sources prohibited from making direct contributions or expenditures.

FECA did not clarify the boundaries of soft money's permissible uses until new regulations took effect in 1991.[49] Although these regulations imposed some restrictions, they placed no ceilings on the raising or spending of soft money. In addition, they codified the FECA advisory opinions permitting the use of nonfederal funds to pay for a portion of expenses that benefit federal candidates.[50] Thus the new rules, which gave the parties "a

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44. FEC Advisory Op. 1976-72, *reprinted in* CAMPAIGN FINANCE REFORM, *supra* note 19, at 187.

45. *Id.* The FEC gave greater weight to federal candidates; thus, although only fifteen percent were federal candidates, the FEC required the party to allocate one-third of its administrative expenses to federal funds. *See id.*

46. *See id.*

47. *See* Allocation of Costs for Voter Registration, FEC Advisory Op. 1978-10, [1976-1990 Transfer Binder] Fed. Election Campaign Fin. Guide (CCH) ¶ 5340 (Aug. 29, 1978). The Commission rejected a dissenting commissioner's argument that the use of nonfederal funds, which may include corporate and union contributions, violates the Act's ban on the use of corporate and union funds "in connection with" a federal election. *See id.* (Comm'r Thomas E. Harris, dissenting) Commissioner Harris pointed out acidly that one of the commissioners voting in favor of Advisory Opinion 1978-10 was the author of the contrary 1976 opinion. *See id.*

As a general matter, the impact of FEC advisory opinions in the absence of judicial or legislative pronouncements raises some thorny questions about administrative competency. *Cf.* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998) (raising similar questions about the influence of SEC no-action letters).

48. *See* Corrado, *supra* note 42, at 172-73.

49. A federal court ordered the FEC to promulgate these regulations in response to a lawsuit by Common Cause, a group which advocates for campaign finance reform. *See* Common Cause v. FEC, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

50. *See id.*

clearer sense of how to spend soft money legally," appear to have contributed to significant increases in the use of soft money.[51]

The role of corporate money in federal elections grew even larger when the parties began to make extensive use of soft money to finance advertisements in support of their candidates. The Supreme Court has held that Congress may regulate political expenditures on advertising only if they "in express terms advocate the election or defeat of a clearly identified candidate."[52] Courts have tended to define this concept of "express advocacy" very narrowly.[53] Thus the question arose whether FECA prohibited the use of soft money on advertisements designed to support or attack candidates by focusing on issues without "expressly advocating" a candidate's election or defeat. In 1995, the FEC permitted the Republican National Committee to use soft money to pay for portions of the cost of issue ads.[54] These advertisements urged support for GOP positions on federal legislative issues and criticized President Clinton but did not "expressly advocate" the election or defeat of any particular federal candidate. The issue ad concept was stretched to (and indeed beyond) its logical limit during the 1996 and 2000 elections. Both parties used soft money to pay a portion[55] of the costs of ads that included the names, faces, and even biographies of the presidential candidates but that were carefully crafted to narrowly avoid "expressly advocating" the election or defeat of a particular candidate.[56]

2. Corporate PACs

In addition to contributing to parties, a corporation may establish a "separate segregated fund" out of which it can make its own direct

51. Corrado, *supra* note 42, at 175.

52. Buckley v. Valeo, 424 U.S. 1, 44 (1976).

53. The *Buckley* Court stated that "express words of advocacy" include "vote for," "elect", "support", "cast your ballot for," "Smith for Congress," "vote against," "defeat", and "reject". *Id*. at 44 n.52. Most lower courts have held that election-related advocacy may be regulated only if it includes the "magic words" listed in *Buckley*. *See* Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1754-59 (1999) (citing cases).

54. The FEC stated that such ads qualified as either "administrative expenses" or "costs of generic voter drives," of which forty percent can be paid for with nonfederal money in a nonpresidential election year under 11 C.F.R. § 106.5(b)(2)(ii) (1999). *See* Costs of Advertising to Influence Congressional Legislation Allocated to both Federal and Nonfederal Funds, FEC Advisory Op. 1995-25, Fed. Election Campaign Fin. Guide (CCH) ¶ 6,162 (Aug. 24, 1995).

55. Assuming the ads were indeed a legal use of soft money, the permissible portion would have been thirty-five percent of the total cost. *See* 11 C.F.R. § 106.5(b)(2)(i) (2000).

56. *See* Corrado, *supra* note 42, at 175 (regarding ads in the 1996 elections); 147 CONG. REC. 2705 (2001) (regarding ads in the 2000 election). Following the 1996 election, both campaigns, and even Senator Bob Dole himself, openly admitted the obvious—that the issue ads were intended for electioneering purposes. *See* Note, *supra* note 40, at 1333-36.

contributions to and expenditures on behalf of federal candidates.[57] Such a fund is commonly known as a corporate political action committee (PAC).[58] A separate segregated fund may contain only voluntary contributions specifically intended to support the fund's political purpose.[59] The corporation may not contribute to its PAC, nor may the corporation or the PAC solicit contributions from the general public.[60] The corporation may solicit voluntary contributions from the corporation's stockholders, management, and administration, which together are known as the corporation's "restricted class."[61] Twice a year, the corporation may solicit contributions from employees outside the restricted class, as well as from their families.[62]

Although a corporate PAC is funded by voluntary contributions and not from corporate assets or revenues, it is not financially independent of the corporation. FECA specifically permits corporations to use corporate funds outside of the separate segregated fund to establish the PAC, to pay for its administration, and to solicit contributions from the restricted class.[63] In this way, FECA very clearly allows the use of corporate property to support federal election campaigns. Furthermore, PACs use corporate property primarily to further the views of managers; PACs solicit contributions

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57. *See* 2 U.S.C. § 441b(b)(2)(C) (1997).

58. "PAC" is not a technical term and appears nowhere in FECA. Corporate PACs disbursed a total of $106,221,041 in 1999-2000, of which $60,871,011 were contributions to candidates. *See* Federal Election Committee, Summary of PAC Activity, *available at* http://www.fec.gov/press/pachist1800.htm (last visited Apr. 11, 2001). This Article discusses only corporate PACs; some PACs are genuine stand-alone political organizations and not the segregated funds of any parent corporation or other organization.

Although corporate PACs are permitted to contribute only $5,000 to any one federal candidate, 2 U.S.C. § 441a(a)(2)(A); 11 C.F.R. § 110.2(b) (2000), they can easily evade this limit by means of "PAC bundling." A PAC engages in "bundling" by soliciting from individual members contributions made out directly to the candidate, which the PAC then presents to the candidate. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126, 1140-41 (1994). The "bundled" contributions are technically made by the individual contributor and not by the PAC itself; thus, the aggregate amount of bundled contributions is not restricted by the $5,000 limit. "The PAC, however, gets the credit—and the influence that flows from it—for giving the total amount of bundled contributions to the candidate." *Id.* at 1141.

59. *See* 11 C.F.R. § 114.5(a). The Supreme Court refers to corporate property other than the segregated fund as the corporate "treasury" or "general treasury," terms not used in FECA or in corporations law. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 656 (1990); Mass. Citizens for Life v. FEC, 479 U.S. 238, 241 (1986).

60. 11 C.F.R. §§ 114.5(b),(g)(1).

61. 11 C.F.R. § 114.1(j). Ostensibly, voluntary contributions may not always be truly voluntary if a corporation's board solicits contributions from officers or other employees. If employees contribute on the tacit understanding that their contributions are a condition of employment, then the corporation is, in effect, making contributions to the PAC in the guise of employee compensation.

62. 11 C.F.R. § 114.6(a).

63. 2 U.S.C. § 441b(b)(2)(C) (2000); 11 C.F.R. §§ 114.1(b), 114.5(b).

primarily from managers and thus need not represent the views of shareholders or lower-level employees.[64] PAC administrative costs are by no means nominal. Such costs often exceed the amount of the PAC's actual contributions to candidates.[65] Furthermore, the corporation's management may control the PAC's management, appoint its officers, and direct the raising and spending of its funds.[66]

3. *Internal Communications and Issue Advocacy*

In addition to allowing corporate spending for the administration and solicitation of PAC funds, FECA permits two types of direct corporate spending in connection with federal elections. First, a corporation may use general corporate property above and beyond the separate segregated fund to pay for any political communications to members of its restricted class, including express partisan advocacy.[67] Second, as noted above in connection with soft money, FECA's ban on corporate expenditures applies only to "express advocacy." Thus corporations may use general corporate property to pay for issue advocacy in connection with an election for federal office as long as it does not "expressly advocate" the victory or defeat of a particular candidate.[68] As discussed above,[69] the link between express candidate advocacy and issue advocacy is a fine one.

4. *Charitable Contributions and Conduits*

FECA notwithstanding, corporations can indirectly support federal campaigns by donating to educational organizations. The corporations codes of most states as well as the District of Columbia specifically authorize corporations to make donations to charitable and educational organizations.[70]

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64. *See* Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 126-27 (1992).

65. *See* DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS 591 (1995).

66. 11 C.F.R. § 114.5(d).

67. *Id.* § 114.3(a). *See* Trevor Potter, *Where are We Now? The Current State of Campaign Finance Law*, *in* CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 19, at 11. Specifically, a corporation may direct such communications to its "restricted class," defined in the regulations as "its stockholders, executive and administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments, and their families." 11 C.F.R. § 114.1(j).

68. *See* Faucher v. FEC, 928 F.2d 468, 471-72 (1st Cir. 1991) (holding that FECA applies only to express candidate advocacy); FEC v. Nat'l Org. of Women, 713 F. Supp. 428, 433-35 (D.D.C. 1989) (holding that FEC prohibitions on corporate expenditures apply only to materials that explicitly recommend voting for or against a specific candidate).

69. *See supra* Part II.B.1.

70. *See, e.g.*, DEL. CODE. ANN. tit. 8, § 122(9) (2000) ("Every corporation created under this

However, groups considered educational for purposes of tax-exempt status include many whose primary purpose is to advocate for political issues, such as partisan "think tanks."[71] In extreme cases, tax-exempt educational organizations may be used as conduits to channel funds from donors to political candidates.[72]

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chapter shall have power to . . . Make donations for the public welfare or for charitable, scientific or educational purposes . . . ."). *See also* ALASKA STAT. § 10.06.010(13) (Michie 1989); ARIZ. REV. STAT. ANN. § 10-302(13) (West 1999); ARK. CODE ANN. § 4-25-103 (Michie 1987); CAL. CORP. CODE § 207(e) (West Supp. 1990); D.C. CODE ANN. § 29-304(13) (1981); FLA. STAT. ANN. § 607.0302 (West 2000); GA. CODE ANN. § 14-2-302(13) (1990); HAW. REV. STAT. § 415-4(13) (1985); IDAHO CODE § 30-1-302 (Michie 2000); 805 ILL. COMP. STAT. ANN. 5/3-10 (West 2000); IND. CODE ANN. § 23-1-22-2(13) (West 1989); IOWA CODE § 490.302(13) (1990); KAN. STAT. ANN. § 17-6102(9) (1988); KY. REV. STAT. ANN. § 271.A-020(13) (Banks-Baldwin 1989); LA. REV. STAT. ANN. § 12:41(B)(12) (West 1969); MD. CODE ANN., CORPS & ASS'NS § 2-103(13) (1985); MASS. GEN. LAWS ANN. ch. 155, § 12C (West 1970); MICH. COMP. LAWS ANN. 450 § 450.1261(k) (West 1990); MINN. STAT. ANN. § 302A.161(11) (West 1985); MISS. CODE ANN. § 79-1-3 (1989); MO. ANN. STAT. § 351.385(15) (West 1990); NEV. REV. STAT. § 78.070(6) (1989); N.H. REV. STAT. ANN. § 293-A:4 (1987); N.J. STAT. ANN. § 14A:3-4 (West Supp. 1990); N.M. STAT. ANN. § 53-11-4(M) (Michie 1989); N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 1986); N.C. GEN. STAT. § 55-3-02(a)(13) (1990); N.D. CENT. CODE § 10-19.1-26(11) (1985); OHIO REV. CODE ANN. § 1701.13(D) (Anderson 1989); OKLA. STAT. ANN. tit. 18, § 1016(9) (West 1986); OR. REV. STAT. § 60.077(n) (1989); PA. STAT. ANN. tit. 15, § 1502(9) (West 1990); R.I. GEN. LAWS § 7-1.1-4(13) (1985); S.C. CODE ANN. § 33-3-102(13) (Law. Co-op. 1990); S.D. CODIFIED LAWS § 47-2- 58(13) (Michie 1990); TENN. CODE ANN. § 48-13-102(13) (1988); TEX. BUS. CORP. ACT ANN. art. 2.02A(14) (Vernon 1990); UTAH CODE ANN. § 16-10-4(m) (Supp. 1990); VT. STAT. ANN. tit. 11, § 1852(13) (1984); VA. CODE ANN. § 13.1-627(12) (Michie 1989); WASH. REV. CODE ANN. § 23B.03.020(o) (West 1990); W. VA. CODE § 31-1-8(m) (1990); WIS. STAT. ANN. § 180.0302 (West 2000); WYO. STAT. ANN. § 17-16-302(a)(xiii) (Michie 1990). The source of this list is E.C. Lashbrooke, Jr., *Internal Revenue Code Section 170 and the Great Corporate Giveaway*, 22 PAC. L. J. 221, 222 n.2 (1991).

71. *See* Faith Stevelman Kahn, *Silence and Power in Corporate and Securities Law*, 41 N.Y.L. SCH. L. REV. 1107, 1140 & n.126 (1997).

72. *See generally* Frances R. Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 N.Y.L. SCH. L. REV. 881 (1997).

According to Frances Hill, such conduits may have tax-exempt status as "social welfare organizations" under I.R.C. § 501(c)(4) (this includes politically active groups like the Sierra Club and National Rifle Association) or as "trade associations" under I.R.C. § 501(c)(6) (such as the Chamber of Commerce in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)). *Id*. at 924-25. Even I.R.C. § 501(c)(3) charitable or educational organizations may indirectly channel funds to candidates, although they are prohibited from supporting or opposing candidates for office. *Id*. at 927. Professor Hill cites the famous example of the Abraham Lincoln Opportunity Fund, through which funds solicited by GOPAC and employees of Representative Newt Gingrich were channeled to support and disseminate a series of college lectures Representative Gingrich taught. *Id.* at 929-30.

The Christian Coalition enjoyed tax exempt status for many years while actively supporting Republican political candidates. *See* Sam Fulwood, III, *Christian Coalition Denied Tax-Exempt Status by IRS Agency*, L.A. TIMES, June 11, 1999, at A14. This activity ultimately led the IRS to revoke the Coalition's tax exempt status. *See id.*

III. SUPREME COURT CASE LAW ON THE REGULATION OF ELECTION-RELATED SPENDING

In *Buckley v. Valeo*, the Supreme Court first analyzed campaign spending under the First Amendment based on an individual spending paradigm.[73] Corporations subsequently relied on *Buckley* to bring First Amendment challenges to laws regulating corporate election-related spending.[74] The Court first suggested that corporations should be treated no differently from individuals[75] but retreated considerably from that position in later cases.[76] As this Part will show, the Court has not given clear or consistent justifications for these decisions regarding corporate election-related spending.

A. Buckley v. Valeo

As enacted, FECA set maximum limits on all contributions and expenditures in connection with federal elections. *Buckley* struck down FECA's limits on independent expenditures but upheld its ceilings on contributions.[77] According to the Court, any limits on individuals' election-related spending place burdens on constitutionally protected speech.[78] The Court found, however, that limits on contributions raise less serious First Amendment concerns than limits on expenditures.[79] A campaign contribution has limited expressive content because it does not reveal the contributor's reasons for supporting the candidate.[80] It merely symbolically expresses the fact that the contributor supports the candidate.[81] As long as an individual is allowed to make a contribution, this merely symbolic expressive purpose is achieved, regardless of the amount of money contributed. Thus, a limitation on individual contribution amounts imposes "only a marginal restriction" on political expression.[82] Moreover, a "sufficiently important" government interest—the prevention of corruption or the appearance of corruption that may undermine the integrity of and the public's faith in the political

73. 424 U.S. 1 (1976).
74. *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 769 (1978).
75. *See Bellotti*, 435 U.S. at 784-85, 791.
76. *See, e.g.*, *Austin*, 494 U.S. at 659-60; FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982).
77. *Buckley*, 425 U.S. at 58.
78. *Id*. at 19-22.
79. *See id.* at 20.
80. *Id*. at 20-21.
81. *Id*. at 21.
82. *Id*. at 20.

system—justifies this limited burden on speech.[83] Major contributors may command or be perceived as commanding political favors from elected officials as a quid pro quo for their financial support.[84]

In contrast, "because virtually every means of communicating ideas in today's mass society requires the expenditure of money," a limit on the amount of money an individual may independently spend to support a candidate constitutes a restriction on the amount of political expression.[85] Therefore, restrictions on expenditures constitute a heavier burden on political speech than restrictions on contributions.[86] Furthermore, because the spender, not the candidate, controls the content of an independently funded message, an expenditure is less valuable to a candidate than a contribution and may even harm the candidate's campaign.[87] As a result, the Court held, an expenditure poses less danger of corruption than a contribution does.[88] Thus the state interest in combating corruption does not justify limits on individuals' expenditures.[89]

While recognizing the corruption rationale as a ground for regulation, the *Buckley* Court vociferously rejected another proffered rationale. The Court insisted that the government has no compelling interest in "equalizing the

83. *Buckley*, 424 U.S. at 19.

84. *See id.* at 26-27. The Court, like the entire nation, was concerned about corruption and the public's loss of faith in government following the Watergate scandal and the election law abuses uncovered in its aftermath. *See id.* at 27 & n.28 (citing 519 F.2d 821, 839-40 (D.C. Cir. 1975)). Thus, the *Buckley* Court presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. The amount and kind of evidence required to support an allegation of corruption or the appearance of corruption remains unclear. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Laws,* 18 REV. LITIG. 85 (1999) (describing lower courts' struggle over the lack of an evidentiary standard). In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court declined to clarify the evidentiary standard. Acknowledging that *Buckley* lacked "precision", *id.* at 386, the Court nonetheless found that *Nixon* "does not present a close call requiring further definition." *Id.* at 393.

85. 424 U.S. at 19. The idea that election-related spending is a form of political speech is fundamental to the Court's jurisprudence, a position that will be accepted for the purposes of this Article. There is, however, a vigorous debate with respect to this issue. Most famously, Judge J. Skelly Wright of the Court of Appeals for the District of Columbia has argued that political money is "speech-related conduct" distinguishable from political expression, which constitutes the "pure speech" at the core of the First Amendment. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1007-08 (1976). Judge Wright sat on the en banc panel whose per curiam opinion upholding FECA's restrictions was reversed in part by *Buckley*. *See also* Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235 (2000) (arguing that, for constitutional purposes, limitations on election-related spending are more analogous to restrictions on the use of property than to restrictions on speech).

86. *Buckley*, 424 U.S. at 47-48.

87. *Id.* at 47.

88. *Id.*

89. *Id.* at 47-48.

relative ability of individuals and groups to influence the outcome of elections."[90] Rather, the First Amendment was intended to foster the broad dissemination of diverse ideas, and "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[91]

B. First National Bank of Boston v. Bellotti

The Supreme Court has never directly addressed the constitutionality of FECA's disparate treatment of business corporations and individuals. It has, however, addressed FECA's treatment of nonprofit corporations in *Massachusetts Citizens for Life v. FEC*[92] and addressed state law treatment of business corporations' election-related spending in *First National Bank of Boston v. Bellotti*[93] and *Austin v. Michigan State Chamber of Commerce*.[94]

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90. *Id*. at 48.

91. *Id.* This antiequalization concept long predates *Buckley*. Its focus on the value of ideas rather than of individuals is reminiscent of Justice Holmes's famous argument for "free trade in ideas" on the ground that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The antiequalization argument has appeared more recently in Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty, in* THE BILL OF RIGHTS AND THE MODERN STATE 225, 226-27 (Geoffrey R. Stone et al. eds., 1992); Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas,* 94 COLUM. L. REV. 1258, 1260 (1994); and Kathleen M. Sullivan, *Political Money and Freedom of Speech,* 30 U.C. DAVIS L. REV. 663, 678-81 (1997) [hereinafter, Sullivan, *Political Money*].

On the other hand, many other commentators argue that the First Amendment allows or even requires the state to ensure equal participation in political debate. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 22-26 (1989) (arguing that the proper unit of analysis for freedom of speech purposes is not the idea but the individual); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 75 (1948) (arguing that the purpose of the First Amendment "is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal"); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing for an equalization rule in campaign finance jurisprudence); Cass R. Sunstein, *Political Equality and Unintended Consequences,* 94 COLUM. L. REV. 1390 (1994) (same).

Margaret Jane Radin and Kathleen M. Sullivan provide a good overview of this debate. *Compare* MARGARET JANE RADIN, CONTESTED COMMODITIES 164-83 (1996) (in favor of equalization), *with* Kathleen M. Sullivan, *Free Speech and Unfree Markets,* 42 UCLA L. REV. 949, 959-60 (1995) (against equalization). Both scholars reject the "marketplace" metaphor but arrive at very different conclusions about the antiequalization rule. *See* RADIN, *supra*, at 164-83; Sullivan, *supra*, at 949, 959-60.

Debating the merits of the antiequalization principle is beyond the scope of this Article and beyond the expertise of its author. Rather, this Article simply accepts *Buckley*'s antiequalization rule as a central, controlling principle of campaign finance jurisprudence and argues that the Court has incorrectly applied this principle in the corporate context.

92. 479 U.S. 238 (1986).

93. 435 U.S. 765 (1978).

94. 494 U.S. 652 (1990).

Bellotti and *Austin* take very different approaches to the First Amendment analysis of corporate election-related spending. In *Bellotti*, the first major case addressing the issue, the Court suggested that no reason exists to treat corporate and individual spending differently under the First Amendment.[95] Later, however, in *Austin* and other cases, the Court contradicted this suggestion and stated that spending by business corporations should be regulated more closely than that of individuals.[96] *Bellotti* failed to satisfactorily explain why corporate and individual spending are equivalent under the First Amendment; unfortunately, *Austin* failed to explain why they are not.

In *Bellotti,* the Supreme Court faced the question of whether *Buckley*'s prohibition on the restriction of expenditures applied to corporations. A Massachusetts state statute prohibited business corporations, banks, and certain other corporations from making contributions or expenditures for the purpose of influencing "any question submitted to the voters," except with respect to questions "materially affecting the property, business or assets of the corporation."[97] The legislature had submitted for voter approval a state constitutional amendment that would permit the legislature to enact a graduated personal income tax.[98] A group of corporations planning to make expenditures in opposition to the amendment brought suit to prevent enforcement of the statute.[99]

The *Bellotti* Court struck down the statute on the ground that the public interest in hearing debate on governmental affairs justified protecting the spending from regulation under the First Amendment.[100] The Court asserted that the First Amendment covers both the individual self-expression of speakers and the "inherent worth of the speech in terms of its capacity for

95. *Bellotti*, 494 U.S. at 657. The *Bellotti* Court refused to address corporate First Amendment rights as a distinct issue, even though the Massachusetts Supreme Judicial Court (MSJC) had predicated its decision below on the ground that corporations do not enjoy the same First Amendment rights as individuals. First Nat'l Bank of Boston v. Attorney Gen., 359 N.E.2d 1262, 1270 (Mass. 1977). The MSJC held that the First Amendment protects a corporation's speech concerning a general political issue only when that issue "materially affects [the] corporation's business, property or assets." *Bellotti*, 435 U.S. at 771 (quoting *First National*, 359 N.E.2d at 1270).

96. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658-59 (1990); Mass. Citizens for Life v. FEC, 479 U.S. 238, 257 (1986); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982).

97. 435 U.S. at 768 n.2 (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

98. *Bellotti*, 435 U.S. at 769.

99. *Id*. at 769. As the Court observed, the statute was "linked to the legislature's repeated submissions to the voters" of the amendment that would authorize the graduated tax, which had appeared on the ballot and had been defeated three times prior to the election at issue in the case. *Id.* at 769 n.3. Indeed, the version of the statute at issue specified that questions involving personal income tax did not "materially affect" business corporations. *Id.*

100. *Id.* at 776.

informing the public."[101] Because the constitutional protection derived from the public interest in hearing the speech, the Court stated that it was unnecessary to address whether corporations, as speakers, have the same First Amendment rights as individuals.[102] In other words, the rights of speakers and the interests of listeners are two distinct First Amendment concerns. The latter is sufficient to justify the protection of speech even when individual expressive rights are not at issue.[103]

Nonetheless, the Court also strongly suggested that corporations have the same constitutional right as individuals to participate in public discourse. For example, the Court stated that the government may not "dictat[e] the subjects about which *persons* may speak and the speakers who may address a public issue."[104] Furthermore, the Court cited the *Buckley* principle that the state may not "restrict the speech of some elements of our society in order to enhance the relative voice of others."[105] The individual is the paradigmatic "element of society" with a right to participate in political discourse; this passage suggests that corporations are equivalent elements of society.

In defense of the statute, the State argued that despite the potential value of the speech, the statute served the State's countervailing compelling interest in protecting shareholders.[106] The State contended that the statute protected

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101. *Bellotti*, 435 U.S. at 777.

102. *See id.*

103. *See id.* at 777 n.12 ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed [political] discussion, although the two often converge."); *cf.* Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998) ("An intended and justifying consequence of rights is that through protecting the interests of specific plaintiffs, rights also realize the interests of others, including the construction of a political culture with a specific kind of character.").

The informational value of spending is sometimes characterized as an individual "right" to hear political messages. Meir Dan-Cohen, for example, refers to speech as implicating speakers' "active" speech rights and listeners' "passive" speech rights. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991). While it may ultimately be grounded in the idea of a categorical right to informed self-government, courts correctly treat the idea of listeners' rights more as a social welfare concern rather than as a personal right to be asserted by individuals. Courts have not recognized any plaintiff with standing to assert this "right" in litigation, and it is difficult to imagine how they could. *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992) (finding plaintiffs have no standing to bring an action "claiming only harm to [their] and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [plaintiffs] than it does the public at large").

104. *Bellotti*, 435 U.S. at 784-85 (citing Police Dept. v. Mosley, 408 U.S. 92, 96 (1972)). The Court further argued that allowing the state to limit business corporations' speech to issues of business concerns would inevitably lead to limits on the permissible topics of speech for "'religious, charitable, or civic' corporations." *Id.* at 785.

105. *Id.* at 791.

106. *See id.* at 787. Justice White pursued this argument in his dissenting opinion. *See id.* at 812.

shareholders by "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree."[107] The Court identified the protection of shareholders as both a legitimate state interest and one traditionally within the province of state law.[108] The Court assumed, without deciding, that this interest may be sufficiently compelling to justify burdens on speech.[109] The Court found, however, that corporate election-related spending did not implicate that interest because shareholders themselves control corporate spending "through the procedures of corporate democracy."[110]

C. Massachusetts Citizens for Life v. FEC

Despite *Bellotti*'s rhetoric about the constitutionally protected nature of election-related spending regardless of the corporate identity of the spender, subsequent Supreme Court cases have indicated that it is permissible to place greater restrictions on business corporations than on individuals. In *FEC v. Massachusetts Citizens for Life (MCFL)*,[111] the Court struck down FECA's limitations on corporate expenditures as applied to Massachusetts Citizens for Life (MCFL), a "nonprofit, nonstock corporation" formed under Massachusetts law specifically to promote the antiabortion cause.[112] The Court found that MCFL had "features more akin to voluntary political associations than business firms."[113] In *Austin v. Michigan Chamber of Commerce*, however, the Court upheld a state's identical limitations on corporate expenditures as applied to a nonprofit corporation. The Court found that the Michigan Chamber of Commerce represented the interests of business corporations and itself resembled a for-profit business corporation.[114]

The *MCFL* opinion included extensive dicta about the "corrosive influence" of corporate wealth on electoral politics.[115] The Court made clear that it perceived this as a threat posed only by business corporations, rather

107. *Id.* at 792-93.
108. *Id.* at 792 (citing Cort v. Ash, 422 U.S. 66, 82-84 (1975)).
109. *See Bellotti*, 435 U.S. at 795.
110. *Bellotti*, 435 U.S. at 794. Thus, the Court found the statute overinclusive in that it would prohibit spending authorized by shareholders, even if authorized "unanimously". *Id.* at 794-95. The Court further found the statute underinclusive because it prohibited corporate expenditures only in connection with voter referenda and not with respect to other politically or ideologically related spending. *Id.* at 793.
111. 479 U.S. 238 (1986).
112. *See id.* at 241-42.
113. *Id.* at 263.
114. *Austin*, 494 U.S. at 669.
115. *Mass. Citizens for Life*, 479 U.S. at 257.

than by incorporated organizations per se.[116] The Court's definition of "corrosive influence" however, diverged significantly from the "corruption" identified as a compelling state interest in *Buckley* and *Bellotti.*[117] The Court explained that "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace."[118] The advantage is supposedly unfair because the size of a business corporation's treasury is not a measure of popular support for the corporation's political positions but, rather, the result of "economically motivated decisions of investors and customers."[119] Without citing to precedent, the *MCFL* Court called this "threat to the political marketplace" a justification for unique limits on corporate election-related spending.[120] *MCFL* contradicts *Buckley*'s "anti-equalization" principle by suggesting that it is unfair for wealthy corporations to spend large amounts of money unless their political positions have popular support.[121] The *MCFL* Court gave a passing nod to the antiequalization rule,[122] but did not address the contradiction.

Having described the dangers of election-related spending by business corporations, the Court found that corporations like MCFL had "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."[123] The Court specified three features of MCFL "essential" to its holding.

> *First*, [MCFL] was formed for the express purpose of promoting political ideas, and [it] cannot engage in business activities . . . . This ensures that political resources reflect political support. *Second*, [MCFL] has no shareholders or other persons affiliated [who would] have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

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116. *See id*. at 257-58 (describing the specific dangers posed by business corporations).

117. The Court did not cite either *Buckley* or *Bellotti* in defining "corrosive influence." *See id*. at 257.

118. *Id.*

119. *Id.* at 258.

120. *Id.*

121. *See supra* notes 90-91 and accompanying text.

122. *See Mass. Citizens for Life*, 479 U.S. at 257 ("Political free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.").

123. *Id*. at 263.

> This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.[124]

D. Austin v. Michigan State Chamber of Commerce

Ironically, although MCFL's nonbusiness nature was "essential" to the First Amendment protection of its election-related spending, the Court explicitly left open the question of whether FECA's ban on corporate expenditures is constitutional as applied to business corporations.[125] The issue of corporate expenditures in candidate elections surfaced again in *Austin v. Michigan State Chamber of Commerce.*[126] The *Austin* Court relied on an expanded version of *MCFL*'s dicta regarding the "unfair" and "corrosive" role of business corporations to uphold state-law restrictions on corporate expenditures.[127] The Michigan State Chamber of Commerce was a nonprofit corporation funded through the annual dues of its members, three quarters of which were business corporations.[128] The Michigan Campaign Finance Act allowed corporations to engage in election-related spending only from a separate segregated fund.[129] This rule was patterned after § 441b of FECA.[130] The Chamber planned to defy the rule and make an independent political expenditure from its general funds by purchasing a newspaper advertisement supporting a candidate for state office.[131] It sued for injunctive relief against the enforcement of the statute.[132]

The *Austin* Court acknowledged *Bellotti*'s holding that corporate spending implicates First Amendment interests.[133] The Court also conceded that, according to *Buckley,* independent expenditures create less risk of quid pro quo corruption than do contributions.[134] According to the Court, however, the Michigan statute targeted a "different type of corruption": the "corrosive" effect on electoral politics caused by the wealth of business

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124. *Id*. at 264.
125. *Id*. at 263.
126. 494 U.S. 652 (1990).
127. *Id*. at 660.
128. *Id.*
129. *Id.* at 654-55.
130. *Id*. at 655 n.1. *See also* 2 U.S.C. § 441b (2000).
131. *Austin*, 494 U.S. at 656.
132. *Id*.
133. *Id*. at 652. Although the *Bellotti* Court specifically refused to address whether corporations have First Amendment rights, *Bellotti*, 435 U.S. at 776, the *Austin* Court abandoned *Bellotti*'s "listeners' interests" theory of First Amendment protection. Instead, it stated that the statute "burdens the Chamber's exercise of expression." *Austin*, 494 U.S. at 658. *Cf. Mass. Citizens for Life,* 479 U.S. at 252 (referring to "MCFL's First Amendment rights").
134. *Austin*, 494 U.S. at 659.

corporations.[135] According to the Court, two related aspects of corporate wealth conspire to create a risk of "unfair advantage" resulting in the "corrosion" of politics.[136] First, the Court repeated the contention from *MCFL* that corporate wealth is not a measure of "popular support" for the corporation's political positions but rather, only a measure of "economically motivated decisions of investors and customers."[137] The Court emphasized, however, that disproportionate economic power alone does not justify regulation.[138] Rather, the unfairness stems from a second factor: "State law grants corporations special advantages" facilitating their accumulation of wealth.[139] Such advantages include "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[140]

The Court found that although the Chamber was a nonprofit organization, it resembled a business corporation closely enough to be treated as one for First Amendment purposes.[141] The Chamber could not satisfy the three elements that the Court had labeled "essential" to distinguishing MCFL from business corporations in *MCFL*.[142] First, MCFL was founded solely for a specific political purpose.[143] By contrast, the Chamber pursued, in addition to political activities, many purposes that the Court described as "not inherently political," including business-related education and group insurance.[144] Second, MCFL's members were not shareholders or persons with a similar economic disincentive to dissociate from the organization if they disagreed with its policies.[145] Although it had no shareholders, the Chamber offered significant material benefits to its members that would create a similar disincentive.[146] Finally, business corporations neither established nor funded MCFL, while three-quarters of the Chamber's members, whose donations supported the Chamber, were business corporations.[147] According to the Court, the Chamber could thus serve as a device for business corporations to circumvent existing restrictions on corporate election-related spending.[148]

Austin upheld a restriction on independent expenditures by corporations,

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135. *Id*. at 660.
136. *Id.*
137. 494 U.S. at 659 (quoting *Mass. Citizens for Life*, 479 U.S. at 258).
138. *Id.* at 660.
139. *Id*. at 658.
140. *Id*. at 658-59.
141. *Id*. at 661-62.
142. *Id*. at 662 (quoting *Mass. Citizens for Life*, 479 U.S. at 263).
143. *Mass. Citizens for Life*, 479 U.S. at 264.
144. *Austin*, 494 U.S. at 662.
145. *See Mass. Citizens for Life*, 479 U.S. at 264.
146. *Austin*, 494 U.S. at 663.
147. *Id*. at 664.
148. *Id.*

despite the fact that *Bellotti* suggested that corporate expenditures deserve the same strict First Amendment protection that individual expenditures enjoy. The Ninth Circuit has held that this conflict can be explained on the ground that *Bellotti* struck down the regulation of corporate spending on ballot questions, while *Austin*'s more permissive stance toward regulation involved the financing of *candidate* elections.[149] Thus, the Ninth Circuit struck down a Montana law allowing corporations to make expenditures on ballot initiative campaigns only out of a "separate segregated fund."[150]

Despite the troubling conflict between the two Supreme Court opinions, the Ninth Circuit was justified in refusing to hold that *Austin* overruled *Bellotti*, based on the principle that lower courts should "'leav[e] to [the Supreme] Court the prerogative of overruling its own decisions.'"[151] But even if lower courts must read between the lines of *Austin* and *Bellotti* to reconcile them, the candidate-initiative distinction is not the most convincing explanation. The *Austin* Court itself did not credit this distinction with making a difference. Indeed, interpreting *Austin* as applicable only to candidate elections requires ignoring its basic reasoning. While it is true that quid pro quo corruption of elected officials presents a danger only in candidate elections, *Austin* did not rely on quid pro quo corruption as a justification for regulation. The Court held, rather, that regulation was justified by the problem of "corrosion". "Corrosion"—the Court's term for the likelihood that concentrated wealth will sway the outcome of elections—is just as likely in the context of a ballot question as in the candidate election context.[152]

Austin and *Bellotti* might be distinguished based on the relative restrictiveness of the regulations rather than on the distinction between candidate elections and ballot questions. The statute in *Austin* might be said to have been less offensive to the First Amendment because it allowed corporations to spend out of a segregated fund, while the *Bellotti* statute was a blanket prohibition on corporate spending.[153] However, even though this

149. *See* Montana v. Argenbright, 226 F.3d 1050, 1055-57 (9th Cir. 2000).

150. *Id.* at 1052-53.

151. *Id.* at 1057 (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

152. See *Argenbright*, 226 F.3d at 1060-61 (Hawkins, C.J., dissenting) (citing Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court*, 44 VAND. L. REV. 767, 779 (1991); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 252 (1991); Thomas C. Goldstein, *Corporate Influence in Referenda: A Comment About the Prescription,* 1996 ANN. SURV. AM. L. 469, 473; Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393, 408).

153. If *Austin* and *Bellotti* are distinguished on this ground, however, the Montana law at issue in *Argenbright*, which allowed the use of segregated funds, should survive First Amendment scrutiny.

approach makes *Austin* consistent with *Bellotti*, it does not address the fact that the *Austin/MCFL* "corrosion" rationale conflicts with the antiequalization principle of *Buckley*. Parts IV and V of this Article will critique the Supreme Court's corporate campaign finance jurisprudence and argue that the regulation of corporate election-related spending can be distinguished from the regulation of individual spending based on the institutional characteristics of large business corporations. This analysis offers a justification for the regulation of corporate spending that does not conflict with the antiequalization rule of *Buckley*.

IV. THE SUPREME COURT'S RELIANCE ON TRADITIONAL MODELS OF THE CORPORATION

Three traditional conceptualizations of the corporation—usually referred to as the grant (or artificial entity) theory, the aggregation theory, and the personality (or natural entity) theory—historically dominated American corporate theory.[154] As William W. Bratton and others have observed, the essential nature of the corporation was a common subject of discussion among legal theorists until the 1930s.[155] Under the influence of legal realism, essentialist inquiry "largely ceased as the management-centered conception of large corporate entities took hold."[156] Although academic attention wandered away from the metaphysics of the nature of the corporation, the various essentialist models had not lost their significance in legal doctrine or even in scholarship.[157] The traditional models, despite their conflicts with one another, had simply been taken for granted and quietly assimilated into legal discourse. This Part summarizes the traditional models. The following Part will criticize these models and the Court's reliance on them in *Bellotti* and *Austin.*

Legal scholarship exhibits a faith in theoretical development by tending to assume that new, superior theories supplant older, discredited ones in an inexorable march toward the one true theory. In reality, however, old theories never die; they just accumulate. All three of the traditional essentialist

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See 226 F.3d at 1060-62 (Hawkins, C.J., dissenting).

154. *See, e.g.*, MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 72-74 (1992); Mark Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 579-82 (1989); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441-42 (1987).

155. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989).

156. *Id.*

157. *See id*. at 1526-27.

concepts of the corporation coexist simultaneously in case law and continue to influence courts and scholars today.[158] The Supreme Court's application of First Amendment analysis to corporate election-related spending demonstrates this simultaneous coexistence of theories.[159] Although corporate law has developed richer models,[160] the Court has continued to recycle the tired essentialist concepts when applying constitutional law in the corporate context.[161]

A. Grant Theory

Early American jurisprudence viewed a corporation as an artificial entity created by the state. Before the advent of modern incorporation statutes, legislatures created corporations individually by special legislation to perform a particular purpose for the public benefit.[162] Because a corporation's powers and its very existence were granted by special act of the state, courts held that the state retained the power to impose regulations on the corporation.[163] In this century, the Court has occasionally invoked this grant (or artificial entity) theory to uphold state regulation of corporations against constitutional challenges.[164] When the Court has upheld government

158. *See id.*
159. *See infra* Part IV.
160. *See infra* notes 192-200 and accompanying text.
161. *See infra* Part IV.
162. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188, 192 (2d ed. 1985).
163. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (characterizing a corporation as an "artificial being . . . existing only in contemplation of law"). According to the *Dartmouth College* Court, a corporate charter is analogous to a contract between the corporation and the state. *See id.* at 637-38. Thus, the Court held that the state violates the Contracts Clause if it imposes requirements on the corporation that unilaterally alter the terms of that contract. *See id.* at 705-06; U.S. CONST. art. I, § 10, cl. 1. However, the Court implied that the state would not abrogate the contract if it were explicitly to reserve the right to alter the contract as part of the charter or legislation. *Trs. of Dartmouth Coll.*, 17 U.S. at 638-39. In response, state codes have done precisely that. *See, e.g.*, MODEL BUS. CORP. ACT § 1.02 off. cmt (rev. ed. 1999); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 113 (1995) (citing DEL. CODE ANN. tit. 8, § 394 as an example of such a state code provision). Thus, states' reserved powers now prevent corporations from invoking the Contracts Clause argument against state regulation.
164. For example, in rejecting a corporation's Fourth Amendment challenge to a government search, the Court stated, "The Federal Government allows [corporations] the privilege of engaging in interstate commerce. *Favors from government often carry with them an enhanced measure of regulation.*" United States v. Morton Salt, 338 U.S. 632, 652 (1950) (emphasis added). The Court has stated that corporations, as artificial rather than natural persons, do not enjoy the Fourteenth Amendment's guarantee of liberty, *see* Northwestern Nat'l Life Ins. v. Riggs, 203 U.S. 243, 255 (1906), or of due process, *see* Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939). The Court has also denied corporations the Fifth Amendment privilege against self-incrimination on the ground that they are mere "creature[s] of the state." Hale v. Henkel, 201 U.S. 43, 74 (1906). Elsewhere, however, the Court has contradicted itself by stating that corporations are entitled to liberty rights under the Fourteenth Amendment because they are "persons". *See* Grosjean v. Am. Press Co., 297 U.S. 233, 244

regulation of corporate election-related spending, its reasoning has often echoed the grant theory. Chief Justice Rehnquist has specifically invoked the grant theory, both in dissent[165] and in dictum while writing for the Court,[166] to argue in favor of state regulation of election-related spending.

The *Austin* opinion, authored by Justice Marshall, relied primarily on a version of the grant theory. The Court's description of corporate influence as "corrosive" evokes "corruption," which *Buckley* recognized as a state interest sufficient to justify regulation of political expenditures.[167] However, the *Austin* Court specifically stated that the statute was not intended to fight quid pro quo corruption.[168] Rather, the statute was concerned with limiting the effects of excessive corporate wealth.[169] As Justice Scalia argued in dissent, this concern conflicts with *Buckley*'s rule that the state may not attempt to equalize relative financial influence on elections.[170] The Court defended this deviation from *Buckley* on the ground that corporations amass their great wealth by means of a "unique state-conferred . . . structure."[171] Ultimately, then, corporate corrosion has nothing to do with quid pro quo corruption. Rather, the *Austin* Court relied on the grant theory, under which the state may regulate corporate election-related spending more closely than individual

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(1936). *Cf.* Gulf, Cal. & San Francisco Ry. v. Ellis, 165 U.S. 150, 154 (1897) (stating that corporations are persons within the meaning of the Fourteenth Amendment).

165. *See Mass. Citizens for Life*, 479 U.S. at 268-69 (Rehnquist, J., dissenting) (arguing that the grant theory applies to all nonprofit corporations, as well as business corporations).

166. In 1982, the Court upheld FECA's rule that a corporation may solicit PAC contributions only from its "restricted class." FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982). Writing for a unanimous Court, Chief Justice Rehnquist suggested that "the special advantages that go with the corporate form of organization," militate against First Amendment protection for corporate spending. *Id*. at 207. The opinion also refers to "the particular legal and economic attributes of corporations and labor organizations," and the "special characteristics of the corporate structure." *Id.* at 209. Although Chief Justice Rehnquist did not explicitly invoke the grant theory in *National Right to Work Committee*, he cited, *United States v. Morton Salt*, 338 U.S. at 632, 652 (1950), one of the few Supreme Court opinions expressly to invoke that theory. Writing for the Court in a later opinion, Chief Justice Rehnquist stated in dictum that *National Right to Work Committee* had indeed been based on the grant theory. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 495 (1985) (citing *Nat'l Right to Work Comm.*, 459 U.S. at 209-10).

167. *See Austin*, 494 U.S. at 660; *Buckley*, 424 U.S. at 26. "Corrosive" derives from the word "corrode" and not from "corrupt". WEBSTER'S LAW DICTIONARY 455 (2d ed. 1997). But it is unlikely that Justice Marshall's choice of a similar-sounding word was a mere coincidence.

168. 494 U.S. at 659-60.

169. *See id*. at 660.

170. *Id*. at 685 (Scalia, J., dissenting). The Court insisted that the statute was not intended to equalize relative influence. 494 U.S. at 660. Such insistence, however, cannot be reconciled with the Court's argument that the statute is intended to contain the effects of corporate wealth. *See id*. at 666. Most commentators agree that *Austin* was based on the equalization rationale forbidden by *Buckley*. *See, e.g.*, HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 69 (1995); BeVier, *supra* note 91, at 1270-71; Daniel H. Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 412 (1992).

171. *Austin*, 494 U.S. at 660.

spending because corporate wealth is accumulated with the special help of the state.[172]

B. Aggregation Theory

The aggregation theory holds that the corporations are not entities at all but are no more and no less than "aggregations of individuals united for some legitimate business."[173] As American legislatures began to charter profit-making business corporations during the Jacksonian era, the practice of incorporation by special legislation came under criticism for unfairly granting competitive advantages to certain businesses.[174] As a result, general incorporation supplanted special incorporation under statutes permitting businesses to self-incorporate without the direct involvement of the legislature.[175] Incorporation, therefore, came to be seen as a matter of right rather than of privilege.[176] Moreover, theorists and courts argued that the corporation was not an entity created by the state but was merely a set of private contracts like a partnership.[177] Thus, in the late nineteenth century, courts and commentators held that the activities of a corporation are ultimately the activities of those individuals and that a corporation deserves

172. Another possible explanation of *Austin* is that it was intended to protect shareholders from management's misappropriation of corporate wealth for political purposes without shareholder authorization. *See* Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133, 155-56 (1998). However compelling this interest might be in theory, the Court's opinion does not focus on the possibility that shareholders may not support management's decisions about election-related spending. Rather, the Court argues that corporate expenditures fail to reflect public support. *See Austin*, 494 U.S. at 660.

173. San Mateo v. S. Pac. R.R., 13 F. 722, 743 (1882). With respect to the aggregation theory generally, see HORWITZ, *supra* note 154, at 69-70; Mark, *supra* note 154, at 1455-64.

174. *See* EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 394-95 (1954).

175. *See id.* at 417 n.28.

176. *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 170, at 20 ("The fact that corporations are brought into existence by a perfunctory state filing does not justify a 'state creation' view any more than does the role of obtaining a birth certificate indicate state creation of a child.").

177. *See* Santa Clara v. S. Pac. R.R., 18 F. 385 (9th Cir. 1883); San Mateo v. S. Pac. R.R., 13 F. 722 (9th Cir. 1882). Supreme Court Justice Field wrote both *Southern Pacific Railroad* opinions in his capacity as Justice for the Court of Appeals for the Ninth Circuit. The Supreme Court, affirming these decisions in *Santa Clara v. S. Pac. R.R.*, 118 U.S. 394 (1886), stated without explanation that the Fourteenth Amendment, which applies to "all persons," also applies to corporations. *Santa Clara*, 118 U.S. at 410. Thus, *Santa Clara* has often been interpreted as having introduced the personality theory to American jurisprudence. *See, e.g.*, Liam Seamus O'Melinn, *The Sanctity of Association: The Corporation and Individualism in American Law*, 37 SAN DIEGO L. REV. 101, 146 (2000). However, most commentators agree that the opinion is better interpreted as consistent with *San Mateo*. *See, e.g.*, HORWITZ, *supra* note 154, at 69-72; Charles R. O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression After* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1353-56 (1979).

the same constitutional protection that those individuals would enjoy if acting alone.[178]

Bellotti is illustrative of this doctrine. The Court claimed that its "listeners' interests" theory relieved it of having to decide whether corporate spending implicates expressive rights.[179] Elsewhere in the opinion, however, the Court suggested a theory of corporate expressive rights based on the aggregation model.[180] The Court argued that "corporate democracy" empowers shareholders to control a corporation's spending on political matters.[181] By treating corporate activity as the product of the individual agreement of its shareholders, the Court invoked the logic of the aggregation theory.

C. Personality Theory

The third traditional model of the corporation is based on the idea of corporate personality. According to this theory, a corporation is neither the creation of the state nor merely the sum of its individual human constituents. It is a "natural entity" distinct from its members and is thus entitled to all the legal rights of a human person.[182] The Supreme Court treats corporations as the equivalent of human persons for some constitutional purposes.[183] For example, it has referred to corporations as "persons" protected under the

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178. For example, the *Santa Clara* Court stated:

> Whenever a provision of the [C]onstitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; *not to the name under which different persons are united, but to the individuals composing the union*.

Santa Clara, 18 F. at 402 (emphasis added). *See also* HORWITZ, *supra* note 154, at 90-91 (citing nineteenth century treatise writers).

More specifically, Justice Field argued that individuals who are associated in the form of corporations deserved the same legal protections as individuals who are not. *See Santa Clara*, 18 F. at 401. Thus, the Fourteenth Amendment's guarantee of equal protection to "all persons" protects corporations because a corporation's members are persons, not because a corporation is itself a person under the Constitution.

179. *See Bellotti*, 435 U.S. at 788-92.

180. *See id*. at 794-95.

181. *Id*. at 794.

182. *See* HORWITZ, *supra* note 154, at 101.

183. For the proposition that corporations are entitled to Fifth Amendment double jeopardy and Fourth Amendment constitutional protections see *Bellotti*, 435 U.S. at 778 n.14 (citing United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977)). In addition, the U.S. Code instructs courts to presume that federal statutes intend to give the same treatment to corporations and human persons. 1 U.S.C. § 1 (1997) (Dictionary Act) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

Fourteenth Amendment.[184] The Court has also stated without elaboration that business corporations have negative speech rights—the right against being compelled to express a viewpoint—equivalent to those of individual persons.[185] The idea of the corporation as a person has become so deeply ingrained in our legal culture that it continues to thrive in law.[186] In some constitutional contexts, however, the Court has described corporations as artificial entities undeserving of constitutional protection.[187] Thus it is impossible to say as a general matter whether corporations are persons under the Constitution. All that can be said is that they are persons in some constitutional contexts but not in others.

The *Bellotti* Court made use of the aggregation metaphor and invoked the rhetoric of corporate personality. For example, it stated that the government may not "dictat[e] the subjects about which *persons* may speak and the speakers who may address a public issue."[188] Furthermore, the Court cited the *Buckley* principle that the state may not "restrict the speech of some elements of society in order to enhance the relative voice of others."[189] By doing so, the Court suggested that corporations are "elements of society" equivalent to individuals in public discourse.[190]

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184. *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Grosjean, v. Am. Press Co., 297 U.S. 233 (1936). *Cf.* Gulf, Cal. & San Francisco Ry. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."). *See also* John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept, in* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 142 (Warren J. Samuels & Arthur S. Miller eds., 1987).

185. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (striking down on First Amendment grounds a law requiring utility company to include in its billing envelopes messages from a ratepayers' group).

186. As Mark Hager states:

> Despite the demise of formalism, . . . legal concepts continue to exert their force as they have always done, as metaphors, symbols, images, and visions of social existence . . . . Attacks on the logical deficiencies of legal conceptualizations often carry little force precisely because the 'meaning' of legal concepts does not lie primarily in their logical implications to begin with.

Hager, *supra* note 154, at 576. *Cf.* Mark, *supra* note 154, at 1482 ("Personification . . . had proved to be a potent symbol to legitimate the autonomous business corporation and its management.").

187. *See* cases cited *supra* note 164.

188. 435 U.S. at 784-85 (citing Police Dept. v. Mosley, 408 U.S. 92, 96 (1972)) (emphasis added). The Court further argued that allowing the state to limit business corporations' speech to issues of business concerns would lead inevitably to limits on the permissible topics of speech for "religious, charitable, or civic" corporations. *Id.* at 784.

189. *Bellotti*, 435 U.S. at 790-91 (quoting *Buckley*, 424 U.S. at 48-49).

190. *Cf.* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

V. THE FLAWS OF THE TRADITIONAL MODELS AS APPLIED TO ELECTION-RELATED SPENDING

Constitutional jurisprudence in the libertarian tradition envisions an individual asserting her interests against those of society. The personality and aggregation metaphors attempt to apply the libertarian individual paradigm to the constitutional protection of corporations. However, when applied to corporations, constitutional jurisprudence has failed to grasp the ways in which the corporation differs from the individual.[191] Because the corporation is by nature not individual but divisible, the libertarian individualist paradigm is a poor fit.

All three of the traditional corporate models—personality, aggregation, and grant—fail to grasp the central insight of contemporary corporate law, namely that a corporation is not a monolithic actor but a complex set of relationships.[192] Shareholders, managers, employees, creditors, the state, and others negotiate and compete for the corporation's resources. Contemporary corporate theories proceed from the insight of corporate complexity, although they draw differing conclusions from it. They share as their central concern the issue of who legitimately controls corporate resources and the source of that legitimacy. According to the standard contemporary model of corporate law, corporate managers are the fiduciaries of shareholders, who are the true owners of corporate resources.[193] Unlike the aggregation model, the standard contemporary model does not presume that shareholders directly control the acts of the corporation.[194] Rather, management has wide discretion to operate the corporation for the shareholders' benefit subject only to legal prohibitions against abuses of this discretion.[195]

The contractarian view of the firm—the new orthodoxy in academic circles—holds that corporate resources are efficiently allocated among management, shareholders, and other parties through consensual bargaining

191. The grant model refuses to treat corporations like individuals, but it simply asserts that the state has special authority to regulate corporations and fails to explain why.

192. *See, e.g.*, G. Mitu Gulati, William A. Klein & Eric M. Zolt, *Connected Contracts*, 47 UCLA L. REV. 887, 890-98 (2000) (describing the dominant contemporary models as focusing on certain relationships but proposing a broader focus on a greater number of relationships). Of course, the smaller a corporation and its business, the fewer and less complex its relationships.

193. *See* ROBERT C. CLARK, CORPORATE LAW 678 (1986) (noting that "from the traditional legal viewpoint, a corporation's directors and officers have a fiduciary duty to maximize shareholder wealth"); Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders").

194. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1428-29 (1985).

195. *See* CLARK, *supra* note 193, at 123.

and not through state involvement.[196] This view superficially resembles the aggregation model in holding that a corporation is at heart an agreement among its constituent individuals.[197] The contractarian view is more sophisticated, however, in that it attempts to articulate the mechanisms by which constituents reach agreement as to the terms of corporate governance.[198] That mechanism is by "contract," which is variously defined as an agreement by literal bargaining and by "hypothetical bargaining."[199] Unlike the traditional theories, both the standard contemporary and contractarian models focus on balancing the conflicting interests within a corporation.[200] Constitutional law, however, has tended to ignore this central issue. The Supreme Court's analysis of corporate election-related spending has followed the traditional flawed models and remains mired in the archaic monolithic view of the corporation. Corporate governance law gives shareholders some formal structures for input into management decisions, but as this section will argue, those structures are mostly empty formalities.

A. Personality Theory

Under the personality metaphor, a corporation, like a person, is a moral actor with a unitary will. The legal realists convinced American academicians to abandon the personality metaphor by the 1930s.[201] As John Dewey argued in 1926, the idea of corporate personality as a basis for rights is rooted more in terminological sleight-of-hand than reasoned argument.[202] A corporation is obviously not a person in the normal sense of the word. The

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196. The classic manifesto of the contractarian view of the firm is FRANK N. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). For a brief and critical history of the ascent of the contractarian model, see Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 820-22 (1999).

197. *See* EASTERBROOK & FISCHEL, *supra* note 196, at 16-17.

198. *See id*. at 15-22.

199. The former approach is summarized in EASTERBROOK & FISCHEL, *supra* note 196, at 18-19, the latter in Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law*, 82 CORNELL L. REV. 856, 864-65 & n.31 (1997).

200. *See* EASTERBROOK & FISCHEL, *supra* note 196, at 4-6.

201. *See* Mark, *supra* note 154, at 1478-83. Mark Hager rejects the logic and metaphysics of the personality theory, but nonetheless perceptively (if somewhat cynically) notes that its rhetorical power can be manipulated for political ends. Hager, *supra* note 154, at 576-77.

202. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). Deliberate misdirection may have also played a part. In the late 1800s and early 1900s, some attorneys argued (perhaps disingenuously) that the drafters of the Fourteenth Amendment had inserted the term "person" into the Due Process and Equal Protection Clauses (as distinct from the term "citizen" in the Privileges and Immunities Clause) specifically to include "artificial persons" or corporations. That "conspiracy theory" of the Fourteenth Amendment was convincingly discredited in the 1930s. *See* Graham, *supra* note 177, at 371-74.

fact that the same word is applied to corporations and humans in some contexts does not explain why the two deserve the same moral status in any given context.[203] As applied to a corporation, the word "person" served as "a kind of legal shorthand" intended only to simplify the joint treatment of a group of investors and their property.[204] Semantic sleight-of-hand insufficiently justifies treating corporations like human beings under the Constitution.[205] Thus, while the *Bellotti* Court correctly stated that the First Amendment limits the government's ability to restrict the speech of "persons"[206] the Court made an unjustifiable leap of logic in suggesting that the same limitation applies to the regulation of corporations.

B. Aggregation Theory

The mistake of treating the corporation like an individual also appears in more subtle form in the aggregation theory. The aggregation theory views a corporation as a group of individuals, and thus it superficially acknowledges the multiple constituents involved in a corporation. The theory, however, ignores the competing interests in the corporation and conclusorily asserts that all corporate activity is by definition the product of agreement among these diverse constituents.[207] The theory does not describe the mechanism by which these diverse constituents supposedly reach agreement. By unrealistically presuming that the corporation's multiple constituents act in unity and by using this description as the basis for constitutional protection, the aggregation theory attempts to rationalize treating the corporation as the functional equivalent of an individual and its rights as the equivalent of individual rights.

As Justice Field articulated in the 1880s, the aggregation model viewed the corporation as made up of individual "members" who created, owned, and operated an enterprise.[208] By the time Justice Field and others developed

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203. *See* Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporation Philanthropy*, 41 N.Y.L. SCH. L. REV. 835 (1997).

While the Realists showed how corporate rights are not natural or inherent, they did not attempt to explain, as a normative matter, why society should not recognize corporate rights. Meir Dan-Cohen has attempted to fill this gap with a Kantian argument that characterizes the corporation as a mere "instrumentality". *See* MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 199-200 (1986).

204. Mark, *supra* note 154, at 1447.

205. Indeed, one commentator has argued that corporations should not be recognized as constitutional actors without a constitutional amendment to that effect. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

206. *See Bellotti*, 435 U.S. at 784-85.

207. *See supra* notes 177-81 and accompanying text.

208. Thus Justice Field used the terms "member" and "corporator" synonymously. *See Santa*

the aggregation theory, however, giant public corporations had already begun to dominate the economy.[209] Field's idealized harmonious "corporators" may exist in some small, closely held corporations, but not in the large, modern corporation. Unlike Field's active corporate "members", most shareholders of large public corporations are passive participants.[210] They own the corporation in a formal, attenuated sense, but they typically have nothing to do with the founding or operation of the corporation. The shareholders did not join the corporation to participate in its business; instead, they purchased shares in the secondary market for investment purposes. They are atomized and dispersed, and cannot even readily identify one another.

In modern terminology, the original aggregation theory failed to take into account the issue of agency costs. Corporate acts are not actually performed by individuals acting in concert but by managers and employees purporting to represent the corporation.[211] The group cannot realistically approve every one of these acts, so some of these acts will not actually represent the interests of the group. This agency cost issue is the orthodox rationale for state involvement in corporate governance. The fiduciary model of corporate law holds that the state is justified in imposing fiduciary duties upon managers in order to counter the danger of managers pursuing their own self-interest ahead of shareholder interests.[212]

Clara, 18 F. at 403.

209. *See* HORWITZ, *supra* note 154, at 92-93. Furthermore, the theory was incompatible with corporate powers such as limited liability and perpetual existence, which cannot be created by private action. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that individuals associated in a corporation may not demand all the rights of individuals if the state grants them freedom from some of their liabilities); HORWITZ, *supra* note 154, at 93-100 (arguing that the limited liability dilemma contributed to the demise of the original aggregation theory in turn of the century American jurisprudence); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201. *But see* Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995) (arguing that a firm could achieve the equivalent of limited liability, even with respect to involuntary creditors, through contract rather than incorporation).

Judge Frank Easterbrook and Daniel Fischel acknowledge that limited liability allows corporations to shift costs to involuntary creditors. However, they fail to explain why limited liability contributes to efficient resource allocation, other than to say that the cost is mitigated by corporations' incentives to purchase insurance. *See* EASTERBROOK & FISCHEL, *supra* note 196, at 52-53.

210. *See* Mark, *supra* note 154, at 1447 (stating that most owners of corporations were actively involved in corporate affairs until the rise of publicly held industrial corporations in the 1890s).

211. Representative democracy has similar agency costs. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 465 (1989) (observing that the "dualist" strand of constitutionalism "distinguish[es] the will of We the People of the United States from the acts of We the Normally Elected Politicians of the United States").

212. *See* Brudney, *supra* note 194, at 1431 ("[E]xternally imposed legal strictures—such as the classic fiduciary categorical prohibitions against self-dealing—are . . . a way of restraining managerial diversion of assets."). Contractarianism also concerns itself with agency costs. Under the contractarian view, however, the law need not "protect" shareholders in allocating agency costs, because contractual bargaining yields optimal allocations. *See* Henry N. Butler & Larry E. Ribstein, *Opting Out of*

By using "listeners' interests" as a basis for protecting corporate spending, the *Bellotti* Court appeared to take an encouraging step beyond conclusory traditional models of the corporation.[213] Nonetheless, *Bellotti*'s approach is unsatisfactory because ultimately, it too falls back on a traditional monolithic model of action within the corporation.[214] The *Bellotti* Court considered only listeners' interests. The state had argued that protection of corporate political spending may conflict with the other primary First Amendment value—protecting individual expression—by using shareholders' money to support views with which they disagree.[215] In summarily dismissing this argument, the Court, like the aggregation theorists, assumed without analysis that corporate acts are the product of agreement among the members of the corporation and are in effect the product of a uniform corporate will. The Court refused to believe that management can control election-related spending without shareholder support.[216] It assumed that corporate acts express the will of the shareholders because such acts are made through an undefined process the Court termed "corporate democracy."[217] The Court suggested that managers, shareholders, and the public uniformly supported corporate spending, while the state arbitrarily sought to suppress it.[218] This assumption masks the differences within a corporation, as well as the potential conflicts between the public and various corporate constituencies.

C. Grant Theory

Like the other two traditional theories, the grant theory also fails to consider the various relationships that make up the corporation. It simplistically focuses on only two parties: the state and the corporation.[219] But the state, like the corporation, represents multiple interests. State interests include both societal interests and the protection of individual interests against society or other individuals. The grant theory's bald assertion of state power to regulate corporations does not take into account the state's multifaceted interests.

Fiduciary Duties: A Response to the Anti-Contractarians, 65 WASH. L. REV. 1, 19-20 (1990).

213. 435 U.S. at 788-92.

214. The absence of expressive rights in corporate political spending undermines the listeners' interest argument in favor of First Amendment protection. *See infra* Part VII.

215. 435 U.S. at 792-93.

216. *See id*. at 794-95 & n.34.

217. *Id*. at 794.

218. *See id*.

219. *See supra* Part IV.C.

In contrast to the aggregation and personality theories, however, the grant theory distinguishes the corporation from the individual.[220] Just as the aggregation and personality theories leap to the conclusion that corporations are like individuals for constitutional purposes, the grant theory is little more than a conclusory assertion that corporations differ from individuals. It falls short of furnishing a satisfactory explanation of why they differ. In addition, the grant theory disagrees with existing constitutional doctrine. The theory's premise that incorporation is a state-granted privilege does not lead inevitably to the conclusion that the state may regulate all aspects of the corporation. While the state may burden First Amendment rights as a condition of state privileges in some instances, it may not do so in all cases.[221] The outcome in a given case depends on a case-specific balancing of the value of the speech against the state's interest in attaching conditions to the privilege.[222]

Although the Court in *Austin* relied primarily on the conclusory reasoning of the grant theory, it made some attempt to explain how corporations differ from individuals by using the three factors from *MCFL*: (1) the corporation's purpose, (2) its members' disincentive to dissociate if they disagree with the corporation's political activities, and (3) its relationship to business corporations.[223] The first two factors recognize some of the ways in which a corporation involves multiple and sometimes conflicting interests.[224] The *Austin* Court, however, failed to explain why these distinctions should make a constitutional difference. Rather, the *Austin* Court proceeded from the conclusion that the state may regulate the spending of business corporations.[225] It held MCFL exempt from regulation because it did not resemble a business corporation in these three ways, while the Chamber of Commerce was subject to regulation because it did.[226]

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220. *See id*.

221. *See Austin,* 494 U.S. at 680 (Scalia, J., dissenting); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (noting that the state "may not deny a benefit to a person on a basis that infringes . . . his interest in freedom of speech"). *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

222. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (invalidating a public school's dismissal of a teacher for criticizing school policies that were a matter of legitimate public concern), *with* Connick v. Meyers, 461 U.S. 138 (1983) (upholding a district attorney's dismissal of an employee for questioning superiors and thereby disrupting the work of the office).

223. *See supra* Part III.D.

224. *See Austin*, 494 U.S. at 662-63. The third factor is of little substance because it merely begs the question of whether election-related spending by business corporations is appropriate.

225. 494 U.S. at 661.

226. *Id*. at 661-62.

VI. MOVING BEYOND THE TRADITIONAL MODELS: RECOGNIZING THE REALITIES OF CORPORATE GOVERNANCE

Constitutional analysis should not simply assume that the acts of a corporation represent the expression of its constituent individuals, as the *Bellotti* Court did.[227] Dissenting in *Bellotti*, Justice White asserted that corporate spending does not express the preferences of shareholders,[228] but he did not directly counter the majority's assertion that shareholders control decisions through "corporate democracy."[229] Justice White's assertion that corporate spending does not represent shareholder interests was as conclusory as the majority's insistence that it does.[230]

Instead of jumping to either of these conclusions, constitutional law should use the insights of corporate law to ask whether corporate spending implicates individuals' expressive rights.[231] Neither the majority nor the dissent examined the actual institutional characteristics of the appellant[232] corporations in *Bellotti*. The justices simply analyzed them as generic corporations. The opinion neither considers nor mentions whether they were small enterprises or large, publicly traded corporations.[233] In fact, they were among the nation's largest business corporations and banks: First National Bank of Boston, New England Merchants National Bank, Gillette Co.,

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227. *Bellotti*, 435 U.S. at 778-83.

228. *See id*. at 805-06.

229. *Compare id*. at 794, *with id*. at 815 (White, J., dissenting).

230. *See id*. at 804-07.

231. *Cf.* DAN-COHEN, *supra* note 203, at 110 (arguing that because corporate speech rights derive from individual rights, corporate speech may be regulated in the interests of better serving individual rights); Bezanson, *supra* note 6, at 790-91 (arguing that an organization's political speech deserves the same First Amendment protection as its members' individual speech, if the speech "represents its members' own choice, as individuals, to communicate to others information on selected types of topics, decided upon through an established and participatory or consultative process").

Even if an organization's speech is equivalent to the speech of individuals, the First Amendment interest in protecting the speech must be viewed in the context of countervailing societal interests. First Amendment doctrine reflects this idea by allowing compelling state interests to justify some burdens on free speech. *See Buckley*, 424 U.S. at 25 ("Even a 'significant interference' with protected rights . . . may be sustained if the state demonstrates a sufficiently important interest . . . .").

232. The corporations were "appellants" rather than "petitioners". *See Bellotti*, 435 U.S. at 765. Appeals of right to the Supreme Court were largely eliminated by the Supreme Court Case Selection Act, Pub. L. No. 100-352, 102 Stat. 662 (1988). *See also* Diane P. Wood, *Justice Harry A. Blackmun and the Responsibility of Judging*, 26 HASTINGS CONST. L.Q. 11, 13 (1998) (explaining the shift from mandatory to discretionary Supreme Court review).

233. When *Bellotti* was argued before the Supreme Judicial Court in 1976, both Digital Equipment and Gillette Co. were publicly traded, and their stock valuations were the nation's 70th and 121st highest, respectively. *See The Forbes Market 500*, FORBES, May 15, 1976, at 152. Wyman-Gordon stock was first offered to the public in 1978. *See* Wyman Gordan Company, *available at* LEXIS, NEXUS Library, Company & Financial, Company Profiles & Directories, Individual Publications, Hoover's Company Profile Database.

Digital Equipment Corp., and Wyman-Gordon Co.[234] In addition, both Justice White and the majority considered only the interests of shareholders, and not those of other corporate constituents, who are completely disenfranchised by "corporate democracy."[235]

Rather than relying on the easy assumption that a corporation's acts express its constituents' preferences as the *Bellotti* Court did, a court could undertake another approach and employ an intense factual inquiry for each given speech act by each given organization. A court would have to determine both how the organization in question actually reached a given decision to make a political expenditure, and to what extent it considered its members' concerns in that decision. While this idea may work in principle because it requires the speech to truly reflect the will of individuals, the required fact-finding would be terribly cumbersome in practice. Courts should therefore stake out a middle ground between conclusory assumptions on the one hand, and an unmanageable individualized empirical approach on the other.

Large business corporations share significant and similar organizational characteristics because of the common default form of their internal management. State corporate laws and federal securities laws prescribe default governance norms for publicly traded business corporations.[236] These default norms tend to favor wealth creation over individuals' participation[237] and thus justify presumptions that corporate spending does not reflect the expression of individual shareholders.[238] The remainder of this Part will

234. The opinion only lists the names of the corporations in a footnote. *See Bellotti,* 435 U.S. at 768 n.1. Although then Justice Rehnquist mentioned in passing that two of the appellant corporations were not state-chartered corporations but federally chartered banks, neither the majority nor any of the dissents assigned significance to this fact. *See id*. at 824 n.2 (Rehnquist, J., dissenting). Digital and Wyman-Gordon were incorporated in Massachusetts, and Gillette was incorporated in Delaware. *Id. See* First Nat'l Bank v. Attorney Gen., 359 N.E.2d 1262 (Mass. 1977).

235. With respect to nonshareholder constituents, see *infra* Part VI.F.

236. Many provisions of the Securities Exchange Act of 1934 (SEA), including section 14, discussed *infra*, apply only to securities that are required to register under that Act. *See* 15 U.S.C. § 78 (2000). The 1934 Act does not require registration by corporations whose stock is not traded on a national exchange, *see* 15 U.S.C. §§ 12(a), 78c(a)(1), or whose assets do not exceed $10 million. *See* Securities Exchange Act Rule 12g-1, 17 C.F.R. § 240.12g-1 (2001). Thus, much of federal securities law that impacts corporate governance does not apply to small, thinly traded corporations.

237. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980) (arguing that the separation of ownership and control is efficient); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982) (criticizing the movement toward increased shareholder participation); Henry G. Manne, *Some Theoretical Aspects of Share Voting*, 64 COLUM. L. REV. 1427, 1440-41 (1964) (arguing that the costs of shareholder participation outweigh the benefits).

238. *See* Greenwood, *supra* note 16, at 1002. A given corporation could rebut the presumption by showing that it has modified the default rules such that election-related spending is expressive of the will of the shareholders. For example, a corporate charter could state a specific ideological agenda as

describe the limitations on shareholder participation in decisions about a corporation's election-related spending. So-called "corporate democracy" does not give shareholders meaningful input into such decisions, much less control over them.[239] The default corporate governance regime gives shareholder voting very limited power. Even to the extent that shareholders can challenge management's decisions, federal and state law fail to guarantee shareholder access to information about such decisions.[240] Meaningful opposition to management decisions requires the owners of large numbers of shares to band together. Collective action problems, such as the limited opportunities for shareholders to communicate with one another, limit successful shareholder organization. Finally, while dissatisfied shareholders may dissociate from a corporation by the sale of shares, there are constraints on their ability to exercise this option.[241]

This Part's discussion of shareholder participation demonstrates both shareholders' lack of participation in publicly traded corporations and the necessity of distinguishing publicly traded corporations from smaller corporations. As Melvin Eisenberg notes, publicly traded corporations and closely held corporations are "two types of business associations which may have little in common but their form."[242] In the simplest case, a corporation may be owned, managed, and operated by a single individual. In such a case, the corporation's election-related spending may, quite literally, be that individual's expressive act. Shareholders may also participate more actively, and with less severe collective action problems, in corporations with a small number of shareholders. While shareholders of a public corporation are atomized and generally have no interactions with one another, the few shareholders of a closely held corporation are often "closely associated persons."[243] Thus, they are more likely to have the opportunities to

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one of the purposes of the corporation, or if a corporation reaches political positions by a participatory democratic process involving shareholders. Among publicly traded corporations, however, such cases will be rare or nonexistent.

239. *Cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).

240. *See infra* Part VI.B.

241. The two shareholder tactics of attempting to influence management on the one hand and divesting from the corporation on the other fall into Albert Hirschman's categories of "voice" and "exit" respectively. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 46 (1970).

242. MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 5 (1976).

Although the *Bellotti* Court acknowledged the existence of differences between large and small corporations, 435 U.S. at 785-86 n.22, 793, it was not referring to the differences in governing structures and individual participation. Rather, the Court's point was to argue that the diversity of size may contribute to *ideological* diversity in the election-related spending of various corporations. *See id.* at 785.

243. EISENBERG, *supra* note 242, at 5.

communicate directly with management and other shareholders and to bargain explicitly for participatory rights, simply by virtue of the small size of the organization.[244]

Some state laws expressly permit closely held corporations to depart from certain corporate governance norms and give shareholders a more direct say in corporate decision making.[245] Furthermore, some jurisdictions employ a "partnership analogy" which requires the governance of small corporations to be more responsive to shareholder concerns than that of large corporations.[246] While modification of corporate law default rules is at least theoretically possible in all corporations, the option of statutory close corporation status and judicially created rules favoring the partnership analogy reduce the transaction costs of contracting for participatory management in a small corporation.

None of this is meant to suggest that small corporations operate as harmoniously as Justice Field's hypothetical "aggregation,"[247] but active shareholder involvement is at least a possibility in smaller corporations. In the large, public corporation, however, collective action problems created by the sheer number of shareholders can impose insurmountable transaction costs to contracting around default rules that discourage participation. Thus, courts should presume that speech does not constitute the expression of individuals with publicly traded corporations but should presume the opposite with closely held corporations.[248]

A. Shareholder Voting

The corporate governance regime severely limits shareholders' opportunities to express their disagreement to management. Dissenting in *Austin*, Justice Scalia dismissed the idea that shareholders might justifiably object to management's political speech.[249] According to Justice Scalia, every shareholder "knows that management may take any action that is

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244. *See* O'Kelley, *supra* note 177, at 1363.

245. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 341-56 (1999).

246. *See, e.g.*, Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505 (Mass. 1975). *But see* Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993) (rejecting this concept in Delaware). *See generally* Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699 (1993).

247. *See supra* notes 208-10 and accompanying text.

248. This typology admittedly leaves a vast middle ground of medium-sized and large nonpublic corporations. For such a corporation, a presumption is harder to justify without some specific facts about the corporation's size and governance structure. Nonpublic corporations that have large numbers of passive shareholders and follow the default rules of nonparticipatory governance should be treated like public corporations.

249. *See* 494 U.S. 652, 686 (1990) (Scalia, J., dissenting).

ultimately in accord with what the majority (or a specified supermajority) of the shareholders['] wishes, so long as that action is designed to make a profit. That is the deal."[250] This passage suggests that shareholders are entitled to vote on corporate actions, but corporate decisions are based on a majority vote of shareholders only in very rare instances. While shareholders have the right to vote,[251] they may vote only on a limited range of subjects.[252] Under the default rules of state corporate law, directors, not shareholders, manage a corporation, unless its incorporating documents provide otherwise.[253] Even a majority of shareholders may not make business decisions on behalf of the corporation or order changes in management policies. This rule can be altered by provisions in the corporate chartering documents.[254] This might appear to enable shareholders to increase their role in the decision making process. However, while shareholders must approve amendments to the corporate charter, amendments may normally be put to a shareholder vote only upon a resolution by the board of directors.[255]

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250. *Id.*

251. The usual structure of corporate governance is one share, one vote. *See, e.g.*, DEL. CODE ANN. tit. 8, § 212(a) (1999). A corporation can issue classes of shares that have more or less than one vote each. *See, e.g.*, *id.*

Large, publicly traded corporations may not take away existing shareholder voting rights because New York Stock Exchange, American Stock Exchange, and NASDAQ rules place significant limits on the ability of their listed corporations to do so. *See* Order Granting Approval to Rule Changes Relating to the Exchanges' and Association's Rules Regarding Shareholder Voting Rights, 59 Fed. Reg. 66,570 (Dec. 19, 1994) [hereinafter SEC Order]. However, the exchanges are free to change these rules because the SEC does not have the power to mandate a one vote per share requirement. The D.C. Circuit struck down such an SEC rule on the ground that it exceeded the SEC's statutory authority. *See* Business Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990). The D.C. Circuit held that the regulation of shareholder suffrage is a matter for state corporation law. *See id.* at 412-13. The exchanges voluntarily adopted their rules against disenfranchisement following the *Business Roundtable* case. *See* SEC Order, 59 Fed. Reg. at 66, 570. The NYSE has made clear, however, that it considers its one-vote requirement flexible and subject to change. *See* Roberta S. Karmel, *The Future of Corporate Governance Listing Requirements*, 54 SMU L. REV. 325, 346-47 (2001).

252. In general, shareholders vote only for directors, not for corporate actions or policies. *See, e.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 195 (2000). Shareholders have the right to approve or reject certain rare, fundamental corporate changes recommended by the directors, such as dissolution of the corporation, mergers, or the sale of all or substantially all corporate assets. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 251(c), 271 (1999); MODEL BUS. CORP. ACT §§ 11.03(b), 12.01-02 (rev. ed. 1999). However, "because there is usually more than one way to skin the corporate cat, directors often can restructure transactions to achieve their desired end without triggering a shareholder vote." Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 311-12 (1999).

253. *See* DEL. CODE ANN. tit. 8, § 141(a); MODEL BUS. CORP. ACT § 8.01(b).

254. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a); MODEL BUS. CORP. ACT § 8.01(b).

255. *See* DEL. CODE ANN. tit. 8, § 242(b); MODEL BUS. CORP. ACT § 10.03(b). The requirement that the Board initiate amendments is a mandatory rule. Delaware's statute reads, "Every amendment . . . shall be made and effected in the following manner: (1) if the corporation has capital stock, its board shall adopt a resolution . . . ." DEL. CODE ANN. tit. 8, § 242(b). The MBCA states, "For the amendment to be adopted: (1) the board of directors must recommend the amendment to the

Shareholders' primary voting role is the election of directors.[256] In addition to electing directors, shareholders may remove them by vote.[257] It is often argued that a shareholder who disagrees with a specific act of corporate conduct may discipline management by subsequently mobilizing votes against incumbent directors.[258] Such arguments, however, greatly overstate the power of the shareholder vote.[259]

Mobilizing votes is rarely a realistic option, because incumbent management usually runs for re-election unopposed.[260] As a practical matter, shareholders have little control over the nomination process. A diversified shareholder faces an immense number of potential board candidates and is unlikely to have the time or expertise to identify and evaluate them.[261]

Furthermore, a single shareholder typically has a negligible proportion of votes in the corporation. Even the largest institutional investors typically do not hold nearly enough shares to control board seats on their own.[262] Effective voting against incumbent management requires coalition-building among many diverse shareholders who are geographically dispersed and difficult to identify. By giving management control of corporate resources and decision making, the default corporate governance regime effectively subsidizes management's power to advance its positions while restricting shareholders' ability to do the same. Finally, even if shareholders can muster the votes to remove incumbents, they must wait months to do so, because elections are usually held annually.[263] The so-called "Wall Street Rule" holds

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shareholders . . . ." MODEL BUS. CORP. ACT § 10.03(b).

256. *See supra* note 252. Directors' fiduciary duties require them to serve the shareholder interests. However, "shareholder interests" as defined by corporate law are not necessarily the same as the interests of actual shareholders. *See infra* Part VI.E.

257. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(k). Even when directors are removed by shareholder vote, shareholders do not have control over their replacement. The Delaware code gives the remaining directors the power to fill vacancies on the board. *See* DEL. CODE ANN. tit. 8, § 223. The MBCA creates the possibility of a power struggle by providing that vacancies may be filled by *either* the shareholders *or* the directors. MODEL BUS. CORP. ACT § 8.10.

258. *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, 274-76 (1998). Corporate officers, unlike directors, are generally appointed by the board of directors and are not normally elected or removed by shareholders. *See* GEVURTZ, *supra* note 252, at 181.

259. *See generally* Blair & Stout, *supra* note 252, at 311 ("[S]hareholders in public corporations do not in any realistic sense elect boards. Rather, boards elect themselves.").

260. *See* GEVURTZ, *supra* note 252, at 187.

261. *See* Mark Latham, *Corporate Monitoring: New Shareholder Power Tool*, 54 FIN. ANALYSTS J., Sept.-Oct. 1998, at 9.

262. *See* Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy,* 41 BUFF. L. REV. 1, 42 (1993).

263. *See* Robert B. Thompson, *Shareholders as Grown-Ups*, 67 U. CIN. L. REV. 999, 1012 (1999). If the directors' terms are staggered, shareholders will have to wait through two election cycles. *See id.* Many firms limit the ability of nondirectors to call special meetings. *See id.*

that it is more efficient for dissenting shareholders to sell their shares than to attempt to mobilize opposition to management.[264]

The barriers to shareholder collective action mean that management faces few limitations on its ability to mobilize large amounts of money for political expenditures. Because the board of directors manages the corporation, corporate law gives the board of directors ultimate control over "corporate" activity permitted by election law, such as contributing to political parties or nonfederal candidates, making independent expenditures on initiative campaigns, and establishing and administering PACs.[265] Corporate law also limits shareholders' ability to oppose management's decisions on these matters or to directly control such matters. Upper management, a relatively small, structured group, faces lower organizing costs. Shareholders as a group, or like-minded subsets of shareholders, have very high organizing costs (including identifying other shareholders and determining which of those are like-minded). The division of powers between management and shareholders, then, in effect, subsidizes the organization costs of management but not those of shareholders. Thus, only management can easily and inexpensively participate in decisions such as those regarding political expenditures. Because shareholders are effectively excluded from the process, the collective shareholder group makes no decision at all. Rather, a tiny subset of the group makes all decisions with minimal accountability to the rest of the group.

In addition to their voting power with respect to the election of directors and extraordinary matters, shareholders may propose and vote on resolutions.[266] Such resolutions, however, must be made in precatory form—that is, they are mere suggestions that management take a particular action. Under the default rules of corporate governance, shareholders may not make

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264. *See* Bogus, *supra* note 262, at 42. According to Albert Hirschman, the "best-informed" shareholders are most likely to practice the Wall Street Rule. *See* HIRSCHMAN, *supra* note 241, at 46-47 ("Those customers [sic] who care *most* about the quality of the product [sic] and who, therefore, are those who would be the most active, reliable, and creative agents of voice are for that very reason also those who are apparently likely to exit first in case of deterioration.").

Under the interest group theory of politics, "[g]roups will participate in an institution when the benefits of participation exceed the costs. The costs are primarily the costs of obtaining information about institutional processes and of organizing for collective action. The benefits are whatever benefits the institution can supply to the group." Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith,* 22 LAW & SOC. INQUIRY 959, 967 (1997) (reviewing and citing NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 8 (1994)). While controlling the corporation potentially offers great benefits, the organizing costs for dispersed shareholders are immense.

265. With respect to the corporation's authority to perform these acts under election law, see *supra* Part II.

266. *See* GEVURTZ, *supra* note 252, at 264.

binding resolutions ordering management to take a specific course of action or adopt a policy because, as noted above, corporation codes provide that directors shall manage the corporation.[267]

B. Shareholder Access to Corporate Information

As the previous section shows, the power of the shareholder vote is inherently limited. Corporate law further constrains shareholders' ability to use their votes meaningfully and to participate in corporate decision making because it limits shareholders' access to information about the corporation's political expenditures. Large gaps in the scope of required disclosure in this area mean that management need not even inform shareholders of many kinds of corporate political activity. The rational apathy of the diversified portfolio investor makes it unlikely that she will go to the lengths necessary to seek out such information.[268] Moreover, corporations fall under two kinds of relevant disclosure requirements—disclosure to the FEC under federal campaign law and disclosure directly to shareholders. The latter is governed by both state corporation and federal securities law. Neither body of law provides shareholders with all the information necessary to police the corporation's political involvement.

1. Federal Law

Federal law subjects corporations to two different types of mandatory disclosure. First, federal election law requires some disclosure to the FEC by all political spenders, whether corporate or individual. Second, federal securities law requires corporations to make certain disclosures to shareholders.

FECA requires that corporations and individuals alike make certain disclosures to the FEC regarding election-related spending. As enacted, the statute demanded disclosure of contributions and expenditures made "for the purpose of . . . influencing" the nomination or election of candidates for

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267. DEL. CODE ANN. tit. 8, § 141(a) (2000); MODEL BUS. CORP. ACT § 8.01 (rev. ed. 1999).

268. With respect to shareholder apathy generally, see Bernard Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990). The fact that a shareholder may not want the information does not undermine this Article's basic argument. The default structure does not involve a shareholder's input with respect to political issues because it is focused on profit not politics. If a shareholder is happy with that arrangement, then management betrays a shareholder by using corporate funds for purely political and nonpecuniary purposes. If, on the other hand, management's political expenditures are indeed an efficient method of increasing corporate profits, then management runs squarely into the problem of corruption.

public office.[269] In *Buckley*, however, the Supreme Court held that the phrase "for the purpose of . . . influencing" was impermissibly vague.[270] The Court ruled that while expenditures made specifically to advocate for a candidate may be included under the statute's reporting requirement, expenditures in connection with issue advocacy may not.[271]

Corporations can easily defeat even the surviving disclosure requirements with respect to the support of candidates. As noted above, corporations may make donations to organizations that serve as conduits of funds to political causes, including candidate elections.[272] Because the corporation's donation to the conduit is not nominally related to candidate advocacy, it need not be disclosed under FECA.[273] Furthermore, as noted above, the line between issue advocacy and express candidate advocacy is a fine one.[274]

Finally, and perhaps most important, even when information is properly reported to FECA, shareholders depend on the FEC to disseminate that information to the public. FECA requires the FEC to archive disclosure reports and to make them available for public inspection and copying.[275] The Commission, however, often fails to perform its duties,[276] and the FEC public disclosure office is understaffed and underfunded.[277] Cass Sunstein argues that the structure of FECA itself shows that Congress "concluded that the [FEC] . . . is not entirely reliable on its own and that relevant people should have access to the courts in order to ensure that the (democratically enacted) law is enforced."[278]

In addition to FECA's requirements regarding disclosure to the FEC, the federal securities laws mandate certain types of disclosures to shareholders and the SEC. The Securities Act requires corporations to disclose certain

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269. Buckley v. Valeo, 424 U.S. 1, 77 (1976).

270. *Buckley*, 424 U.S. at 76-82. The section of FECA, as amended in light of *Buckley*, now appears at 2 U.S.C. § 434(c)(1) (2000). *See* Hill, *supra* note 72, at 910 n.131.

271. *Buckley*, 424 U.S. at 80.

272. *See supra* Part II.B.4.

273. *See* Hill, *supra* note 72, at 911, 922-34.

274. *See supra* Parts II.B.1, 3.

275. *See* 2 U.S.C. § 438(a)(4)-(6) (1999).

276. *See* Benjamin Weiser & Bill McAllister, *The Little Agency that Can't*, WASH. POST, Feb. 12, 1997, at A1; Amanda S. La Forge, Note, *The Toothless Tiger—Structural, Political, and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351 (1996).

277. *See* Hill, *supra* note 72, at 909 n.123.

278. Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond,* 147 U. PA. L. REV. 613, 647 (1999). Professor Sunstein's conclusion is based on the fact that FECA not only authorizes private parties to file complaints with the FEC, *see* 2 U.S.C. § 437g(a)(1) (1999), but also allows "any party aggrieved" by the FEC's dismissal of such a complaint to petition the courts for review. *See* 2 U.S.C. § 437g(a)(8)(A) (1999).

specified information when they issue securities.[279] Subsequent to this initial disclosure, the Securities Exchange Act requires publicly traded corporations to make regular periodic disclosures.[280] Regulation S-K integrates the instructions for compliance with these disclosure rules for large corporations.[281] Neither Regulation S-K nor any other provision of federal securities law specifically requires corporations to disclose information regarding corporate political contributions or expenditures.

Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to promulgate rules regarding disclosure and other topics "in the public interest or for the protection of investors."[282] This language, as well as the legislative history of § 14, suggest that Congress intended the section to give the SEC broad authority to require disclosures of socially significant information.[283] The SEC, however, has interpreted this authority narrowly, such that the criteria for determining whether corporations must disclose information focus on economic materiality rather than social or political significance.[284] The SEC has taken the position that shareholders are interested only in economic matters and that expanded disclosure would be distracting and inefficient.[285]

Some mistakenly believe that the materiality standards surrounding corporate disclosure protect shareholders by requiring corporations to disclose all "material" information.[286] There is, however, no general obligation to disclose all information that might be of interest to shareholders or potential investors. To the contrary, a disclosure obligation must have a specific, independent legal foundation—corporations must disclose information that the SEC requests and only that information.[287] In the present context, such obligations usually arise from the express disclosure requirements of Regulation S-K. Because Regulation S-K does not currently call for disclosure of information about election-related spending, corporations do not routinely provide this information.[288] Even regulations

279. *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 7-8 (3d ed. 1996).

280. *See id*. at 8.

281. *See* 17 C.F.R. §§ 229.10-.702 (1999).

282. 15 U.S.C. § 78n(a) (2000).

283. *See* Cynthia Williams, *Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (arguing that it is within the SEC's power to substantially expand disclosure requirements with respect to socially and politically significant information, even if it is not significantly related to corporate financial performance).

284. *See* Kahn, *supra* note 72, at 1134.

285. *See id.* at 1134 n.99 (citing numerous SEC sources).

286. *See* Williams, *supra* note 283, at 1266 (citing NRDC v. SEC, 606 F.2d 1031, 1031 (D.C. Cir. 1979), as an example of this error).

287. *See id.*

288. *Cf. id.*

that call for specific information are sometimes limited by explicit, quantitative materiality standards, generally in the range of five to ten percent of the corporation's assets or earnings.[289] While five to ten percent of a corporation's assets or earnings may sound like a small figure, it translates into enormous dollar amounts. For example, for the year 2000, the fifty largest American corporations, based on assets, ranged in size from Citigroup with over $902 billion to Bank of New York Co. with over $77 billion.[290]

The specific information required by securities regulations is "further 'filtered' through the screen of materiality."[291] According to the Supreme Court, the general test of materiality "is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[292] According to the SEC, however, this hypothetical reasonable investor is interested only in investment return. An SEC Advisory Committee on Corporate Disclosure reviewed SEC and judicial standards of materiality and recommended that the FEC consider "social and environmental information" material "only when it reflects significantly on the economic and financial performance" of a corporation.[293]

2. *State Law*

As with federal disclosure requirements, state disclosure requirements include those under election law and those under corporate law. Most states require candidates to disclose their major contributors,[294] and some require major contributors themselves to disclose their contributions.[295] The specific requirements vary widely from state to state.[296] As in the federal system, the

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289. *See, e.g.*, SEC Regulation S-K, Instruction 2 to Item 103, 17 C.F.R. § 229.103 (1999) (requiring disclosure of pending legal proceedings if claims amount to ten percent or more of the corporation's current assets); SEA Rule 14a-8(c)(5), 17 C.F.R. § 240.14a-8(c)(5) (2000) (discussed *infra* at Part VI.C.).

The SEC also recognizes qualitative materiality standards. These standards typically require disclosure of facts that raise "questions about the integrity of management." 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 678 (3d ed. 1989).

290. *Fortune 500: America's Largest Corporations*, *at* http://www.fortune.com (last visited May 7, 2001) (searching full list of companies and custom ranking by assets).

291. Williams, *supra* note 283, at 1208.

292. TSC Indus. v. Northway, 426 U.S. 438, 445 (1976). *See also* Basic v. Levinson, 485 U.S. 224 (1988).

293. 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 675 n.157 (3d ed. rev. ed. 1999) (quoting HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., REPORT OF THE ADVISORY COMM. ON CORP. DISCLOSURE TO THE SEC, 321, 395 (Comm. Print 1977)).

294. *See* FEIGENBAUM & PALMER, *supra* note 23, chart 1, *available at* http://www.fec.gov/pages/of100chart1.htm.

295. *See id.*

296. *See id.*; *see also, e.g.,* MINN. STAT. ANN. § 10A.20 (West 1988 & Supp. 1997); TENN. CODE

value of this disclosure to shareholders depends on how well the government maintains and disseminates the information.[297]

The power of corporations to make political contributions, political expenditures, and charitable and educational donations, like other corporate powers, is traditionally a matter of state corporate law.[298] Early in this century, some courts held that corporate officers who authorized the expenditure of corporate funds for charitable or political purposes committed misappropriation of corporate funds. Courts in those cases held that such activity exceeded the scope of the corporate powers enumerated in the corporation's charter or those permitted the state corporations code.[299] Some states allowed corporate charitable contributions but required specific disclosure of expenditures unrelated to profits.[300] The evolving notion of corporate social responsibility in the latter part of this century, however, led to a more favorable attitude toward corporate involvement in charity and, by extension, politics.[301] Current state corporate laws, which tend to encourage corporate philanthropy, generally do not require management to disclose corporate charitable or political contributions to shareholders.[302]

In addition, any state securities statutes attempting to impose disclosure requirements beyond those of federal law on large, nationally traded corporations would probably be invalid. Nationally traded securities and certain other kinds of securities are exempt from state law registration requirements pursuant to the National Securities Markets Improvement Act

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ANN. § 2-10-105 (1996).

297. *See supra* notes 275-78 and accompanying text.

298. *See, e.g.*, Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974); Kelly v. Bell, 254 A.2d 62 (Del. 1969); Marsili v. Pac. Gas & Elec. Co., 51 Cal. App. 3d 313 (Cal. Ct. App. 1975). Of course, state corporate law intersects with federal election law, and both are subject to the First Amendment.

299. A Montana court, for example, held that corporate officers misappropriated corporate funds when they expended funds for political purposes because the state corporations code did not specifically mention political activity as a permissible corporate purpose. McConnell v. Combination Mining & Milling Co., 76 P. 194 (Mont.), *modified by* 79 P. 248 (Mont. 1904). In another case, an officer of a New York corporation contributed to a national presidential election campaign fund and received reimbursement from corporate funds, as instructed by the corporation's president. People ex rel. Perkins v. Moss, 80 N.E. 383, 384 (N.Y. 1907). He was arrested on a charge of grand larceny. *See id.* On his motion for habeas corpus, the court stated that the corporation did not have the power to agree to contribute to political campaigns. *See* id. at 387.

In contrast to more recent cases, *McConnell* and *Perkins* did not inquire whether the political expenditures would have benefited the corporation. *See Marsili*, 51 Cal. App. 3d at 323-24. *Cf. Romnes*, 495 F.2d at 852. In fact, such benefit could have been found in *McConnell* because the corporation was a mining concern and the expenditures included funds to support the silver cause. *See McConnell*, 79 P. at 248-49.

300. *See* Kahn, *supra* note 71, at 1112.

301. *See* Brudney, *supra* note 16, at 236.

302. *See* Kahn, *supra* note 71, at 1132.

of 1996.[303] Common law also does not appear to impose a generalized disclosure duty on managers. [304]

Where management does not have to actively disclose information, the shareholder has only a limited right to seek it out. State law typically gives shareholders the right to inspect corporate books and records.[305] A shareholder, however, must establish that her request has a "proper purpose."[306] Courts have held that "proper purpose" must relate to the firm's financial condition and may not serve only the social and political concerns of the shareholder.[307] In *Minnesota ex rel. Pillsbury v. Honeywell, Inc.*, shareholder Pillsbury bought a single share of Honeywell, Inc. in order to gain a voice in opposing Honeywell's production of weapons for American use in the Vietnam War.[308] Honeywell denied his request for "all corporate records dealing with weapons and munitions manufacture."[309] The Supreme Court of Minnesota held that Pillsbury was not entitled to access Honeywell's books and records because "petitioner was not interested in even the long-term well-being of Honeywell or the enhancement of the value of his shares. His sole purpose was to persuade the company to adopt his social and political concerns, irrespective of any economic benefit to himself or Honeywell."[310]

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303. Pub. L. No. 104-290, 110 Stat. 3416 (codified in scattered sections of 15 U.S.C.). *See* Richard Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 29-30 (1999).

304. State cases occasionally allude to a common law duty of disclosure, sometimes called the "duty of candor." *See, e.g.*, Brandt v. Travelers Corp., 665 A.2d 616, 617 (Conn. Super. 1995); Persinger v. Carmazzi, 441 S.E.2d 646, 652 (W. Va. 1994). The Delaware Supreme Court, however, has referred to the phrase as "unfortunate terminology" and emphasized that it does not refer to any disclosure duties greater than those imposed by federal securities law. Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992). *See* Douglas M. Branson, *Securities Litigation in State Courts—Something Old, Something New, Something Borrowed . . . ,* 76 WASH. U. L.Q. 509, 525 (1998); Donald E. Pease, *Delaware's Disclosure Rule: The "Complete Candor" Standard, Its Application, and Why Sue in Delaware*, 14 DEL. J. CORP. L. 445, 447, 452 (1989).

305. *See, e.g.*, DEL. CODE ANN. tit. 8, § 220(b) (1999); MODEL BUS. CORP. ACT § 16.02(a) (rev. ed. 1999).

306. DEL. CODE ANN. tit. 8, § 220(c) (1999). In contrast, where a shareholder seeks access to shareholder lists, the corporation bears the burden of disproving proper purpose. *Id.*

307. *See* Kahn, *supra* note 71, at 1132-33 (citing Nat'l Consumers Union v. Nat'l Tea Co., 302 N.E.2d 118 (Ill. App. Ct. 1973); State ex rel. Pillsbury v. Honeywell, Inc., 191 N.W.2d 406 (Minn. 1971)).

308. 191 N.W.2d 406, 408-09, 411 (Minn. 1971). Apparently, the shareholder "had previously ordered his agent to buy 100 shares . . . . and also had a contingent beneficial interest in 242 shares." *Id.* at 411.

309. *Id.* at 408.

310. *Id.* at 412. The court applied Delaware law because Honeywell was incorporated in Delaware. *Id.* at 409-10. Of course, this holding is not a definitive interpretation of Delaware law, but the Minnesota court indicated that the same result would be obtained if the case had been decided under Minnesota's corporation law. *Id.* at 409. *Chevron* distinguished *Pillsbury* and indicated that the

Corporate management is free to engage in "educational" and even explicitly political spending without consulting shareholders or affirmatively establishing that the spending benefits the corporation.[311] Shareholders, on the other hand, may not obtain information about such uses of corporate property or use the corporate forum even to raise the issue unless they can prove a business-related purpose.[312] Management's disclosure requirements do not extend to social and political expenditures, since noneconomic information is presumed to be of no interest to shareholders.[313] In the absence of data about shareholders' actual desire for such noneconomic information, such a presumption may be both plausible and useful in conserving the corporation's resources and protecting shareholders from an overload of information.

However, when a shareholder, like Pillsbury, shows actual interest in noneconomic information, the presumption of disinterest is defeated. Nonetheless, shareholders seeking such information may be dismissed on the normative ground that the shareholder has no "proper purpose" for the information.[314] In this way, corporate and securities law imposes a normative model of acceptable shareholder concerns rather than following the demonstrated preferences of the real shareholder.

C. Limitations on Shareholder Communication

Corporate law provides shareholders with some tools for communicating with management and other shareholders. Shareholders' restricted access to

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Delaware Supreme Court had expressed disapproval of *Pillsbury*. *See* Credit Bureau Reports v. Credit Bureau of St. Paul, 290 A.2d 691, 692 (Del. 1972). However *Credit Bureau Reports* stated only that *Pillsbury* was an incorrect interpretation of Delaware law insofar as it conflicted with the *Credit Bureau Reports* holding. *See id*. This case held that a shareholder is entitled to shareholder lists when he seeks them in an attempt to elect an opposition slate of directors by proxy contest, regardless of any other motivations he may have. *Id. Pillsbury* denied a shareholder's request for ledgers for this purpose and thereby conflicted with *Credit Bureau Reports*. *See Pillsbury*, 191 N.W.2d at 412-13.

Pillsbury's denial of the shareholder's request for access to corporate books and records, however, did not conflict with *Credit Bureau Reports*. *See Credit Bureau Reports*, 290 A.3d at 692; *Pillsbury*, 191 N.W.2d at 412. The "proper purpose" for access to books and records and for access to shareholder lists are usually treated as the same inquiry because both are articulated in section 220 of the Delaware Code. DEL. CODE ANN. tit. 8, § 220 (1999). Similarly, they appear in the same section of the MBCA. MODEL BUS. CORP. ACT § 16.02 (rev. ed. 1999). The holding of *Credit Bureau Reports* is inapposite in the books and records context because books and records are not directly relevant to the solicitation of proxies in a director election. Furthermore, under section 220(b), the corporation must prove impropriety of purpose to defeat a request for shareholder lists, while the shareholder must prove propriety to obtain books and records. DEL. CODE ANN. tit. 8, § 220(b) (1999).

311. *See supra* note 27 and accompanying text.

312. *See* Kahn, *supra* note 71, at 1133.

313. *See supra* notes 284-93, 307-10 and accompanying text.

314. *See supra* notes 306-10 and accompanying text.

information about the corporation and restrictions on the kinds of issues that can be discussed through these tools limit the value and utility of these tools. In certain circumstances, shareholders can obtain access to the corporation's list of shareholder names and addresses, can receive the corporation's assistance in soliciting proxy votes, and can obtain access to the corporation's proxy materials. Because the shareholders of a large corporation are numerous, dispersed, and not otherwise identifiable, the corporation's lists of shareholders are a crucial method of contacting and communicating with shareholders. Furthermore, the vast majority of shareholders of large, publicly traded corporations do not attend shareholder meetings to exercise their voting rights but, instead, cast their votes by proxy. Thus, contacting shareholders by mail to inform them about corporate issues or to seek their support in casting their proxy votes is key to winning voting contests. Shareholders, however, are severely constrained in their ability to use the corporate forum for debate about political spending or even about the merits of the candidates for directorships who will make the decisions about such spending. Ironically, while *Bellotti* defended corporate election-related spending on the ground that it contributed to the democratic value of informed political discourse in the broader society,[315] such deliberation is absent within the corporation itself.

As with corporate books and records, management is generally required to give a shareholder access to shareholder lists only if the shareholder states a "proper purpose."[316] The Delaware Supreme Court has held that "the desire to solicit proxies for a slate of directors in opposition to management is a purpose reasonably related to the stockholder's interest as a stockholder" and that "any further or secondary purpose in seeking the list is irrelevant."[317] When a shareholder requests shareholder lists to solicit proxies or to disseminate information in connection with a shareholder proposal, however, case law suggests that the request has a "proper purpose" only if the proposal has a sufficient connection to the corporation's distinct business interests.[318]

315. *See supra* Part III.B.

316. *See* DEL. CODE ANN. tit. 8, § 220(b) (1999); MODEL BUS. CORP. ACT § 16.02(b), (c) (rev. ed. 1999). Delaware law requires the corporation to disprove the existence of a proper purpose to justify denying the shareholder access to the lists. *See* DEL. CODE ANN. tit. 8, § 220(c) (1999). The MBCA does not indicate who bears the burden of proof.

317. *Credit Bureau Reports*, 290 A.2d at 692.

318. Although this is the prevailing version of the "proper purpose" test, other jurisdictions may apply it differently. For example, a shareholder of an Ohio corporation has a "basic" right to know the identities of his or her fellow shareholders. *See* Celina Mut. Ins. Co. v. Am. Druggists Ins. Co., 369 N.E.2d 1066 (Ohio Ct. App. 1977). Furthermore, an Ohio corporation's shareholder who states a specific purpose which "on its face, is [n]either illegal [n]or unreasonable [n]or improper" is presumptively entitled to access to shareholder lists. Lake v. Buckeye Steel Castings Co., 206 N.E.2d

In *Conservative Caucus Research, Analysis & Education Foundation, Inc. v. Chevron Corp.*, a shareholder sought shareholder lists in order to rally support for a pending shareholder proposal requesting Chevron management to curtail its business dealings with the Communist government of Angola.[319] The political motivations of the shareholder, a group called the "Conservative Caucus," were obviously significant.[320] Nonetheless, the court went out of its way to avoid ruling that political concerns constitute a proper purpose.[321] Instead, the court predicated its decision on the Conservative Caucus's assertions that doing business with Angola could have a negative economic impact on the corporation because of the possibility of civil war or government instability.[322]

In addition to state law rules regarding shareholder lists, federal law mandates certain narrow types of management cooperation with shareholders making proposals. If a corporation is soliciting proxies from shareholders, it must provide solicitation assistance to shareholders who request assistance in circulating their own proxy solicitations. Under Rule 14a-7, the corporation must either give the requesting shareholder a list of the shareholders it intends to solicit or must itself mail the requesting shareholder's materials to the other shareholders.[323] The requesting shareholder bears any expenses the corporation incurs in this process, which can be considerable.[324] Thus management usually elects to do the mailing at the requester's expense rather

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566, 568 (Ohio 1965). The Supreme Court of Ohio ordered the corporation to comply with Lake's request for shareholder lists, which stated simply, "[t]he purpose of this demand to examine the records of shareholders is to obtain the names, addresses and holdings of other shareholders with whom I may desire to communicate regarding the affairs of the corporation." *Id.* at 568.

Such differences among states' jurisprudence bring up a potentially interesting theoretical issue. This Article's analysis focuses on the "traditional" corporate law exemplified by the Delaware code, under which the majority of Fortune 500 corporations are incorporated. *See* Delaware Division of Corporations Home Page, *at* http://www.state.de.us/corp (last visited Apr. 13, 2001). Most states' laws follow the same general contours as Delaware's. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 163 (3d ed. 1999). In theory, however, a state's laws could alter the traditional shareholder role and provide for meaningful shareholder involvement in decision making about political expenditures. A corporation that could prove that its law of incorporation provides such opportunities might overcome the presumption herein advanced that the political expenditure is not the speech of its shareholders. Unlikely though it may be, such a development could engender competition among states for laws of incorporation that favor shareholder input.

319. 525 A.2d 569, 570-71 (Del. Ch. 1987).

320. *See id*. at 571.

321. *See id*. at 571-73. Concededly, however, the court also refused to rule out the possibility entirely. *See id.*

322. *Id.* at 572.

323. *See* Securities Exchange Act Rule 14a-7, 17 C.F.R. § 240.14a-7 (2000). The shareholder chooses between the two options only in very narrow circumstances outlined in Rule 14a-7(b). *Id.*

324. *See* O'KELLEY & THOMPSON, *supra* note 318, at 251.

than disclose the contents of the shareholder list to the requester.[325]

Rule 14a-8 provides another avenue for shareholder communication by requiring a corporation to include, at a shareholder's request, certain shareholder proposals and supporting statements on the corporation's proxy card and proxy statement.[326] This Rule saves the shareholder the time and expense of printing and mailing her own proxy materials. The Rule applies, however, only to shareholders who have owned one percent or $2,000 worth of stock for one year and continue to hold it at the time of the shareholder meeting at which the vote is taken.[327] Moreover, the Rule specifies many circumstances that allow management to exclude a shareholder's proposal.[328] For example, the corporation may exclude a shareholder's proposal from a proxy statement if the proposal deals with an issue that lacks sufficient economic significance to the corporation and is not "otherwise significantly related" to the corporation's business.[329] The economic significance test allows the corporation to omit a proposal that "relates to operations . . . account[ing] for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year."[330] Shareholder proposals regarding political expenditures at America's most profitable corporations would not reach the five percent threshold unless those expenditures were in the range of $75 million to $1.1 billion.[331]

In *Lovenheim v. Iroquois Brands, Ltd.*, a shareholder argued that the term

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325. *See id*.

326. 17 C.F.R. § 240.14a-8. The corporation's "proxy card" is the form the shareholders receive listing the issues to be voted on at an upcoming meeting and seeking authority to vote the recipients' shares in favor of management's positions. "Proxy statement" refers to the accompanying materials describing and supporting management's positions.

327. 17 C.F.R. § 240.14a-8(b)(1).

328. 17 C.F.R. § 240.14A-8. A shareholder may, of course, evade Rule 14a-8's constraints by independently printing and mailing proxy materials at her own expense and effort. *See, e.g.*, Union of Needletrades, Indus. & Textile Employees v. May Dept. Stores Co., 26 F. Supp. 2d 577 (S.D.N.Y. 1997). This approach, however, is extremely expensive and time-consuming. Furthermore, even a wealthy shareholder will probably need access to shareholder lists to mail the proxy materials to shareholders. Moreover, access to lists is subject to a "proper purpose" requirement. *See supra* notes 307-10, 318-21 and accompanying text. Finally, by obtaining shareholders' discretionary authority to vote their shares on unforeseen issues the corporation's proxy solicitation may preemptively obtain authority to vote proxies against dissident shareholder proposals, should they be presented at the shareholder meeting. *See* Securities Exchange Act Rules 14a-4(a)(3), 14a-4(c)(1), 17 C.F.R. §§ 240.14a-4(a)(3), (c)(1) (2000). Even if management has reason to know that dissident shareholders may subsequently launch an independent antimanagement proxy solicitation, management can retain discretionary authority by disclosing its knowledge and intent to use its discretionary authority to vote against dissident proposals if they are made. *See Union of Needletrades*, 26 F. Supp. 2d at 584-86.

329. Securities Exchange Act Rule 14a-8(i)(5), 17 C.F.R. § 240.14a-8(i)(5) (2000).

330. Securities Exchange Act Rule 14a-8(c)(5), 17 C.F.R. § 240.14a-8(c)(5) (2000).

331. *See supra* Part VI.C.1 (discussing the five percent threshold of Regulation S-K).

"otherwise significantly related" required the inclusion of a proposal with "ethical or social significance" even though it failed the economic significance test.[332] The shareholder's proposal requested that management investigate whether the manufacture of pâté de foie gras imported by the corporation involved cruelty to animals.[333] The proposal did not meet the economic significance test because pâté implicated only .05 percent of the corporation's total assets and had no proportion of its earnings because the corporation suffered small net losses on its sales.[334] While the court found a substantial likelihood that the shareholder would prevail on the substantial relationship test,[335] it indicated that noneconomic factors alone do not satisfy the significant relationship test.[336] Rather, the court based its ruling on the combination of the proposal's "ethical and social significance . . . *and* the fact that it implicates significant levels of sales."[337] The court noted that "[t]he result would, of course, be different if plaintiff's proposal was [sic] ethically significant in the abstract but had no meaningful relationship to the business of Iroquois/Delaware as Iroquois/Delaware was not engaged in the business of importing paté de foie gras."[338] Under this logic, a court could find that a shareholder's proposal requesting that management cease or begin election-related spending is not significantly related to the business of the corporation because the corporation is not engaged in the business of election-related spending.[339]

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332. 618 F. Supp. 554, 559-60 (D.D.C. 1985).

333. *See id.* at 556. Pâté de foie gras is made from the liver of geese, and the shareholder alleged that its production involves the force-feeding of the animals to increase the size of their livers. *See id.* at 556 n.2.

334. *Id.* at 558-59.

335. The court did not actually hold that the proposal was substantially related to the corporation's business. Rather, it found that the shareholder had demonstrated a likelihood of prevailing on this issue, and thus granted his motion for a preliminary injunction preventing Iroquois from excluding the proposal. *See id.* at 562.

336. *Id.* at 561.

337. *Id.* at 561 (emphasis added). *Cf.* Med. Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970) (upholding a proposal with both economic and political significance under an earlier version of Rule 14a-8).

338. 618 F. Supp. at 561 n.16.

339. Another exception under Rule 14a-8 allows management to exclude proposals that relate to the corporation's "ordinary business." Securities Exchange Act Rule 14a-8, 17 C.F.R. § 240.14a-8 (2000). This unfortunate choice of terminology may appear to contradict Rule 14a-8(i)(5)'s requirement that a proposal be "significantly related to the company's business." 17 C.F.R. § 240.14a-8(i)(5). The exception is intended to exclude proposals that deal with everyday business decisions. The SEC formerly interpreted this rule very strictly, such that the exclusion extended to proposals with "social significance." *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 76,418, at 77,284 (Oct. 13, 1992), *available at* 1992 WL 289095. In response to public outcry, however, the SEC reversed this position in 1998. *See* Amendment to Rules on Shareholder Proposals Investment Company Act Release No. 23,200, 67 SEC Docket 373 (May 21, 1998), *available at* 1998 WL 254809. Thus, at least according to the SEC, a shareholder who demonstrates

Shareholders' primary role in corporate governance is the election of directors.[340] Surprisingly, however, shareholders may not use the proxy statement to advocate for or against the election of particular directors.[341] The apparent justification for this odd exception is the potential drain on corporate resources if shareholders were to have such access.[342] This Rule is yet another indication that corporate law is meant to further efficient wealth creation and not shareholders' participation or expression.

In *Bellotti*, the Court stated that even if protecting shareholders from management abuse of corporate property constitutes a compelling state interest, the statute at issue was overinclusive with respect to that goal.[343] According to the Court, the statute would prohibit expenditures on referenda "even if [the corporation's] . . . shareholders unanimously authorized the contribution or expenditure."[344] The statute would indeed have prohibited such an expenditure, but the Court failed to recognize that a unanimously authorized act by a large publicly traded corporation is a creature of fantasy. Corporate law does not require management to consult shareholders at all before making such expenditures, much less acquire their unanimous approval. Political expenditures specifically authorized by shareholders simply do not occur in large corporations. Management is not required to disclose such expenditures to the shareholders, so they are unable to protest. Even if a shareholder discovered the expenditures and wanted to launch a shareholder protest, the shareholder would have difficulty obtaining access to lists and proxy statements to inform other shareholders and organize them to protest.

D. "Voting with Your Feet": Divestment as an Unsatisfactory Remedy

The "Wall Street Rule" teaches that if a shareholder disagrees with

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significant social policy issues can now trump management's invocation of the ordinary business exception. However, case law such as *Lovenheim* still suggests that social significance must be accompanied by some economic significance. 618 F. Supp. at 561.

340. *See supra* notes 256-59 and accompanying text.

341. Rule 14a-8(i)8, 17 C.F.R. § 240.14a-8(i)(8) (2000). Before Rule 14a-8 was rewritten in 1998, section 14a-8(c)(8), the predecessor of 14a-8(i)(8), permitted management to exclude shareholder proposals relating to an election to office. Amendments to Rules on Shareholder Proposals of May 28, 1998, 17 C.F.R. pt. 240 (1998). The SEC interpreted this language to allow the exclusion of proposals regarding elections to government office as well as director elections. *See* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999 [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812 (Nov. 22, 1976).

342. *See* CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 283 (2d ed. 1996).

343. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794-95 (1978).

344. *Id.* at 794.

management, it is more efficient for her to sell her stock than to attempt to change management.[345] This course of action is a poor remedy, however. A shareholder will know she has reason to sell only after she discovers that management is using corporate resources for political purposes with which she disagrees. First, the limitations on required disclosure impair her ability to obtain this information.[346] Second, even if the shareholder learns of objectionable election-related spending, "voting with her feet" allows the shareholder only to escape continued unauthorized use of corporate resources. It does not put a stop to the activity generally or provide any remedy for the unauthorized use that has already occurred.[347]

Moreover, selling shares because of the corporation's election-related spending is unlikely to have a disciplining effect on management. A sell-off in sufficient volume or threat of such sell-off can discipline management indirectly by depressing share prices and threatening their jobs. A divestiture, however, will not depress share prices unless an extremely large group of shareholders sells at roughly the same time. Even if divestiture causes stock price to fall, management may be unaware of the reason, as the corporate governance structure does not offer a method of communicating to management that political spending prompted the sell-off. Furthermore, orchestrating a concerted shareholder threat of sell-off is extremely difficult because of the obstacles to communicating and coordinating with other shareholders.[348] Even if these obstacles are overcome, the exit option will not necessarily cause the market to provide the governance terms that investors prefer. Indeed, the availability of exit may actually reduce corporations' incentive to satisfy investor preferences by leading investors to sell and to search quixotically for ideal terms rather than staying invested in the firm and agitating for change from within.[349]

In addition, while it is literally true that "the shareholder . . . is free to

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345. *See supra* note 264 and accompanying text.

346. *See supra* Part VI.B.

347. *See* Winkler, *supra* note 172, at 168. Furthermore, she is unlikely to find a remedy through a suit for breach of fiduciary duty. *See infra* Part VI.E.3 (discussing the enforcement of the business judgment rule).

348. *See supra* Part VI.B.

349. *See* HIRSCHMAN, *supra* note 241, at 26-29, 124-25. According to Albert O. Hirschman:

> [C]ompetition may result merely in the mutual luring over of each others' customers on the part of a group of competing firms; and . . . to this extent competition and product diversification is wasteful and diversionary especially when, in its absence, consumers would either be able to bring more effective pressures upon management toward product improvement or would stop using up their energies in a futile search for the "ideal" product.

Id. at 28.

withdraw his investment at any time and for any reason,"[350] selling shares does not serve to punish the corporation by depleting its capital. An exiting shareholder does not "reclaim" his capital investment from the corporation but merely sells his investment to a new shareholder. Moreover, shareholders' "freedom" to exit is limited by the fact that exit can entail significant costs. If the share price is depressed at the time the shareholder disagrees with management, the shareholder will pay a price to exit.[351] If the share price has appreciated, exit by liquidation of stock constitutes a taxable event which may impose costs on the exit.[352] Furthermore, notwithstanding the current boom in day-trading and other high-turnover strategies, economists generally agree that a long-term buy-and-hold strategy is the most reliably profitable method of equity investing.[353] Thus exit may impose costs even absent a depressed stock price or a tax penalty.[354]

E. Wealth Maximization: A Flawed Model of Shareholder Interests

Even though shareholders do not participate directly in election-related spending decisions, it may be argued that corporate governance law ensures that corporate actions indirectly represent shareholders' interests. The standard fiduciary and contractarian models of corporate law both hold that management must use its control over corporate powers to enrich shareholders.[355] This shareholder wealth maximization is both the main source of management power and the principal limitation upon it.[356] The *Bellotti* Court failed to understand the wealth maximization principle's

350. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 n.34 (1978).

351. In *MCFL* and *Austin*, the Supreme Court referred to the exit problem, though it did not elaborate on it. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 663 (1990); Mass. Citizens for Life v. FEC, 479 U.S. 238, 260-61 (1986).

352. *See, e.g.*, 26 U.S.C. § 1001 (2000).

353. *See, e.g.*, Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CALIF. L. REV. 627, 650 (1996); Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 611, 622-23 (1995).

354. The restraints on exit suggest that the corporate governance regime not only prevents shareholders from controlling election-related spending but also forces them to fund spending they may disagree with. Thus, it has been argued that state restriction of corporate spending is not only permissible under the First Amendment but necessary to safeguard shareholders' negative First Amendment rights against compelled speech. *See* Brudney, *supra* note 16, at 257-64.

355. *See* Gulati, Klein & Zolt, *supra* note 192, at 891-93.

356. The wealth maximization doctrine is of relatively recent vintage. Before it took shape early in the twentieth century, the doctrine of ultra vires limited management activity to pursuit of the corporate powers specifically enumerated in corporate codes or charters. *See* GEVURTZ, *supra* note 252, at 22. In most cases, this clearly prohibited election-related spending, even if it could have been construed as beneficial to shareholder wealth. *See supra* note 299.

intended role as a limit on management activity. It stated that the government violates the First Amendment if it requires business corporations to "stick to business" in their election-related spending.[357] In fact, "stick to business" is corporate law's prime directive to managers.

Although not explicitly mentioned in state corporate codes, the wealth maximization principle is generally accepted as "the most basic principle of corporate law."[358] Under the fiduciary model, managers' fiduciary duty to shareholders, the owners of the corporate assets, is often reduced to a single duty: namely, to maximize the value of those assets.[359] In contractarian terms, the duty may be described as a term of the contractual relationship between shareholders and management.[360] In areas where management's powers and duties are not expressly provided for in background law or governance documents, the wealth maximization principle fills the gap.

While the wealth maximization rule is a useful approximation of shareholder interests in most corporate governance disputes about the duties of directors, it has two major shortcomings as a justification of the legitimacy of management control over election-related spending. First, it fails to ask whether corporate election-related spending implicates shareholder interests other than wealth. Second, the business judgment rule renders the wealth maximization principle's constraints on management largely illusory. Wealth maximizing action is not easily defined. No law actually requires management to prove compliance with the wealth maximization principle. Instead, the business judgment rule imposes a presumption of compliance that shields all but the most egregious management misconduct.[361]

357. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978).

358. Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273, 1278 (1991).

359. *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(a) (1994) ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

360. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 196, at 36-37; Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1068 (1990) ("[C]ourts should treat an allegation of a breach of fiduciary duty as they would treat any alleged breach of contract."). More recent versions of contractarianism suggest that managers are not, or should not be, constrained by the wealth maximization rule at all. *See, e.g.*, Blair & Stout, *supra* note 252, at 249.

Other corporate constituents are even worse off than shareholders vis-á-vis management. They have no default right to information or input and no general "catch-all" rule like the wealth maximization rule. *See infra* notes 447-55 and accompanying text.

361. *Cf.* EISENBERG, *supra* note 242, at 3 ("While an agent must normally follow his principal's instructions, shareholders have no legal power to give binding instructions to the board on matters within its powers.").

1. Nonpecuniary Interests of Shareholders

The wealth maximization rule ignores the diverse nonpecuniary interests of shareholders.[362] Most shareholders likely invest primarily for the purpose of wealth maximization. Institutional investors, for example, generally invest for that purpose alone. But at least some shareholders invest for other reasons. For example, shareholders may purchase stock in hopes of using their votes to affect politically significant corporate actions.[363] Moreover, even investors who primarily seek profit may value certain ethical or ideological preferences over profit.[364] In Parts V and VI, this Article criticized the failures of constitutional law as it is applied to corporations. The present discussion, however, notes a potential pitfall of applying corporate law in the constitutional context. Corporate law's narrow focus on efficient wealth creation may be appropriate when deciding most corporate governance disputes, which are ultimately about creating and distributing corporate wealth. Such a narrow focus, however, leaves corporate law alone ill-equipped to deal with issues like election-related spending, which implicates constitutional and political values as well.

Every organization faces the problem of setting uniform group goals despite various and conflicting individual or factional interests. Even if all the interests of shareholders could be identified, the corporation's actions might not satisfactorily reflect the diversity of shareholder interests or even the interests of the majority of shareholders. Organizational theorists observe that a collective decision does not clearly reveal the "underlying individual preferences or motivations that generated it."[365] This failure of collective decision making derives, in part, from transaction costs, unequal bargaining power, and imperfect information, and, in part, from some inherent qualities

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362. *See* Greenwood, *supra* note 16, at 1068-70 ("While *ceteris paribus* higher share value obviously is better for the owners of the shares than lower share value, in the real world *ceteris* is rarely *paribus*.").

363. For example, the plaintiff shareholder in *Pillsbury v. Honeywell* bought a single share of stock in the Honeywell corporation to gain a voice to oppose Honeywell's production of weapons for use in the Vietnam War. 191 N.W.2d 406, 408-09 (Minn. 1971). *Cf. Use Your Stock to Save Animals' Lives*, PETA'S ANIMAL TIMES, Spring 1998, at 17 (urging shareholders of corporations that use animals for product testing to donate that stock to People for the Ethical Treatment of Animals (PETA) to give PETA a voice in changing the corporations' testing policies).

364. Thus, for example, some mutual funds make investments guided by social responsibility principles ranging from environmental sensitivity to gay rights to fundamentalist religious values. *See, e.g.*, Susan Sherriek, *A Conscience Doesn't Have to Make You Poor*, BUSINESS WEEK, May 1, 2000, at 204.

365. DAN-COHEN, *supra* note 203, at 33 (citing THOMAS SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978)).

of group behavior.[366] As a result, a paradox of collective behavior is that it can yield group decisions that reflect the preferences of none of the group's members.[367] Even when individuals intend to act in concert, their individual rational behavior can result in irrational or suboptimal group actions.[368]

The shareholders of a corporation have diverse financial interests and diverse political preferences that can conflict with the preferences of the hypothetical, idealized shareholder who is an undiversified, long-term investor. Unlike the manager, the shareholder does not owe fiduciary duties to the corporation or fellow shareholders. Instead, she may use any subjective criteria when deciding how she wants corporate resources to be used. Thus the shareholders, with varying and often conflicting preferences, should compete freely over how to use the corporate resources. The resulting collective action problem is analogous to the problem of setting policy goals in a political democracy. Political democracy encourages debate regarding the purposes and goals of the nation. In the corporate context, however, the law does not facilitate—or even permit—discussion of the purpose of the corporation.

The classic contractarian view would challenge this Article's assertion that corporate law fails to account for shareholders' nonpecuniary concerns. Contractarianism holds that even if shareholders have no direct input into specific decisions, shareholders have indirectly consented to them because they have bargained for the terms of corporate governance.[369] Thus, contractarians argue that the allocation of agency costs under the existing corporate governance regime is by definition fair.[370] Even if shareholders have interests other than wealth, they have bargained for a governance system that reflects only that interest.

Characterizing corporate governance terms as a meaningful mutual bargain, however, ignores information gaps and transaction costs.[371] It also

366. *See supra* Parts VI.A-C.

367. *See* DAN-COHEN, *supra* note 203, at 33.

368. For example, decision making by committees often results in individual preferences canceling out one another and yielding compromises that please no one. *See* DAN-COHEN, *supra* note 203, at 220.

369. For example, Judge Easterbrook and Professor Fischel argue that each term of corporate governance (whether privately tailored or a legally supplied default) is literally bargained for because the cost of each term is reflected in the overall price of the share. *See* EASTERBROOK & FISCHEL, *supra* note 196, at 18-19.

370. *See, e.g.*, Ribstein*, supra* note 64, at 136-38.

371. Larry Ribstein, for example, argues that shareholders can choose their investments based on the corporation's political activities. *See* Ribstein, *supra* note 64, at 140. This is not really possible because of the lack of information available to investors and shareholders which I discuss in Part VI.B. Professor Ribstein also argues that exiting by selling stock is costless, *see* Ribstein, *supra* note 64, at 139-40, which I dispute in Part VI.D.

ignores the facts that corporate law rules are shaped by forces other than the mutual consent of parties and that bargaining around default rules set by law is not as smooth and frictionless as contractarians sometimes assume. According to Lucian Arye Bebchuck and Mark J. Roe, "path dependence" accounts for much of the content of corporate rules. They argue that "[t]he [economic] rules . . . [used] at any given point in time depend on, and reflect, the ownership and governance structures that the economy had initially. . . . The initial structures affect future corporate rules which in turn affect future decisions on corporate structures."[372] In short, a rule becomes the controlling authority for decision making precisely because it has been the rule in the past,[373] not simply because the shareholders and management to whom it applies find it mutually beneficial.[374]

The tendency for existing rules to resist bargaining applies to default as well as to mandatory rules. A legal rule structured as a default indicates only the absence of a legal prohibition against bargaining around it. It does not guarantee that parties who prefer another rule can easily modify the default. The Coase Theorem teaches that default rules will not prevent parties from bargaining to efficient outcomes in the absence of transaction costs.[375] In the real world, however, transaction costs interfere with the ability to contract around default rules.[376] As the transaction costs of explicit contracting rise, a default rule begins to resemble a mandatory rule. Tacit adoption of default rules is the path of least resistance, which reduces the transaction costs of establishing a corporation's governance structure.[377] The act of substituting a

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372. Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 154 (1999).

373. Explanations for this tendency include transaction costs, network externalities, and endowment effects, which are discussed *infra* this Part. *See id.* at 139-42.

374. While path dependence may cause inefficient rules to persist, Professors Bebchuck and Roe suggest that some rules may be both path dependent and efficient at the same time. *See id.* at 131-32.

375. *See* Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 14 (1972).

376. Ronald Coase has deplored the tendency of theoreticians to ignore this fact when applying the Coase Theorem. *See* RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 174 (1988) ("The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave."). *See also* Daniel Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem,* 83 VA. L. REV. 397 (1996) (arguing that critics of the Coase Theorem's assumption of zero transaction costs are more faithful to Professor Coase's purpose than are those who assume the absence of transaction costs in applying his theorem to the real world).

377. *See* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts,* 81 VA. L. REV. 757, 826 (1995). Professor Klausner further argues that the bias toward default rules is enhanced by the fact that they can generate "network benefits" to the extent that a "contractual network" forms around a default rule or rules. *Id.* at 828 ("Default terms . . . are prime candidates as focal points because they are well known, and they uniquely have the imprimatur of the legislature or court that created them.").

tailored rule for a default rule in the corporation's initial charter is a relatively low cost procedure. Because chartering precedes the public sale of equity, however, public shareholders are not parties to the initial chartering process. A shareholder seeking to contract around a state law default rule must alter the charter of an existing corporation, a process which entails substantial costs. These costs include identifying a problem despite barriers to obtaining information,[378] overcoming collective action problems to organize political pressure on management,[379] convincing the board to pass a resolution recommending an amendment,[380] and orchestrating a political campaign to approve the amendment by shareholder vote.[381] Furthermore, certain mandatory rules restrict a shareholder's ability to contract around defaults, most notably the rule that only directors may initiate changes to the charter.[382] This obstacle to charter amendment is particularly relevant in states whose default rules authorize corporations to make political contributions.[383]

Transaction costs are not alone in keeping default rules in place. Experimental psychology suggests that the Coase Theorem may have been incorrect in assuming that preferences are independent of entitlement allocations. Some experiments suggest that people have a preference, sometimes referred to as the "status quo bias" or the "endowment effect," for existing entitlement allocations, such as default rules, over reallocations.[384] Thus "alienable legal entitlements will be 'sticky'—that is, tend not to be traded—*even when such stickiness cannot be explained by transaction costs*."[385]

Whether caused by transaction costs or other factors, the "stickiness" of defaults means that the initial allocation of legal entitlements is not a matter of indifference. It has been argued that even if the market inefficiently allocates entitlement between shareholders and management, it surely allocates them more efficiently than government can, and thus government should leave the allocation to market forces.[386] This argument, however, posits a false dichotomy between law and markets. In reality, the market

378. *See supra* note 240 and accompanying text.

379. *See supra* note 244 and accompanying text.

380. *See supra* note 254 and accompanying text.

381. *See supra* note 255 and accompanying text.

382. *See* DEL. CODE ANN. tit. 8, § 242(b) (1999); MODEL BUS. CORP. ACT § 10.03(b) (rev. ed. 1999). *See also supra* Part VI.A.

383. *See supra* Part II.A (citing examples from state codes).

384. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms,* 51 VAND. L. REV. 1583, 1584 (1998).

385. *Id.* (emphasis added).

386. *See* EASTERBROOK & FISCHEL, *supra* note 196, at 19; Ribstein, *supra* note 64, at 136-44.

operates against a complex background of legal rules. The fact that these rules resist private ordering adds force to the classic Realist argument that the state cannot remain neutral with respect to the allocation of entitlements.[387] Whenever background default law exists, the state has given someone a sticky, and thus privileged, initial entitlement.[388] The corporate governance regime gives management an initial entitlement to control election-related spending. Corporate campaign finance regulation does not interfere with a pristine market but, simply fine-tunes the states' allocation of entitlements giving an advantage to management.

Even if, despite path dependence, contracting is capable of overcoming all inefficient corporate law rules in the long run, such a power would ensure only that corporate governance terms would reach efficient arrangements *over time*. It would not address the effect of default rules on the efficiency of any given shareholder-management dispute at any given time.[389] Every particular disagreement among constituents of a corporation—whether in connection with corporate political contributions or anything else—takes place over the short and not the long term.[390] Even if market pressures eventually cause corporate governance terms to conform to shareholder expectations, this change fails to consider whether any given shareholder has consented to any given corporate election-related spending decision.

The preceding argument has challenged the classic contractarian argument that governance terms are literal contracts, whose terms are bought and paid for through securities markets.[391] Recent refinements of contractarian thought more convincingly concede that governance terms are not literal contracts, but *hypothetical* bargains reflecting the terms parties would have reached through bargaining but for transaction costs.[392]

387. *See* Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 676-77 (1979) ("The enforcement of any particular set of property rights . . . is inevitably distribution determinative . . . .").

388. Even when a dispute is not adjudicated, background legal rules affect parties' private agreements. *See, e.g.,* Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161 (1988); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950, 968 (1979) ("The outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips.").

389. Bernard Black has characterized most of corporate governance law as not only nonmandatory but, indeed, "trivial" because it can be avoided or modified by contracting and other tactics. *See* Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis,* 84 NW. U. L. REV. 542, 544 (1990). However, this characterization applies only in the long term. Professor Black concedes that rules can indeed matter in the short run. *See id.*

390. Indeed, in the long run, all particular shareholder grievances, like all shareholders, are dead.

391. *See, e.g.*, EASTERBROOK AND FISCHEL, *supra* note 196, at 18-19.

392. *See, e.g.*, Bainbridge, *supra* note 199, at 864-65.

According to Stephen Bainbridge, "corporate law default rules . . . [are not] entitlements but . . . our best guess as to what parties would rationally agree to in the absence of any pre-existing set of imposed terms."[393] The "guess," however, is just that—a guess. Moreover, this guess tends to defy empirical confirmation. Hence corporate law default rules, like other hypothetical contracts, cannot meaningfully be said to reflect what parties would have agreed to. Rather, they reflect what lawmakers believe the parties *should* have agreed to.[394]

The corporate governance regime does not provide a system to resolve conflicts among shareholder preferences about the purpose of their ownership of the corporation. Instead, it privileges one type of preference—wealth maximization—and refuses to recognize others.[395] Indeed, corporate law does not allow shareholders to use the corporation to pursue purposes other than wealth creation, even if they demonstrate that wealth maximization is not their actual preference.[396] The principle does not operate as an approximate description of shareholder preferences but, rather, as a normative directive by the state. In corporate governance, the wealth of shareholders is worthy of legal protection, and other concerns are not.[397]

Any legal rule unavoidably embodies some particular conception of the good. The law not only reflects but also communicates and shapes normative values.[398] Despite its pretenses to political neutrality, this is as true of

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393. *Id.* at 865 n.31.

394. *See* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law,* 47 WASH. & LEE L. REV. 697, 730-31 (1990) ("The common label 'gap-filling terms' is a misnomer because the 'gaps' the law has to fill generally are wider than the zones filled in by the parties."); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation,* 89 MICH. L. REV. 1815 (1991); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism,* 60 VA. L. REV. 451 (1974). In his discussion of hypothetical bargains, Professor Bainbridge, who specifically styles himself a "*conservative* contractarian," candidly discloses the normative assumptions that drive his model of corporate law. *See* Bainbridge, *supra* note 199, at 882-99 (emphasis added). However, most contractarians, like most legal scholars, fail to disclose or even recognize the normative assumptions behind their legal analysis. *See* Thomas W. Joo, *Common Sense and Contract Law: Fear of a Normative Planet?*, 17 TOURO L. REV. 1037, 1048-52 (2001) (discussing contract law's aversion to revealing its normative assumptions); Leff, *supra*.

395. *See* Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Managers Trustees Revisited,* 69 S. CAL. L. REV. 1021, 1035, 1037 (1996) (arguing that corporate law is tailored to the interests of a construct he calls the "fictional shareholder" and not to the interests of actual individuals).

396. *See supra* Part VI.B.1.

397. *Cf.* Greenwood, *supra* note 16, at 1067 (arguing that fiduciary duty requires managers' speech on behalf of the corporation "to defend a single position that they are directed by state law to defend, not a position that they, or anyone else, choose").

398. As Margaret Jane Radin argues:

> Where legal institutions help shape culture, they do so in part by instantiating and reinforcing particular conceptions of the nature of persons and their good. That is, they do so in part by means

corporate law as it is of other areas of the law.[399] Wealth creation is a worthy societal goal. Centralizing power in management can contribute to achieving that goal, despite the risks of management abuse. Meaningful, multidimensional shareholder participation in corporate governance conflicts with that goal.[400] No politically neutral reason exists, however, why this conflict should always be resolved in favor of efficient wealth creation. The resolution does not depend only on individuals' actual priorities (which, in any event, cannot be satisfactorily determined), but also on what priorities society should encourage individuals to hold.

Constitutional law does not and should not share corporate law's single-minded devotion to the maximization of wealth. Because corporate law justifies shareholder nonparticipation in election-related spending decisions based on the wealth maximization principle, the law presumes that all shareholders hold that view. Such a presumption amounts to the state's implicit endorsement of the idea that citizens should abandon their nonpecuniary political priorities in pursuit of wealth. The state's choice of what values to endorse can contribute to the formation of norms that will guide managerial and shareholder behavior.[401] Certainly, shareholders have the right to hold and to support that mercenary view, but the law should not endorse such views that do not comport with the values of a self-governing polity.[402] The law should communicate society's disapproval of the

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> of discourse, by means of underwriting a conceptual scheme. *Indeed it seems that the state is always involved in preferring one discourse to another . . . . because of the cultural, symbolic nature of the government's activities, it is implicitly promoting some specific ('private') goods and discouraging others, whether it says so or not.*

MARGARET JANE RADIN, CONTESTED COMMODITIES 173 (1996) (emphasis added).

A growing body of law and economics scholarship explores the role of the law in shaping social norms. *See, e.g.*, Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 948 (1997) ("The state should suppress harmful norms, such as the collusive and monopolistic practices of cartels, and fill gaps in norms with laws, as when pollution outruns responsibility."); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996) (characterizing "law as an effort to produce adequate social norms . . . . [and] might either do the work of such norms, or instead be designed to work directly against existing norms and to push them in new directions").

399. *Cf.* Bainbridge, *supra* note 199, at 882-85 (criticizing the pretense of neutrality in corporate law scholarship and proposing an approach to corporate law explicitly based on Burkean conservatism); James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 7 (1999) ("Corporate law is about norm management.").

400. Then again, so does unchecked management discretion, which may encourage rent-seeking instead of efficient wealth creation.

401. *Cf.* Black, *supra* note 389, at 570 ("[M]andatory rules may help to frame a corporate culture that leads managers not to abuse the discretion they will inevitably have."). In addition to the factors noted in Part VI.E.1 that make default rules resistant to bargaining, the state's endorsement can itself contribute to the "stickiness" of these norms. Korobkin, *supra* note 384, at 1584.

402. Compare, for example, laws against the buying and selling of votes. *See, e.g.*, 18 U.S.C. §§ 597-598 (2000); 42 U.S.C.A. § 1973(c) (1999).

mercenary view by rejecting the presumption that shareholders always value wealth above their political preferences.

2. *Indeterminacy of the Wealth Maximization Principle*

Even assuming that shareholders are interested only in monetary gain, the wealth maximization rule still creates problems by failing to place meaningful constraints on management's election-related spending decisions. In the end, shareholders have virtually no direct or indirect control over corporate election-related spending. Voting and divestment are ineffective as indirect controls.[403] Litigation based on the wealth maximization principle might seem to offer shareholders a direct tool to control management, but it too is severely limited in practice. The wealth maximization rule is sufficiently vague that managers can engage in self-interested acts without violating the letter of the principle. The differences among shareholders' risk preferences and investment portfolios mean that there is no single course of action that results in universal shareholder wealth maximization. Different corporate strategies will maximize wealth for different shareholders.[404]

Whom then are managers to serve? Courts have tended to hold that management must serve an idealized shareholder, who is an undiversified long-term investor.[405] Real shareholders' financial interests are more complex, however. For example, say Widget Corp. makes political

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403. *See supra* Parts VI.A, C.

404. *See generally* Hu, *supra* note 358. The traditional interpretation of the wealth maximization thesis states that shareholder welfare is best served by maximizing corporate welfare, typically measured in terms of earnings per share. *See id.* at 1279. Most judges, lawmakers, and corporate managers ascribe to this view. *See id.* at 1279-80. In contrast to the traditional view, most theorists today agree that wealth maximization means that the corporation's purpose is the maximization of share value. *See id*. These two views may dictate very different versions of shareholders' best interests. Furthermore, neither of the views is without its problems. With respect to the traditional view, the maximization of a shareholder's wealth is not always congruent with the corporation's welfare because shareholders usually have diversified economic interests. *See id.* at 1280-82. Thus, a shareholder's wealth is rarely, if ever, entirely tied to the fortunes of a single corporation. A well-diversified shareholder may stand to gain from high-risk, high-return behavior on the part of management, even though such behavior may put the corporation's survival at risk.

The share-maximizing principle is similarly indeterminate. The strategies that maximize share value in the long run are not necessarily the same ones that maximize it in the short run. *See, e.g.*, Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1155 (Del. 1989) (holding that management was justified in defending against an immediately lucrative tender offer because management's continued control of the corporation would supposedly yield greater share value in the indeterminate longer term). Thus, because shareholders hold shares for differing lengths of time, they will disagree as to whether long- or short-term strategies best serve their pecuniary interests. *See* Hu, *supra* note 358, at 1302.

405. *See* Richard A. Booth, *Stockholders, Stakeholders, and Bagholders*, 53 BUS. LAW. 429 (1998); Greenwood, *supra* note 395, at 1025, 1027.

expenditures in favor of candidate *X*, who intends to make it easier for U.S. corporations to move their widget factories abroad in order to cut production costs and to raise profits.[406] The assertion that the rational shareholder will favor Widget's support of *X* rests on the unrealistic assumption that the shareholder has no competing economic interests. Real Widget Corp. shareholders may have legitimate economic reasons to oppose the candidate's policies. Shareholder *S* may have a greater financial interest in Gadget Inc., which builds widget factories and will be wiped out if the widget industry moves offshore. Alternatively, she may be an employee of Widget Corp. who stands to lose her job if Widget moves its production abroad.

As many commentators have noticed, the interests of the hypothetical undiversified, long-term shareholder coincide more with the interests of management than those of actual diversified shareholders.[407] This idealized shareholder prefers the conservative, stable continuation of the enterprise rather than aggressive attempts to realize large profits in the short term.[408] Thus, the wealth maximization rule is not only unresponsive to shareholder needs, it can also operate as an excuse for management to pursue its own interests while professing to serve those of shareholders.[409]

3. *Enforcement and the Business Judgment Rule*

The wealth maximization principle also fails to constrain management discretion because of enforcement difficulties. In theory, the wealth maximization principle is enforced by shareholders' rights to file suit on behalf of the corporation against the managers who violate it. The *Bellotti*

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406. While a corporation may not contribute directly to the candidate's campaign, recall that it can give soft money to his party, establish and administer a PAC that gives to her campaign, or pay for issue ads that highlight campaign issues without explicitly advocating the election of a particular candidate. *See supra* Part II.

407. *See, e.g.*, Booth, *supra* note 405, at 434; Greenwood, *supra* note 395.

408. *See* Greenwood, *supra* note 395, at 1062, 1077, 1097.

409. Recent statutory developments may work to free management from even nominal adherence to the wealth maximization principle. In a majority of states, "other constituencies" statutes authorize management to consider interests other than shareholder wealth, such as employees, bondholders, or the neighboring community. *See, e.g.*, 15 PA. CONS. STAT. § 1715(b) (1999); WIS. STAT. § 180.0827 (1992). By their terms, these statutes have the potential to remove all limits on management discretion, as they do not require management to emphasize any particular concerns. *See, e.g.*, 15 PA. CONS. STAT. § 1715(b); WIS. STAT. § 180.0827. Indeed, some commentators have argued that such statutes simply increased directors' power by insulating them from takeovers and even awarding them powers that shareholders had specifically refused to authorize through charter amendments. *See, e.g.*, Lucian Arye Bebchuck & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers,* 99 COLUM. L. REV. 1168, 1187 (1999); Roberta Romano, *The Political Economy of Takeover Statutes,* 73 VA. L. REV. 111, 129-30 (1987).

Court cited derivative actions as evidence that corporate governance law enables shareholders to control corporate election-related spending.[410] A shareholder derivative suit, however, is a drastic and costly course of action likely to be worthwhile only in cases of massive abuse of funds.[411] The inability of shareholders to organize compounds the difficulty of bringing suit.[412] Moreover, even if shareholders bring suit, the business judgment rule renders management's business decisions largely immune to judicial review. Under the rule, it is irrelevant whether management's conduct substantively benefits shareholders, as long as management acted "on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company."[413] The rule presumes that management behaved in this manner and places a heavy burden on shareholders attempting to prove otherwise. In effect, if a managerial decision falls under the rule, neither courts nor shareholders may disturb that decision.

The limited case law available suggests that managerial decisions regarding election-related spending fall within the business judgment rule. In other words, courts presume that election-related spending is intended in good faith to serve shareholder interests. For example, in *Marsili v. Pacific Gas & Electric Co.,* the California Court of Appeals used the rule to reject a shareholder challenge to a utility corporation's contribution to a group supporting a municipal ballot measure.[414] Neither state law nor the corporate charter expressly authorized or prohibited the political expenditure.[415] The measure would have required voter approval for the construction of any building over seventy-two feet tall in San Francisco.[416] While fighting the measure could possibly have benefited the corporation, the court did not

410. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978).

411. A derivative suit may disrupt the corporate business and eat up corporate resources. Thus, shareholders have disincentives to bring even a meritorious suit. Moreover, shareholders may recover attorneys' fees only after the completion of a successful suit. *See* GEVURTZ, *supra* note 252, at 424. This problem is partially alleviated by contingent fee arrangements, but the risk that attorneys take by working on a contingent basis presumably increases the fees shareholders must pay.

412. *See supra* Parts VI.A-C.

413. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Management acts may fall outside the scope of the rule if, for example, they constitute a "waste" of corporate assets that is, a use of corporate property that yields no corporate benefit. The waste rule carries little weight in light of the presumptions of the business judgment rule. In any event, the waste standard is "'an extreme test, very rarely satisfied by a shareholder plaintiff,' because 'if under the circumstances any reasonable person might conclude that the deal made sense, then the judicial inquiry ends.'" Zupnick v. Goizueta, 698 A.2d 384, 387 (Del. Ch. 1997) (quoting Steiner v. Meyerson, Fed. Sec. L. Rep. (CCH) ¶ 98,857, at 93,145 (Del. Ch. 1995) (Allen, C.), *available at* 1995 WL 441999).

414. 51 Cal. App. 3d 313 (1975).

415. *Id.* at 318.

416. *Id.* at 323.

require management to show any such benefit.[417] The court even indicated that it would be insufficient for shareholders to prove a lack of benefit.[418] Citing the business judgment rule, the court stated that in the absence of allegations of bad faith, the contribution was immune to a shareholder challenge "unless it is held, *as a matter of law*, that the contribution *could not be construed* as incidental or expedient for the attainment of corporate purposes."[419]

The ostensible purpose of the business judgment rule is the institutional competency concern that, unlike professional managers, "[t]he judges are not business experts."[420] Business judgment deference to management's political decisions, however, is inconsistent with this purpose. Managers are business experts, not political experts, and decisions regarding political expenditures are not manifestly business decisions.[421] A shareholder suit challenging a political expenditure by management does not merely question the wisdom of a business-related decision by management. It also raises the question of whether election-related spending is a business-related decision. Remarkably, *Marsili* allows managers themselves to answer this question. The opinion defines "business decision" as any decision that might benefit the corporation.[422] As if this standard were not permissive enough, the court also defers to management's judgment as to whether any benefit exists.[423]

Such a toothless definition of "business decision" transforms the business judgment rule from one that requires courts to defer to managerial business expertise into a rule mandating deference to managerial decisions in all matters. It remains to be seen whether other courts will follow *Marsili*'s lead. However, the application of business judgment rule deference to the review

417. *Id*. at 324-25.

418. *Id.*

419. *Id.* at 324 (emphasis added).

420. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

421. While it is true that a corporate board member may be a political insider with expertise as to what political expenditures will "pay off" for the corporation, describing this as a matter of "business judgment" depends on the crass normative assumption that political influence is no more than an economic input equivalent to fuel, to machinery, or to intellectual property. Moreover, it concedes a risk of quid pro quo corruption, which *Buckley* recognized as a justification for regulations on election-related spending. *See* Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

Charitable donations may arguably be characterized as business decisions because they may, as a side effect, materially benefit the corporation by improving the corporation's community relations and public image. *See, e.g.*, Kahn v. Sullivan, 594 A.2d 48, 51 (Del. 1991) ("[T]he Board has determined that it is in the best interest of Occidental to support and promote the . . . Art Collection."). However, unlike business decisions regarding the corporation's business dealings, it is not apparent that business executives have special expertise in evaluating the potential side effects of charitable donations or election-related spending.

422. *See Marsili*, 51 Cal. App. 3d at 324-25.

423. *See id.*

of charitable contributions suggests that they may. In *Kahn v. Sullivan*, the Supreme Court of Delaware extended the business judgment rule to shareholder suits challenging charitable corporate contributions.[424] Like *Marsili*, the court relied on case law applying the rule to business decisions but failed to explain why the rule should be imported into the charitable corporate contributions context.[425] Because Delaware is the leading corporate law jurisdiction, *Kahn* is likely to be an influential case in many jurisdictions.

Perhaps it is not difficult to imagine diversified, passive shareholders consenting to a contract giving management broad discretion to make political expenditures for the good of the corporation. It is implausible, however, to suggest that shareholders would assent to such an arrangement if it ensured little or no management accountability. The current regime is just such an arrangement. The SEC's constricted view of disclosure means that shareholders have no ready means of obtaining information about managerial decisions.[426] Even if shareholders obtain such information, the business judgment rule will likely insulate management's election-related spending decisions from challenges by shareholders.

Because the business judgment rule fails to constrain managerial discretion, using it to justify managerial control over election-related spending does not merely exalt wealth. It suggests that management's political preferences are more worthy of respect than those of shareholders. Leaving both political and business decisions to the sole discretion of management suggests that there is no distinction at all; all decisions are business decisions, and political or ideological content is irrelevant. As with the presumption that shareholders always prefer wealth maximization, the extension of business judgment discretion to political decisions expresses norms inconsistent with our self-governing polity. Most shareholders presumably have neither expertise nor interest in making the corporation's routine business decisions and understandably assign them to professional managers. However, to presume that shareholders have neither expertise nor interest in matters involving political preference contradicts the basic

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424. 594 A.2d 48, 59-61 (Del. 1991). In *Kahn*, the Occidental Petroleum Corporation board approved an $85 million donation to establish the Armand Hammer Museum and Cultural Center, a project conceived by and named after Occidental's chairman and CEO, Armand Hammer, in order to display his personal art collection. *Id*. at 52-54.

425. While it is possible that charitable decisions may benefit the corporation and its shareholders, *see supra* note 421, it is not clear why courts should presume this to be true without evidence. *See* Kahn, *supra* note 71, at 1126-27. In fact, earlier Delaware and New Jersey case law, although deferential to management, applied a "reasonableness" standard to corporate philanthropy instead of the business judgment rule. *See id*. at 1124-25 (citing Theodora Holding Corp. v. Henderson, 257 A.2d 398, 404 (Del. Ch. 1969); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953)).

426. *See supra* notes 281-86 and accompanying text.

assumptions of self-government and thereby perverts the meaning of the First Amendment.[427]

Management enjoys a presumption that corporate spending in favor of a candidate is intended as a worthwhile investment for the corporation, but managers are not required to articulate what that benefit is. If pressed, management would likely argue that spending is simply intended to secure the election of the candidate whose positions are the best for the corporation's interests. Even corporate donors themselves, however, admit that their spending is intended to purchase influence with,[428] or at least access to, decision makers.[429] This intention is of course precisely the kind of quid

427. Distinguishing between communicative expenditures that are "political" and those that are "merely business" and thus within management discretion would admittedly be difficult in marginal cases. However, the mere fact that the distinction is a difficult one is not an excuse to avoid making it. *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 770 (1975) (Blackmun, J., dissenting) (criticizing the Court for adopting an imperfect bright line rule limiting SEC Rule 10b-5 standing to avoid the difficulty of administering a flexible standard).

428. *See, e.g.*, Edward A. Kangas, *Soft Money and Hard Bargains,* N.Y. TIMES, Oct. 22, 1999, at A27. According to Mr. Kangas, the chairman of Deloitte Touche Tomatsu, corporate contributors do not pursue politicians with bribes but are rather the victims of a "shakedown" by politicians. *Id.* He argues that "[t]he threat may be veiled, but the message is clear: failing to donate could hurt your company." *Id. See also* Viveca Novak, *Dialing Back the Dollars,* TIME, Sept. 6, 1999, at 42. Whether contributions are bribes doled out by corporate managers or "protection money" demanded by politicians, they constitute quid pro quo corruption.

Kathleen M. Sullivan points out that many big political contributors are "'political hermaphrodites'" that contribute to both major parties. Sullivan, *Political Money*, *supra* note 91, at 679 (quoting LaFalce v. Houston, 712 F.2d 292, 294 (7th Cir. 1983) (Posner, J.)). She cites this fact as evidence that even contributors have no confidence in the influence their money buys. *See id.* at 679. However, political hermaphrodism shows just the opposite. If the management of Politically Hermaphroditic Corp. (PHC) wishes to help the Democrats (or the Republicans) win, contributing to both parties makes no sense. But if money buys influence, it does not matter to PHC whether the Democrats or Republicans win. It matters only that PHC contributed to the party that wins. Because PHC cannot know which party will win, it contributes to both.

429. It is sometimes argued that campaign contributions do not constitute corruption because they buy only access to politicians not influence with them. The concept of access means that a major contributor has the opportunity to communicate directly with decision makers in a way that nondonors cannot. The Democratic and Republican parties openly advertise these opportunities as perks of large donations in connection with "Team 2000" and the "Business Leadership Trust." *See* websites cited *supra* note 1. *See also* Mike Allen, *For Party Faithful, "Packages" and Perks,* WASH. POST, June 20, 2000, at A1 (noting that Team 2000 members were invited to a private dinner with Representatives Kennedy and Gephardt at the Democratic National Convention). Even if the money itself does not "buy" any official acts—indeed, even if access does not always succeed in convincing the targeted politician—access to political decision makers' time and attention is a valuable public resource, and buying and selling it in exchange for campaign contributions is a form of quid pro quo corruption.

Other commentators have gone one step further and argued that empirical evidence shows no connection between contributions and legislators' voting records. *See* Bradley Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45, 58 n.91 (1997) (citing sources). While disproving the influence that money may justify the First Amendment protection of individual election-related spending, it is an inherently flawed defense of corporate spending. If corporate political contributions do not yield favorable political results, they do not generate any benefit for the corporation and, thus, constitute an improper use of corporate resources.

pro quo corruption the *Buckley* Court recognized as a justification for regulating contributions to candidate-election campaigns.[430]

To distinguish corporations from individuals, the *Austin* Court invented the vague and unconvincing corrosion argument rather than using the existing corruption rationale of *Buckley*.[431] By not pursuing the corruption argument, the Court seemed to concede that it could not explain why corporate spending is more corruptive than individual spending.[432] But this Article's description of corporate governance suggests such an explanation. Unlike individuals, corporate managers acting in good faith do not have authority to engage in election-related spending for purely ideological or expressive purposes.[433] Rather, the central principle of corporate governance requires management to seek material benefit in exchange for election-related spending. Even corporate codes that specifically permit corporations to engage in election-related spending[434] do not purport to relieve management of its duty to maximize wealth. Thus corporate election-related spending in compliance with the corporate governance regime is more likely than individual spending to cause corruption or the appearance of corruption. This is true of both corporate election-related contributions and expenditures, though it applies with more force to contributions.

In short, both the wealth maximization rule and the competitive marketplace pressure managers to engage in corrupt spending. Under the business judgment rule, management need not explain to courts or shareholder plaintiffs the corrupt purpose behind such spending. The state has an interest in using campaign finance law to blunt the effect of these perverse incentives and protections created by the corporate governance regime.[435]

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430. *See* Buckley v. Valeo, 424 U.S. 1, 26-30 (1976).

431. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659-60 (1990); *Buckley*, 424 U.S. at 19.

432. *See Austin*, 494 U.S. at 659-60.

433. Daniel J.H. Greenwood has argued that, as long as managers obey the mandate of corporate law, corporate speech merely parrots the wealth maximization rule and does not constitute "speech" at all. *See* Greenwood, *supra* note 16, at 1068 ("[C]itizens functioning as corporate decision makers are expected to set aside their politics (in the largest sense of the word, including all their views of the good life) and instead to work for a simple set of goals set by state law and the (legally structured) financial marketplace.").

434. *See supra* Part II.A. While corporate codes allow philanthropic activity, partisan election-related spending cannot honestly be so characterized. Unlike philanthropic spending, partisan election-related spending is unlikely to generate goodwill in the community. A partisan position can alienate as many customers as it impresses. Indeed, it may be a poor business decision to support even a popular candidate, as public opinion seems to disfavor corporate election-related spending in general.

435. Alternatively, the necessity for regulation could be alleviated by wholesale changes to the default corporate governance regime.

F. Accounting for Nonshareholder Interests

For the sake of simplicity, this Article has thus far focused on the tension between shareholders and management, following the lead of the fiduciary model and the dominant version of contractarianism.[436] Recent scholarship, however, has criticized shareholder-centric approaches to corporate law on two related grounds.[437] First, such approaches privilege the interests of shareholders and ignore managers as corporate constituents with their own legitimate concerns.[438] Second, it fails to consider the many relationships that make up a corporation.[439] This Part addresses these objections. As for the first, managers' concerns do not justify their virtually complete lack of accountability for election-related spending decisions. As for the second, while this Article focuses on the manager-shareholder relationship for the sake of convenience, its argument is entirely consistent with a broad view of corporate relationships. Indeed, a richer model of corporate relationships only strengthens this Article's argument.

It has been argued that even if corporate election-related spending does not constitute shareholder expression, it implicates the expressive interests of the managers who make election-related spending decisions.[440] A basic principle of corporate law, however, maintains that managers may not make unauthorized use of corporate resources for their personal purposes.[441] This prohibition on mangers need not be a fiduciary duty; it may be a bargained for contractual term or a default rule that mimics the outcome of bargaining between hypothetical rational parties. In any case, the manager-controlled corporation makes little sense without it. Thus, if shareholders can be said to have authorized management to control election-related spending, such

436. *See* Gulati, Klein & Zolt, *supra* note 192, at 891-93.

437. Another branch of corporate governance scholarship rejects both the fiduciary and contractarian approaches for a model based on property law. Economists have advanced the theory that a firm consists of "those assets that it owns or over which it has control." Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 693 (1986). Some legal scholars suggest that corporation law accomplishes purposes that normally cannot be accomplished by contract but are more like those achieved via property law. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000). Unlike the fiduciary model, however, this emerging propertarian view does not center around the assumption that shareholders own the corporation. *See id.* The import of this model for constitutional analysis remains unexplored, though obviously Fifth Amendment takings jurisprudence may be relevant.

438. *See, e.g.*, Margaret M. Blair, *Corporate Philanthropy Symposium Transcript of Proceedings—Corporate Charity: Societal Boon or Shareholder Bust?*, 28 STETSON L. REV. 52, 94 (1998); Ribstein, *supra* note 64.

439. *See, e.g.*, Gulati, Klein & Zolt, *supra* note 192, at 894-95.

440. *See, e.g.*, Ribstein, *supra* note 64, at 125.

441. *See* GEVURTZ, *supra* note 252, at 382-83.

spending cannot serve management's interests alone. The First Amendment does not protect misappropriation for the purpose of expressive activity.[442]

In response to this critique, some have argued that unbridled management control over election-related spending is not misappropriation, but a legitimate, bargained for perquisite of management—in effect, a form of executive compensation.[443] This characterization, however, is not accurate. Election-related spending is not treated as compensation for purposes of managers' personal income tax or corporate tax limits on the deductibility of employee compensation.[444] Moreover, it is simply unrealistic to posit that shareholders have willingly given management such unlimited control over corporate property.[445] Such a broad exception would render the rule against misappropriation practically meaningless. Because election-related spending need not be disclosed, management can award itself this form of compensation without any accountability to shareholders or other corporate constituents. Such compensation would amount to a license to loot the corporation. Whether the corporate "contract" is hypothetical or explicitly bargained for, such unchecked power is not a credible interpretation of the contract. Finally, while academics may debate the management compensation argument, it is unlikely that any party with the proper standing (i.e., an actual corporate director or officer) would ever have the *chutzpah* to assert it before shareholders, judges, or lawmakers.[446]

This Article focuses on the shareholder in order to refute the common myth of "corporate democracy" that empowers the shareholder. This focus is not intended to dismiss the importance of other corporate constituents and relationships.[447] Indeed, the idea of corporate complexity requires acknowledgement of multiple corporate relationships. This Article focuses on the shareholder-management relationship only as an example and not to the exclusion of other relationships. In fact, this Article's argument is ultimately consistent with models that include a broader range of

442. *Cf.* Brudney, *supra* note 16, at 247 ("A's right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.").

443. *See* Ribstein, *supra* note 64, at 125. Margaret Blair has made a similar argument with respect to corporate charitable donations. *See* Blair, *supra* note 438.

444. *Cf.* Sugin, *supra* note 203, at 878-79 (citing I.R.C. §§ 162(a)(1)-(m) and arguing that management discretion over charitable contributions is not management compensation).

445. *Cf.* Henry N. Butler & Fred S. McChesney, *Why they Give at the Office: Shareholder Welfare and Corporate Philanthropy in a Contractual Theory of the Corporation,* 84 CORNELL L. REV. 1195, 1220 (1999) (criticizing Margaret Blair's defense of management control over charitable donations).

446. Similarly, managers have hardly trumpeted their support for Henry Manne's thesis that the opportunity to trade securities on inside information is a form of management compensation. *See* HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET 111-48 (1966).

447. *See supra* introduction to Part V.

relationships. Several models argue that not only shareholders, but many other parties, have legitimate interests that constrain management's use of corporate property. Parties such as bondholders and employees have important relationships with corporate management.[448] The "connected contracts" model suggested by Professors Mitu Gulati, William Klein, and Eric Zolt makes a logical extension of the nexus of the contracts approach by arguing that the shareholder-management relationship is not the central facet of the corporation, but just one of many corporate contracts.[449] This connected contract approach implies "no natural allocation of control to equity investors."[450] The team production theory, as articulated by Professors Blair and Stout, rejects the notion of managers as agents of the shareholders and argues instead that management's purpose is "to protect the enterprise-specific investments of *all* the members of the corporate 'team.'"[451] The "progressive" or communitarian view argues for greater access to corporate decision making and resources by nonshareholder constituents such as employees and the community in which the corporation does business.[452] Some of today's "progressives" have revived Merrick Dodd's venerable argument that a corporation's managers must be guided by social responsibility as well as shareholder wealth maximization.[453]

These models suggest that the expectations not only of shareholders but also of creditors, employees, customers, and others should be interpreted to include at least some implied restrictions on management's control over corporate political spending. This conclusion does not depends on entitlements stemming from ownership or fiduciary principles. Rahter, it is supported by the basic fact that contracts involve a degree of give and take. No model based on bargaining can explain why the corporation's many constituents would allow one constituent group, management, to command unilateral discretionary control over election-related spending or any other use of corporate resources.[454]

448. *See, e.g.,* Lawrence Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165 (1990); Marleen O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993).

449. *See* Gulati, Klein & Zolt, *supra* note 192, at 894-95.

450. *Id.*

451. Blair & Stout, *supra* note 252, at 253.

452. For works by some of the leading "progressives," see PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

453. *See* Edwin Merrick Dodd, *For Whom Are Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW, *supra* note 452, at 1.

454. *See* Butler & McChesney, *supra* note 445, at 1220 ("Surely, the limits of directorial discretion must relate to either the 'team' aspect or the 'production' aspect of team production.").

A corporation's election-related spending does not reflect shareholder expression; it is even less reflective of the expression of other constituents. By positing that "the corporation" properly includes interests outside the traditional boundaries of the firm, the connected contracts, team production and social responsibility models question whether a corporation has any fixed boundaries at all.[455] Thus, shareholders are not the only disenfranchised corporate constituents. While the fiduciary model assumes that shareholders are entitled to control corporate decision making because they are the owners of the corporation, this Article makes no such assumption. Whether corporate law wrongly denies shareholders control over the corporation is beside the point. Rather, the passivity of the shareholder's role, whether right or wrong, means "corporate" political spending is not a form of shareholder expression. Nor is it the expression of other corporate constituents (other than upper management). Corporate law cannot constitute the expression of nonshareholder corporate constituents, because they have even less input into corporate decisions than shareholders do. These corporate stakeholders—such as creditors, employees, customers, the neighboring community, and the environment—do not have even the shareholders' limited opportunities for formal participation in corporate decision making. In addition, their ability to use informal pressure to affect corporate political decisions is weakened because they do not have the information rights of shareholders either. On one level, this amplifies the complaint that corporate governance and campaign finance law regimes give managers disproportionate control over the corporation's "speech". The argument that management acts are legitimated by shareholders via corporate democracy is not only inaccurate but irrelevant. Even if shareholders have consented to give management control of election-related spending, other constituents with equally legitimate interests in the corporation have not. On a deeper level, the powerlessness of nonshareholders suggests an even more devastating critique of corporate "expression": the problem is not that one constituent group (shareholders) is disenfranchised, but that it is impossible even to identify, much less empower, all the corporation's relevant constituents. The constituents comprising the corporation are so diverse, decentralized, and amorphous that there can be no meaningful participatory process by which they can support or oppose the political positions management presents as representative of the corporation's interests.

There are of course important policy reasons for the existing concentration of power in top management. As the team production theory

455. *See* Gulati, Klein & Zolt, *supra* note 192, at 896-97.

argues, the concentration of control in upper management is certainly more efficient than participatory corporate governance when shareholders and other constituents are numerous and widely dispersed.[456] Under a participatory governance system, corporate political spending would more likely constitute a form of individuals' expression. Such a system of corporate governance would, however, be cumbersome, slow, and costly, thereby reducing corporate profitability. This Article does not mean to argue that publicly traded business corporations should adopt more participatory forms of governance. The point is, rather, that corporate governance can be centralized and efficient, or it can be participatory and expressive, but it cannot be both. Law and markets have created a corporate law regime that favors the efficient over the expressive and, thus, have created organizations that deserve less First Amendment protection than individuals do.

VII. APPLYING CORPORATE GOVERNANCE ANALYSIS TO CAMPAIGN FINANCE JURISPRUDENCE

The Court has struggled with the First Amendment issues regarding the regulation of corporate political expenditures.[457] Much of the difficulty comes from a reluctance to explore how the special characteristics of the governance system for large business corporations distinguish election-related spending by such corporations from spending by individuals. Monolithic conceptualizations of the corporation as a person or a harmonious aggregation are easier to grasp than the idea of a complex association in which the voices of constituents are not always heard. Thus, in *Bellotti*, the Court failed to look at the complexity of corporate governance and presumed that corporate election-related spending reflects shareholders' decisions.[458] In *Austin* and *MCFL*, the Court suggested that election-related spending by business corporations is somehow less deserving of protection than speech by individuals or political organizations,[459] but it failed to provide a coherent justification for this distinction. Instead, its reasoning was largely conclusory and inconsistent with its earlier ruling in *Buckley*. The *Austin* Court's reasoning suffered from two major weaknesses. First, by justifying regulation with the lack of public support for corporate views, the Court contradicted the central and longstanding *Buckley* rule against the equalization of relative

456. *See* Blair & Stout, *supra* note 252, at 322.
457. *See supra* Part III.
458. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978). *See supra* Part III.B.
459. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659-60 (1990); Mass. Citizens for Life v. FEC, 479 U.S. 238, 257 (1986).

voices.[460] Although many commentators have criticized this aspect of *Buckley*, it remains a touchstone of campaign finance jurisprudence. *Austin* contradicted the *Buckley* rule while purporting to leave it in place.[461] This equivocation leaves *Austin* standing on shaky ground and provides no clear guidance to future judges or legislators. Second, the *Austin* Court relied on the grant theory in basing its ruling on the special privileges of corporations.[462] Not only is this reasoning conclusory, it also makes the troublesome implication that incorporation is predicated on unconstitutional conditions.

The Court must develop a First Amendment analysis of corporate election-related spending distinct from the analysis of individual spending. That analysis must be based on the realities of contemporary corporate governance. With respect to publicly traded corporations operating under default corporate governance rules, the *Bellotti* Court's presumption that shareholders control election-related spending is unfounded, and the reasoning of that opinion inapplicable. For publicly traded corporations, the Court should apply the reverse presumption: that election-related spending does not constitute the expression of shareholders or of any of the corporation's other constituent individuals.[463] Because a corporation is not a human being with First Amendment expressive rights of its own, any expressive rights involved in corporate election-related spending must be those of the individuals within a corporation. As Part VI shows, however, the corporate governance regime does not give shareholders actual control over decisions regarding corporate election-related spending. Part VI's description of the decision-making process illustrates modern corporate law's

460. *See Austin*, 494 U.S. at 659.

461. *See id*. at 659-60.

462. *See id*. at 659.

463. In *Bellotti*, Gillette Co. and Digital Equipment Corp. in particular were the type of massive publicly traded corporations as to which this presumption should most clearly apply. *See supra* notes 233-34 and accompanying text. A corporation could attempt to rebut this presumption with evidence that its governance varies from the default system in such a way that its political decisions involve shareholder expression. For example, it is conceivable (although unlikely) that a business corporation's charter might expressly authorize management to take certain types of political action in accordance with specified procedures, such as a shareholder vote. *Cf.* Brudney, *supra* note 16, at 257-59 (arguing that the First Amendment would permit a legal requirement conditioning corporate political speech on unanimous shareholder consent); O'Kelley, *supra* note 177, at 1363 ("The key consideration, therefore, is the identity between the member or shareholder and the person who is actually expressing himself.").

Corporations (particularly closely held corporations) may vary their governance structure to include active shareholder participation in management. *See supra* introduction to Part VI. If shareholders are indeed actively involved in decision making, such corporations might avoid the presumption against shareholder expression even if their charters do not expressly authorize political activity.

recognition of "corporate complexity" and demonstrates the inadequacy of the traditional ideas of the monolithic corporation. Shareholders (and other corporate constituents other than managers) have no meaningful input into the decision-making process regarding election-related spending. Rather, such spending is controlled by managers with no real accountability. The default rules of corporate governance concentrate control in the management to streamline the decision-making process. This arrangement neither furthers the ideals of self-governance nor plausibly reflects the kind of arrangement shareholders and management would reach through explicit bargaining.

The *Bellotti* Court purported to base its decision solely on listeners' rights,[464] but the question of expressive rights cannot be ignored because the lack of expressive rights in publicly held corporations undermines the listeners' rights theory. Even assuming arguendo that more political speech is always good for society,[465] no reason exists why society should allocate the cost of this general societal good to shareholders rather than spread it more broadly over society. Listeners' interests may require the state to refrain from blocking individuals' access to messages, but they do not require other individuals to foot the bill for those messages.[466] To the extent that corporate governance law places the cost of corporate political speech on shareholders, it imposes a random tax on those shareholders unfortunate enough to invest in corporations whose managers choose to use corporate resources for this societal good.[467] Furthermore, because the business judgment rule allows managers to unilaterally determine when corporate resources will be used for the benefit of society, the state has given managers complete control over the distribution of the tax burden. Ceding decision-making authority from the state to unaccountable private parties makes the taxation all the more unfair.

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464. *See Bellotti*, 435 U.S. at 783.

465. Some commentators argue that unregulated corporate election-related spending disserves listeners' interests, because the unrestricted flow of political advocacy merely creates a confusing information overload without enlightening voters. *See, e.g.,* Greenwood, *supra* note 16, at 1019 (discussing cascade theory).

466. *Cf.* Brudney, *supra* note 16, at 247 ("[I]t does not follow that the public is entitled to the exchange of the information . . . if speakers do not wish, or are economically or organizationally unable, to make such communications.").

467. Thus it resembles an uncompensated taking of shareholder property. *Cf.* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 605 (2d ed. 1988) (noting that the Fifth Amendment requires compensation for takings so that public goods are not paid for by uneven random taxation).

Although referring to shareholder "property," this Article does not enter the debate over whether shareholders "own" the corporation. *See* Booth, *supra* note 405, at 429; Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991). Shareholders have a residual claim to the corporation's resources; whether this is a property or contractual right makes little difference in the present context. In either case, corporate resources used to pay for public goods ultimately come out of the residuum to which shareholders are theoretically entitled.

An understanding of corporate governance law also shows that regulating corporate election-related spending can prevent quid pro quo corruption or the appearance of corruption, which *Buckley* identified as a compelling state interest sufficient to justify campaign finance regulation.[468] If corporate spending in favor of a candidate is in compliance with corporate law, those contributions cannot be made for purely ideological reasons;[469] they must be made for the purpose of material benefit to the corporation. Hence, corporate contributions are more likely than individual contributions to involve corruption. As a result, it would be consistent with *Buckley* to impose tighter restrictions on corporate contributions than on individual contributions. This reasoning applies to soft money contributions to political parties as well as direct contributions to candidates. Soft money can buy influence with a party just as contributions can buy influence with candidates, and soft money is ultimately used to support candidates.

Tighter restrictions on corporate expenditures are justified as well. *Buckley* rejected all restrictions on individual expenditures.[470] The Court reasoned that individuals' expenditures pose less danger of corruption than individuals' contributions do because the individual, not the candidate, determines how the expenditure is used.[471] Corporate expenditures may pose less danger of corruption than corporate contributions do, but because corporate spending must yield material benefit, corporate expenditures are more likely to seek a quid pro quo than are individual expenditures.

Restrictions on corporate spending in support of candidates or parties are justified on the ground that they guard against corruption and the appearance of corruption.[472] Regulating corporate contributions and expenditures with respect to initiative or referendum campaigns cannot be justified on this basis, however, because such campaigns have no candidates to corrupt. Moreover, there are other government interests that are implicated by all types of corporate election-related spending. While fighting corruption is the only compelling government interest the Court has ever explicitly identified in the context of campaign finance regulation, the protection of shareholders from management abuse may also qualify.[473] The Court has suggested this

468. Buckley v. Valeo, 424 U.S. 1, 19, 26-27 (1976).
469. *See supra* Part VI.E.3.
470. *See Buckley*, 424 U.S. at 58-59.
471. *See id.*
472. *Buckley* recognized this government interest as sufficiently compelling to justify restrictions on election-related spending. *See id.* at 26-28.
473. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 675 (1990) (Brennan, J., concurring).

argument even though it has never explicitly accepted or rejected it.[474] For example, in 1948, the Court stated with approval that the Tillman Act was motivated in part by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders."[475] In 1982, a unanimous Court held that shareholder protection is a permissible justification for the FECA rule that a corporation may solicit PAC contributions only from its "restricted class."[476] In addition, the state also has an interest in avoiding the transmission of a cynical, mercenary view of politics,[477] which may also qualify as a sufficiently compelling interest.[478]

Thus, this Article's analysis is consistent with conventional First Amendment justifications of regulation in the "compelling interest" vein. But moreover, this Article supports a more sophisticated and, admittedly, controversial argument: unlike regulations on individual election-related spending, regulations on corporate spending should be reviewed under less than strict First Amendment scrutiny and can thus be justified by less than compelling government interests. Randall Bezanson has argued that a relaxed standard of review should apply to regulations on "institutional speech" that is not "traceable" to the speech of an individual.[479] First Amendment jurisprudence has evolved around the traditional paradigm of speech as the act of an individual. Individual speech implicates both expressive and listeners' interests. Much ink has been spilled over which interest should be

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474. Recall that the *Bellotti* Court accepted it for the sake of argument only. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).

475. United States v. Cong. of Indus. Orgs., 335 U.S. 106, 113 (1948). *Cf.* United States v. Chestnut, 394 F. Supp. 581, 590 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40 (2d Cir. 1976) (upholding statute descended from the Tillman Act after weighing "the First Amendment rights of corporations and labor unions . . . against the substantial governmental interests . . . in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders"); Schwartz v. Romnes, 357 F. Supp. 30, 36 (S.D.N.Y. 1973), *rev'd on other grounds*, 495 F.2d 844 (2d Cir. 1974) (upholding New York statute prohibiting corporate political expenditures based in part on the "overriding governmental interests" in "prevent[ing] corporate officials from devoting the assets of a corporation to political causes with which its shareholders might not agree").

476. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207-08 (1982).

477. *See supra* Part VI.E.1.

478. As with the state's interest in fighting the appearance of corruption, the point is to prevent public perceptions "that may undermine the public's faith in the [political] system." *Buckley*, 424 U.S. at 19.

479. According to Randall Bezanson:

> If there is no individual speaker at the source of the speech, . . . the First Amendment's protection for freedom of speech—for the individual liberty of speaking—does not apply; instead, the First Amendment interest is limited to the artifact of the speech itself and is made subject to the larger governmental regulatory objectives related to accuracy, equality, fairness, access, and utility.

Bezanson, *supra* note 6, at 781 (describing this theory in detail).

favored when the two conflict.[480] Relatively less attention has been paid to whether First Amendment analysis should be different when only the latter interest is involved and the former is absent. Corporate election-related spending highlights this issue. When speech does not implicate individual expressive rights,[481] but only listeners' interests, its regulation does not infringe on individual liberty—indeed, regulation can advance liberty, as the random taxation argument demonstrates. Because there is no danger of stifling individual liberty by regulating corporate election-related spending, legitimate government interests such as those described above are sufficient to justify regulations even if those interests are less than compelling. This approach is more powerful than justifications based on so-called "compelling interests." Unlike the corruption rationale, it is not limited to spending on candidate elections. And unlike the shareholder protection rationale, it does not require the Court to recognize a new government interest as "compelling". Moreover, this approach is consistent with both shareholder-centered models and multiconstituent corporations theory as described in Part VI.F of this Article. By avoiding the shareholder protection rationale, the current approach transcends the debate over shareholder primacy.

Although neither expressive interests nor listeners' interests justify striking down regulations on corporations' election-related spending, regulations may nonetheless be illegitimate for other reasons. For example, while listeners' interests do not justify the *Bellotti* decision, the statute in that case was overbroad in that it prohibited all business corporations from spending in connection with referenda.[482] Similarly, the Michigan statute at issue in *Austin* applied to all corporations.[483] As interpreted by the Court, the

480. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646 (1982); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591-95 (1982).

481. Professor Bezanson cites the Michigan State Chamber of Commerce's expenditures in *Austin* as one example of such speech. He also cites the professional advice of doctors in *Rust v. Sullivan*, 500 U.S. 173 (1991). *See* Bezanson, *supra* note 6, at 767-72. The Court denied First Amendment protection of doctors' advice to patients regarding abortion because the professional advice of a doctor is "effectively scripted by the standards of the profession. A physician, in effect, is speaking for the profession, or at least in the role of physician, not for himself or herself as an individual."

The Court apparently agreed with Professor Bezanson and rested its decision on the theory that regulating doctors' advice does not implicate their expressive rights. *See Rust*, 500 U.S. at 200 (defending regulations, which prohibited doctors from advising pregnant patients to seek abortions and which required them to encourage patients to carry their pregnancies to full term, because the regulations did not require any doctor "to represent as his [sic] own any opinion that he does not in fact hold").

482. 435 U.S. 765, 768, 794 (1978) (discussing MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977)).

483. 494 U.S. 652, 655 (1989) (discussing MICH. COMP. LAWS § 169.254(1) (1979)).

statute at issue would apply to all business corporations, as well as nonprofit organizations that resemble business corporations.[484] As the Michigan statute was nearly identical to § 441b of FECA, § 441b presumably has the same scope.[485] In light of *MCFL,* neither the Michigan statute nor FECA would apply to "political" nonprofit organizations.[486] Accordingly, all three statutes focus on an organization's incorporated and business-oriented status and not on the issues of corporate complexity. Election-related spending may in fact constitute shareholder expression in some corporations, such as a corporation owned by a single person or a closely held corporation actively managed by its shareholders. Those shareholders do not require state protection from management abuses. Moreover, the statutes would violate those individuals' First Amendment expressive rights. Thus, all three statutes might be found unconstitutional as applied to a small, owner-controlled corporation.

Keeping this in mind, FECA should be reformed to give more leeway to closely held corporations, while imposing tighter restrictions on public corporations. For example, closely held corporations could be given the opportunity to prove that their election-related spending is the result of active input from both shareholders and management. Public corporations, however, should face a strong presumption to the contrary. Indeed, with respect to public corporations, Congress should close FECA's loopholes and give meaning to its nominal restrictions on corporate spending. For example, Congress could prohibit public corporations from contributing soft money to political parties and from spending money on PAC solicitation and administration.

VIII. CONCLUSION

In addition to highlighting the distinction between large and small corporations, this Article also points out the importance of limiting analysis of corporations to the corporations of a particular time and place. In 1932, Adolf A. Berle and Gardiner C. Means pointed the way toward modern agency cost theory with their seminal exploration of the separation of ownership and control in large business corporations.[487] Gregory A. Mark, however, has charged that this work, however insightful it may have been at the time, "exemplified the inability of realist scholarship to provide a

484. *See id*. at 661-62.

485. *See id*. at 655 n.1.

486. *See id*. at 662; Mass. Citizens for Life v. FEC, 479 U.S. 238, 264 (1986).

487. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

framework for legal thought to reach beyond contemporary conditions."[488] Whether or not Berle and Means, or the Realists generally, deserve that criticism,[489] Mark makes an important jurisprudential point. While the application of corporations theory to public policy must take into account real corporations as they exist today, we must not assume that today's corporate governance terms have always existed or need always exist in the future.[490] Although the concept of the corporation has been a part of Western law for centuries, the legal regime and economic factors determining the precise nature of the corporation vary in different times and jurisdictions. This Article's arguments are specifically grounded in the characteristics of public business corporations following the default rules of corporate governance in the early twenty-first century United States and does not necessarily extend beyond those corporations. By pointing out factors that inhibit shareholder participation, this Article also suggests how governance rules might be changed if legislators or corporate constituents wish to make the regulation of corporate election-related spending unnecessary.

While business corporations vary in their specifics, corporate governance and securities regulation law establish a default regime for large, publicly traded corporations which minimizes shareholder input. Although this regime may be an effective means of creating and maximizing wealth, it shortchanges other political values. Corporate law prizes wealth maximization, but that value need not control the application of constitutional law to corporations. The law should not treat political expenditures as just another economic input to which shareholders have no relevant nonpecuniary expertise or preference.

Even if we accept listeners' interest in hearing political messages as a justification for First Amendment protection of corporate election-related

488. *See* Mark, *supra* note 154, at 1481. *Cf.* Gulati, Klein & Zolt, *supra* note 192, at 896 (arguing that a contemporary high-tech startup firm, compared to the stereotypical large "old economy" firm, may be comprised of more fluid, less hierarchical contracts). It should be added that "the dominant corporate form varies widely from country to country." Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance,* 47 AM. J. COMP. L. 583, 604, 605 (1999) (noting Japanese law recognizes corporate "personality" more than the United States and the United Kingdom do, with most of Europe "somewhere in between").

489. Indeed, it seems that the very point of Realism is that the "inability . . . to reach beyond contemporary conditions" is an inherent characteristic of all legal analysis (and not a special flaw of Realism). Mark, *supra* note 154, at 1481.

490. Berle and Means' theory supplanted the traditional theories because it accounted for the relatively new phenomenon of immense corporations with atomized, passive investors. *See* Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 U. MICH. J.L. REFORM 19, 20-21 (1988); Carl Landauer, *Beyond the Law and Economics Style: Advancing Corporate Law in an Era of Downsizing and Corporate Reengineering*, 84 CALIF. L. REV. 1693, 1700 (1996) (book review).

spending, that interest does not necessarily trump all other interests. Some balancing must occur. Speech protection is determined by balancing individual rights against societal interests. Because of the high regard for the individual right to speak, First Amendment jurisprudence requires the articulation of a compelling interest to burden speech. Corporate speech is not an exercise of individual expressive rights, however. Thus speech protection for corporations should be based on a weighing of societal interests rather than on the absolutist rhetoric of rights. The airing of political opinions may have social value favoring protection, but this social value must be weighed against social harms, such as the unfairness of random taxation, the potential for corruption, and the appearance of corruption.

In *Bellotti*, the Court purported to consider multiple interests by acknowledging to the public interest in hearing corporate ideas.[491] Instead of actually engaging in balancing, however, the Court suggested that all political expenditure is socially beneficial and, thus, deserves protection.[492] The Court gave only cursory attention to policy reasons supporting the regulation of corporate expenditures, such as the interests of shareholders. When the *Austin* Court upheld restrictions on corporations' election-related spending, it failed to provide a convincing justification for treating corporations differently from individuals. As this Article demonstrates, constitutional jurisprudence as applied to corporations must abandon conclusory, old metaphors and account for the realities of contemporary corporate governance.

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491. *See Bellotti*, 435 U.S. at 781-82.
492. *See id*.