

Shareholder Rights: *Citizens United* and Delaware  
Corporate Governance Law  
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[T]he facts that determine whether a constitutional provision applies may be very different from facts like a person's age or the amount of the grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them. And this can be tricky.

~Justice David Souter<sup>1</sup>

I. INTRODUCTION

The Supreme Court's decision in *Citizens United v. FEC* is a triumph of First Amendment political speech doctrine.<sup>2</sup> This doctrine holds that "speech is an essential mechanism of democracy,"<sup>3</sup> and as such, "[g]overnment may not suppress political speech on the basis of the speaker's corporate identity."<sup>4</sup> In *Citizens United*, the Court ruled unconstitutional provisions of the Bipartisan Campaign Reform Act

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<sup>1</sup> Justice David Souter, *Text of Justice David Souter's Speech: Harvard Commencement Remarks*, HARVARD GAZETTE, (May 27, 2010), available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

<sup>2</sup> 130 S. Ct. 876 (2010). The political speech doctrine is that the highest purpose of the First Amendment free speech rights is to promote the greatest possible amount of speech in the domestic political arena. *Id.* at 904 (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). It traces its pedigree back to a dissent authored by Justice Holmes about the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out.").

The key question when applying this theory is whether the speech involves political debate. *See Citizens United*, 130 S. Ct. at 904. The actual source of the speech is immaterial. *Id.* at 900 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)). This is important because another justification for the freedom of speech is self-actualization. *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting). This grounds the right within actual persons. The crucial question under this justification is whether the speech is important in a person's important and sometimes highly intimate search for self. The identity of the speaker in such cases is very important, insofar as a corporation cannot engage in the search for self.

<sup>3</sup> *Citizens United*, 130 S. Ct. at 882.

<sup>4</sup> *Id.* at 913.

(“BCRA”), and overturned portions of *McConnell v. FCC*, a case just six years old, and the twenty-year-old case that *McConnell* relied on, *Austin v. Michigan Chamber of Commerce*.<sup>5</sup>

The political speech debate encounters a peculiar situation when corporations are involved. This problem arises because of the structure of corporations: the owners of the corporations, the shareholders, do not control how the assets of the corporation are used; the managers do. This separation of ownership and control is known as the agency problem in corporate law.<sup>6</sup> The agency problem presents the potential for the shareholders’ agents, corporate management, to use the shareholders’ property, the assets of the corporation, for management’s own purposes.<sup>7</sup> One argument made in favor of limiting corporate expenditures is that management can use the assets of the corporations to support political causes shareholders do not agree with, thereby violating the shareholders’ rights of association.<sup>8</sup> The potential violation of this right gives the government a compelling interest justifying speech limitations.<sup>9</sup>

The *Citizens United* opinion gives short shrift to this argument.<sup>10</sup> There is no compelling state interest because there is corporate democracy. Using shareholder democracy, shareholders are able to protect themselves.<sup>11</sup> With this conflict, *Citizens United* raises the agency problem of corporate law to a constitutional level.

The path of this article is as follows. First, it will present the major issues involved with campaign finance reform and corporate political speech to show that the issues that take up most of the Court’s attention do not have any effect on corporate law and are not part of a larger legal scheme. I will also show that the Justices who support greater corporate participation do not base their position within a larger framework of law – that the outcome cannot be connected to doctrines concerning stare decisis or judicial restraint, a robust defense of political speech rights in all its forms, or the protection of property rights. Then, I will present the argument for guarding shareholders’ association rights as a justification for

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<sup>5</sup> *Id.* (overturning *McConnell v. FEC*, 540 U.S. 93 (2003) and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

<sup>6</sup> ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (17th prtg. 1950).

<sup>7</sup> *Id.*

<sup>8</sup> *Citizens United*, 130 S. Ct. at 977 (Stevens, J., dissenting); *Austin*, 494 U.S. at 673-78 (Brennan, J., concurring); *Bellotti*, 435 U.S. at 812-21 (White, J., dissenting).

<sup>9</sup> *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting); *Austin*, 494 U.S. at 673-78 (Brennan, J., concurring); *Bellotti*, 435 U.S. at 812-21 (White, J., dissenting).

<sup>10</sup> It addressed the issue in two paragraphs. *Citizens United*, 130 S. Ct. at 911.

<sup>11</sup> *Id.* (citing *Bellotti*, 435 U.S. at 794).

limiting a corporation's political activities. Next, I will discuss the barriers to shareholder action in Delaware corporate law. I conclude that the current state of corporate governance law is not amenable to a robust approach to corporate democracy described by Justice Kennedy. The two approaches are incompatible; one must yield to the other. The article finishes by presenting a litigation strategy that can determine whether my conclusion is correct.

Throughout this article, I accept the following positions *arguendo*. First, limiting corporate speech through limitations on how corporations may use corporate assets is a restriction based on the content of the speech because the targets of the speech are those who have a particular approach to economic matters.<sup>12</sup> Second, strict scrutiny is the appropriate standard for reviewing corporate speech limitations.<sup>13</sup> Third, I accept that the justification put forward to justify campaign finance limitations, that “the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption,” is a straw man argument.<sup>14</sup> The real purpose of these arguments is to bring about a form of financial equity soundly rejected by *Buckley* and *Bellotti*.<sup>15</sup> This is not a rejection of the arguments that campaign finance laws are not content-based restrictions and therefore subject to a lower standard of review.<sup>16</sup> I argue that shareholder speech rights that conflict with corporate speech rights are equal. Government action that protects speech rights can therefore meet strict scrutiny requirements.<sup>17</sup>

## II. THE PRINCIPAL CAMPAIGN FINANCE ISSUES NOT ABOUT CORPORATE GOVERNANCE

This section will sketch, and only sketch, the issues that preoccupy most of the debate regarding campaign finance regulation and corporate political speech. The first part will examine the key issues as discussed in four significant cases: *Buckley*, *Bellotti*, *Austin*, and *Citizens United*. The

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<sup>12</sup> *Citizens United*, 130 S. Ct. at 912; *Austin*, 494 U.S. at 696 (Kennedy, J., dissenting); *Bellotti*, 435 U.S. at 784-85.

<sup>13</sup> *Citizens United*, 130 S. Ct. at 898; *Bellotti*, 435 U.S. at 786-87.

<sup>14</sup> *Austin*, 494 U.S. at 658; accord *Citizens United*, 130 S. Ct. 952-57 (Stevens, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 205 (2003).

<sup>15</sup> *Citizens United*, 130 S. Ct. at 904 (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49, 53-54 (1976)).

<sup>16</sup> E.g., *McConnell*, 540 U.S. at 137.

<sup>17</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2734 (2010) (Breyer, J., dissenting).

purpose here is to develop an understanding of these issues and demonstrate that they do not directly impact corporate governance law.

Campaign finance cases fall into two distinct periods before *Citizens United*. *Buckley v. Valeo* began the modern era when it stated that use of money in a campaign, both in contributions and expenditures, should be examined as matters of political speech.<sup>18</sup> The political speech protections were extended to corporations in *First National Bank of Boston v. Bellotti*.<sup>19</sup> These cases present the view that the type of speech, political speech, is the key issue, not the manner of the speech or the identity of the speaker. *Citizens United* explicitly returned to this approach.<sup>20</sup>

The line of cases begun by *Austin v. Michigan Chamber of Commerce* represents an approach that allowed more oversight on how corporations can participate in political activities.<sup>21</sup> *McConnell v. FEC* sought to

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<sup>18</sup> *Buckley*, 424 U.S. at 23. *Buckley* involved the Federal Election Campaign Act, as amended in 1974. *Id.* at 6. Various individual candidates and organizations sought declaratory relief that major provisions of the act were unconstitutional. *Id.* at 7-9. The court held that, among other issues: 1) the Constitution permitted limitations on campaign contributions because of the compelling government interest in preventing corruption and the appearance of corruption; and 2) limitations on campaign expenditures did not draw the same level of government interest and were therefore prohibited. *Id.* at 143.

The decision came down as a per curiam opinion. Unlike most per curiam opinions, this decision was far from unanimous. The justices who joined the opinion in full were Stewart, Brennan, and Powell (based on the lack of dissent). The other five (Burger, White, Marshall, Blackmun, and Rehnquist) all dissented on some aspect of the decision, albeit different parts. Justice Stevens took no part in the decision. *Id.* at 1, 144.

<sup>19</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts statute that prevented banks and corporations from participating, through contributions or expenditures, in referendums that did not materially affect their property or assets, including taxation. *Id.* at 767-68. Plaintiffs, several banks and business corporations, sought injunctive relief so that they could voice their views regarding a referendum establishing a graduated personal income tax. *Id.* at 769. The court held that the First Amendment prohibits preventing a speaker from speaking on an otherwise protected matter simply based on its corporate identity, absent some compelling state interest. *Id.* at 795.

<sup>20</sup> *Citizens United*, 130 S. Ct. at 913. *Citizens United* involved Bipartisan Campaign Reform Act § 203, codified at 2 U.S.C. § 441b, which prohibited corporations from using general treasury funds either to engage in election communications or to support or oppose a political candidate. *Id.* at 880-81. This provision had been upheld seven years earlier in *McConnell*, 540 U.S. at 209. Plaintiff, a non-profit corporation funded in part by donations from for-profit corporations, wanted to air ads concerning a political film that criticized a politician in a manner that the act may have prohibited. *Citizens United*, 130 S. Ct. at 886-88. It sought injunctive relief. *Id.* at 888.

<sup>21</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The case involved a Michigan statute that prohibits corporations from using corporate treasury funds for independent expenditures in support of or opposition to a particular political candidate. *Id.* at 654. The Michigan Chamber of Commerce, which wanted to directly advocate for a particular candidate, received its dues from member corporations from their general treasuries, instead of segregated funds solely administered for political activities. *Id.* at 656. The Chamber sought injunctive relief to prevent enforcement of the law. *Id.* The court upheld such restrictions because they prevent the "corrosive and distorting effects of immense aggregations of wealth" that corporations can bring to bear in elections. *Id.* at 660.

downgrade the analysis given to speech issues when they involved corporations from strict scrutiny to “closely drawn scrutiny.”<sup>22</sup>

*A. First Action: Liberty versus Equality*

From this point forward, the various sides of the argument have deep disagreements. One issue cuts across multiple constitutional arguments: whether and to what degree the focus should be about maximizing liberty versus the need to promote equality across the various societal divisions in our country.<sup>23</sup> In *Buckley*, the *per curiam* decision flatly stated that equalizing voices was “wholly foreign to the First Amendment,” a position followed in *Bellotti*.<sup>24</sup> This position was contested by dissents in those two cases.<sup>25</sup>

Twelve years after *Bellotti*, the pendulum swung the other way. In *Austin*, the Court, despite its attempts to equate the distortion effects of large wealth with quid pro quo corruption, moved to the equality side of

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<sup>22</sup> *McConnell*, 540 U.S. at 137. The court relied on a series of decisions based on *Buckley* to hold that political contributions, because of the importance of preventing corruption and the appearance of corruption, should be viewed as presumptively valid. *Id.* This is distinct from a question about campaign expenditures. *Id.* at 138-39. It treated corporate and union expenditures on independent political ads as a means of circumventing contribution limits as opposed to expenditures. *Id.* at 205.

<sup>23</sup> See generally, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143 (2010) (introducing the two concepts of political speech doctrine as political equality and political liberty).

<sup>24</sup> *Buckley*, 424 U.S. at 48-49 (“It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of a candidate imposed by § 608(e)(1)’s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (internal citations omitted)); *Bellotti*, 435 U.S. at 790-91 (quoting *Buckley*, 424 U.S. at 48-49).

<sup>25</sup> *Buckley*, 424 U.S. at 287-88 (Marshall, J., concurring) (“The Court views the ancillary interests in equalizing the relative financial resources of candidates as the relevant rationale for § 608(a), and deems that interest insufficient to justify § 608(a). In my view the interest is more precisely the interest in promoting the reality and appearance of equal access to the political arena . . . the barriers to which § 608(a) is directed are formidable ones, and the interest in removing them substantial.” (internal citations omitted)); *Bellotti*, 435 U.S. at 809 (White, J., dissenting) (“Although *Buckley v. Valeo* provides support for the position that the desire to equalize financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails, the interest of Massachusetts and many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . . The State need not permit its own creation to consume it.” (internal citations omitted)).

the issue.<sup>26</sup> The dissents in *Austin* were equally vigorous in stating this was contrary to *Buckley* and First Amendment jurisprudence.<sup>27</sup> *McConnell* explicitly relied on *Austin* when addressing new federal campaign restrictions.<sup>28</sup>

*Citizens United*, overturned *Austin* and returned the Court to its pro-liberty position.<sup>29</sup> But this liberty versus equality debate, while affecting the ability of corporate managers to speak using a corporation's assets, is a larger debate on conflicting views of the Constitution. The resolution of this issue would have no impact on major doctrines of corporate law.

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<sup>26</sup> *Austin*, 494 U.S. at 659-60. ("Regardless of whether this danger of financial *quid pro quo* corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. The Act does not attempt to equalize the relative influence of speakers on elections; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." (internal citations omitted)).

I use the characterization "moved to the equality side" because the Justices who oppose *Austin* and *McConnell* view the corruption argument as equality in other clothing. *Austin*, 494 U.S. at 680, 685-86 (Scalia, J., dissenting), 704 (Kennedy, J., dissenting). The gist of their arguments is that this corruption argument reaches the same result as the equality argument *Buckley* and *Bellotti* rejected. This equality description was and is sharply contested by other Justices, including Stevens, O'Connor, and Souter, who find that the purpose of the provisions limiting corporate expenditures is to oppose corruption and that this is supported by history and Congressional findings. *Citizens United*, 130 S. Ct. at 958, (Stevens, J., dissenting); *McConnell*, 540 U.S. at 205.

<sup>27</sup> *Austin*, 494 U.S. at 679 (Scalia, J., dissenting) ("Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: \_\_\_\_\_. In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."), 705 (Kennedy, J., dissenting) ("the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relevant influence of speakers on elections is antithetical to the First Amendment. . . . That those who can afford to publicize their views may succeed in the political arena as a result does not detract from the fact that they are exercising a First Amendment right. As we stated in *Bellotti*, paid advocacy may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." (internal citations omitted)).

<sup>28</sup> *McConnell v. FEC*, 540 U.S. 93, 205-12 (2003). The court was examining the provisions of the Bipartisan Campaign Reform Act (BCRA), also known as McCain-Feingold, specifically the provisions of § 203. The provisions extended the prohibition against corporations using funds from the general treasuries to "electioneering communications" or issue ads, in addition to prohibitions against express advocacy of a political candidate or policy. *Id.* at 204.

<sup>29</sup> *Citizens United*, 130 S. Ct. at 913.

*B. The Main Action: Speech or Speaker*

The next point of contention between the two sides can be labeled the “speech or speaker” approach to campaign finance law. The Court’s first action in *Buckley*, and one that affected how it decided the rest of the case, was to dismiss the Court of Appeals’ decision based on *United States v. O’Brien*.<sup>30</sup> Money, according to the lower court, introduced a non-speech element that could be more regulated than speech itself.<sup>31</sup> The *Buckley* Court said that spending money was not conduct in the same way that burning a draft card was conduct.<sup>32</sup> Key support for this position came from two cases. *Mills v. Alabama* stated “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs.”<sup>33</sup> *Winters v. New York* held that the protections of the amendment are not limited to “the exposition of ideas.”<sup>34</sup> Therefore, contributing money was simply about promoting speech.<sup>35</sup> This was different from burning a draft card, which had consequences beyond the speech.<sup>36</sup> As such, the Court of Appeals reliance on *United States v. O’Brien* was misplaced.<sup>37</sup>

Justice White, in dissent, would have none of the argument. For him, saying that “ ‘money talks’ . . . proves entirely too much.”<sup>38</sup> There are numerous instances when federal law affects and limits monies that might otherwise be available for communication, not the least of which is taxation.<sup>39</sup> Nor is money used in political campaigns solely for communication.<sup>40</sup> As such, the issue was whether there is a compelling interest for the state to make such limitations, and Justice White believed there was.<sup>41</sup>

The *Bellotti* opinion used the same theory of political speech importance, relying again on *Mills* and *Winters*.<sup>42</sup> The *Bellotti* opinion overturned regulations based on corporate identity. It reiterated that

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<sup>30</sup> *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>31</sup> *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

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

<sup>33</sup> *Id.* at 14 (quoting *Mills v. Alabama*, 284 U.S. 214, 218 (1966)).

<sup>34</sup> *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *See id.* at 16-17.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 262 (White, J., dissenting).

<sup>39</sup> *Id.* at 263.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 264.

<sup>42</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781-83 (1978). It also quoted the same passage about the purpose of the First Amendment. *Id.* at 776-77.

political speech is what is important.<sup>43</sup> Restrictions against a particular speaker cannot stand if the speech itself would otherwise be protected by the First Amendment.<sup>44</sup>

Justice White, again in dissent, put a speaker's corporate identity front and center in his argument: the "threat to the functioning of a free society [a corporation] is capable of posing reveals that it is not fungible with . . . individuals."<sup>45</sup> This is also the position of Justice Rehnquist, who noted the wide range of governmental organs that had placed restrictions on corporate political activities.<sup>46</sup>

The shareholder protection argument may have an important contribution to the speech/speaker debate. If the Court must choose between the political speech rights of two groups, then the identity of the two groups must be a factor. But insofar as the question is limiting one

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<sup>43</sup> *Id.* at 776 ("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect.").

<sup>44</sup> *Id.* at 784-85 ("We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.").

The court's recent decision in *FCC v. AT&T*, 131 S. Ct. 1177 (2011) does not impact this discussion. The Court in that case held a corporation had no expectation of personal privacy, despite being recognized as a "person." *Id.* at 1182. But the court was specifically engaged in an act of statutory construction, and specifically stated that it was not addressing issues at the constitutional level. *Id.* at 1181.

<sup>45</sup> *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting) ("There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.").

<sup>46</sup> *Id.* at 822-23 (Rehnquist, J., dissenting) ("The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court.").

Justice Rehnquist throughout his career on the court opposed the creation or extension of Constitutional rights. He was one of two dissenters in *Roe v. Wade*, and the basis for his dissent was the extension of the right of privacy. 410 U.S. 113, 174-75 (1973) (Rehnquist, J., dissenting). He put a decisive ending to such searches in *Washington v. Glucksberg*, where he said that not "all important, intimate, and personal decisions" are afforded constitutional protection. 521 U.S. 702, 727 (1997).

group's speech rights, this debate does not impact corporate governance law.<sup>47</sup>

### III. JUSTIFICATIONS POTENTIALLY UNDERPINNING *CITIZENS UNITED*

The scope of political speech protection has been a major point of contention among the Justices. An important question is whether the *Citizens United* majority has an overarching jurisprudence which requires its position. If there is such a principle, then arguments about protecting shareholder rights and the law's effect on Delaware corporate law must address concerns implicated by this principle. More importantly, such a principle can resolve the issue as a legal matter by measuring the result on a different basis.

The *Citizens United* decision cannot be said to follow an overarching jurisprudence. The decision is not based on the principles of stare decisis and judicial restraint. The majority does not have a consistent approach with all freedom of speech issues. And the decision does not evince a consistent desire to protect property rights. The absence of an overarching

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<sup>47</sup> There is some question whether corporations receive the same protections as persons in all speech instances. The issue has not been directly addressed by the Supreme Court in the context of Constitutional or common law context. *FCC v. AT&T*, 131 S. Ct. 1177, 1181 (2011). However, it is clear that a corporation is not a person insofar as it does not have privacy concerns under parts of the Freedom of Information Act. *Id.* at 1182-84. In the First Amendment, this approach would be consistent with the inquiry focusing on the speech, not who was making it.

One final argument addressed statutory construction issues when dealing with Constitutional validity: whether complex electoral regulation schemes can be parsed out, akin to contract language, or if they must be judged as a whole, and stand or fall together. This matter was addressed and resolved by *Buckley*; it dealt with sections individually, upholding contribution limitations while striking down expenditure limitations. *Buckley*, 424 U.S. at 143 ("In summary, we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm."). However, there were justices who felt that the reforms were all of a piece and must stand or fall together. *Id.* at 235 (Burger, J., concurring in part and dissenting in part) ("[T]he Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize that the whole of this Act is greater than the sum of its parts."), 261 (White, J., concurring in part and dissenting in part) ("It would make little sense to me and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf."), 290 (Blackmun, J., concurring in part and dissenting in part) ("I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations, on the one hand, and the expenditure limitations, on the other"). This debate ultimately rests on the appropriate interpretation of the canons of statutory construction; the matter is largely resolved, and, again, does not have an impact on corporate law.

jurisprudence means that the *Citizens United* majority's approach to campaign finance reform stands on its own.<sup>48</sup>

#### A. *Stare Decisis and Judicial Restraint*

The *Citizens United* majority very much wanted the opinion to be seen as following the principles of judicial restraint and stare decisis. The opinion presents itself as retreating from a deviation by the Court to principles that were correctly held previously.<sup>49</sup> Chief Justice Roberts' entire concurrence seeks to explain how the decision follows these principles.<sup>50</sup> The gist of these opinions is that the violation was so great and relied on the reasoning of a case so novel that it was really a matter of returning to the correct principle *post hoc ante*.<sup>51</sup>

The procedural facts of *Citizens United* show that the Court did not follow judicial restraint. *Citizens United* was a nonprofit corporation formed to advance political ideas.<sup>52</sup> Yet the Court's decision also invalidated campaign finance law with regard to for-profit organizations, a very different type of organization.<sup>53</sup> *Citizens United*'s appeal to the Supreme Court was based on an "as-applied" challenge to the statute.<sup>54</sup> Yet

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<sup>48</sup> An example of staying true to one's jurisprudential ideas regarding the First Amendment is Justice Stevens. Throughout his time on the Supreme Court, he has been willing to defer to the legislative and executive branches that certain types of speech should be curtailed. Later in the same term as *Citizens United*, he joined the justices of the *Citizens United* majority in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). That earlier case placed heavy emphasis on the extensive findings of Congress in prohibiting any material support to organizations deemed foreign terrorist organizations and the Court's obligation to defer to those findings, despite a very direct and clear attack on speech as speech. *Id.* at 2711. Stevens relies on the same deference in making one of his first arguments against the decision in *Citizens United*. 130 S. Ct. at 930-31 (Stevens, J., dissenting). Justice Stevens's support for this position can be seen going back to his dissent in *Texas v. Johnson*, when he noted that a statute prohibiting flag burning was not one that fell afoul of the court's usual test for violations of free speech. 491 U.S. 397, 437-38 (1989).

Any inconsistencies of conservative jurisprudence are equally present with the liberal justices (other than Stevens). Those other justices who dissented in both *Citizens United* and *Humanitarian Law Project* did not put forth an underlying theory as to why Congress's findings should be supported in one instance (*Citizens United*), but not in another (*Humanitarian Law Project*). There is no better example of being focused on the desired result, instead of what the precedent requires, than Justice Breyer's use of the *Citizens United* decision to justify his belief that the statute at issue cannot survive an as-applied challenge. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting). It may be tweaking the majority's inconsistencies, but the *Humanitarian Law Project* dissent presents no reason specifically explaining why the legislature should be deferred to in one instance, but not the other. It simply asserts that it would be wrong. *Id.* at 2739 (Breyer, J., dissenting).

<sup>49</sup> *Citizens United*, 130 S. Ct. at 912-13.

<sup>50</sup> *Id.* at 917-27 (Roberts, C.J., concurring).

<sup>51</sup> *Id.* at 912-13.

<sup>52</sup> *Id.* at 886, 891.

<sup>53</sup> *Id.* at 913.

<sup>54</sup> *Id.* at 931-32 (Stevens, J., dissenting) (providing the procedural history of the case, which includes the plaintiff expressly abandoning its facial challenge).

the Court determined the facial validity of the statute.<sup>55</sup> Chief Justice Roberts claimed that since the statute violated the Constitution by restricting the rights of corporations, “the debate over whether to consider this claim on an as-applied or facial basis [was] largely beside the point.”<sup>56</sup> This is because “any other corporation raising the same challenge would win.”<sup>57</sup> But that result should have waited until that case comes along, as the “cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more.”<sup>58</sup>

The stare decisis gaps are also great. The Court purported to find that *Austin* represented a “ ‘significant departure from ancient First Amendment principles.’ ”<sup>59</sup> It may be fair to say that *Austin* did break with *Buckley* in limiting campaign expenditures and *Bellotti* in treating corporations differently from other actors in political debate. However, *Austin* was decided fourteen years after *Buckley* and twelve years after *Bellotti*. Since *Austin* was decided, it has been relied upon numerous times, including in *McConnell*, when the Court first addressed the statute at issue in *Citizens United*.<sup>60</sup> So at the time it was overruled, *Austin* was twenty years old and recent case law continued to support its key positions (especially deference to legislative fact finding on this issue).<sup>61</sup> Yet the majority considered *Austin* to be a novelty despite it being nearly twenty years old and relied upon consistently until the Court’s newest members, Justices Roberts and Alito, tipped the balance the other way.

By way of comparison, consider the Court’s most important statement on stare decisis, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>62</sup> In *Casey*, the Court stated “that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”<sup>63</sup> *Casey* made that determination regarding *Roe v. Wade* nineteen years after it was decided.<sup>64</sup> Justices Kennedy and Scalia dissented in both *Austin* and *McConnell*. Many of the opinions that the majority relied upon for the position that stare decisis does not apply in

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<sup>55</sup> *Id.* at 888.

<sup>56</sup> *Id.* at 919 (Roberts, C.J., concurring).

<sup>57</sup> *Id.*

<sup>58</sup> *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

<sup>59</sup> *Citizens United*, 130 S. Ct. at 886 (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007)).

<sup>60</sup> *Id.* at 888.

<sup>61</sup> *McConnell v. FEC*, 540 U.S. 93, 203-09 (2003).

<sup>62</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). It should be noted that Justice Kennedy was one of the authors of the *Casey* opinion. *Id.* at 843.

<sup>63</sup> *Id.* at 864.

<sup>64</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

*Citizens United* were written by Justices Kennedy and Scalia.<sup>65</sup> But it makes no sense to say that their constant opposition to the *Austin* result justifies ignoring stare decisis any more than Justices Rehnquist and White's constant opposition to *Roe* justified ignoring it in *Casey*.<sup>66</sup>

*Citizen United's* approach to judicial restraint and stare decisis is to say they do not apply when there has been constant opposition to a particular legal result. This turns the purpose that underpins the doctrines on its head. The *Citizens United* decision cannot be said to stand on allegiance to these principles.<sup>67</sup>

### B. Judicial Protection of Speech Rights

Another justification for the majority opinion, one the opinion seeks to take, is a zealous determination that political speech should not be impinged by state action.<sup>68</sup> Such actions include outright limitations, such as that in *Citizens United*.<sup>69</sup> Indirect state action that imposes a burden on those using their own resources is as impermissible as direct limitation, a

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<sup>65</sup> *Citizens United*, 130 S. Ct. at 886 (citing *Wisconsin Right to Life, Inc.*, 551 U.S. at 490 (Scalia, J., concurring in part and concurring in the judgment)), 891 (citing *McConnell*, 540 U.S. at 256, 262 (Kennedy, J., concurring in the judgment and dissenting in part)), 894 (citing *McConnell*, 540 U.S. at 256, 262 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part)), 332, 338 (Kennedy, J., concurring in the judgment in part), 894 (citing *Wisconsin Right to Life, Inc.*, 551 U.S. at 485, 504 (Scalia, J., concurring in part and concurring in the judgment)), 897 (citing *McConnell*, 540 U.S. at 330, 333 (Kennedy, J., concurring in the judgment in part)), 898 (citing *McConnell*, 540 U.S. at 251 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part)), 898 (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in part and concurring in the judgment)), 902 (citing *Wisconsin Right to Life, Inc.*, 551 U.S. at 487 (Scalia, J., concurring in part and concurring in the judgment); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 683 (1990) (Scalia, J., dissenting)), 903 (citing *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)), 905 (citing *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)), 707 (Kennedy, J., dissenting)), 906 (citing *McConnell*, 540 U.S. at 252-53 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part)), 907 (citing *McConnell*, 540 U.S. at 257-58 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part)), 908 (citing *Wisconsin Right to Life, Inc.*, 551 U.S. at 503-04 (Scalia, J., concurring in part and concurring in the judgment)), 909-10 (citing *McConnell*, 540 U.S. at 296, 298 (Kennedy, J., concurring in the judgment in part and dissenting in part)), 910 (citing *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)), 911 (citing *Austin*, 494 U.S. at 687 (Scalia, J., dissenting)), 912 (citing *Wisconsin Right to Life, Inc.*, 551 U.S. at 500 (Scalia, J., concurring in part and concurring in the judgment)), 913 (citing *McConnell*, 540 U.S. at 261 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

<sup>66</sup> *E.g.*, *Casey*, 505 U.S. at 944 (Rehnquist, C.J., dissenting, joined by White, J.); *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); 222 (White, J., dissenting).

<sup>67</sup> Justice Stevens's dissent discusses the judicial restraint and stare decisis problems with *Citizens United* in greater detail. *Citizens United*, 130 S. Ct. at 936-42 (Stevens, J., dissenting).

<sup>68</sup> *Id.* at 898.

<sup>69</sup> *Id.*

decision the court reached recently in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.<sup>70</sup>

These decisions only allow limitations if the state can demonstrate some compelling need.<sup>71</sup> Only quid pro quo corruption meets this standard.<sup>72</sup> A large portion of the *Citizens United* opinion argues that there is no compelling interest to justify the government's action regarding potentially political speech.<sup>73</sup> The Court viewed these other justifications as attempting to equalize access to political speech in the guise of preventing corruption.<sup>74</sup> The Court viewed as irrelevant, or with suspicion, the extensive legislative findings on the dangers for-profit corporations could have on election systems.<sup>75</sup> The Court viewed the protection of political speech as necessary, regardless of consequences.

But this position is belied by the decision in *Holder v. Humanitarian Law Project*.<sup>76</sup> In that decision, the Court said that the United States could punish someone who gave material support to a terrorist organization.<sup>77</sup> The Court held punishment valid even if an organization was training a terrorist organization on how to use a country's legal system to achieve its aims in lieu of violence.<sup>78</sup> Going beyond the national security realm to justify the decision, Chief Justice Roberts went out of his way to write that the Court had the constitutional authority to invalidate congressional

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<sup>70</sup> *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). The prevailing argument that unites both cases appears to be that the First Amendment seeks to ensure that the government does not interfere in speech that would otherwise naturally occur.

<sup>71</sup> *Citizens United*, 130 S. Ct. at 898, 908.

<sup>72</sup> *Id.* at 901-02.

<sup>73</sup> *Id.* at 903-08.

<sup>74</sup> *See id.* at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. . . . *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace. But *Buckley* rejected the premise that the Government had an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.") (internal quotation marks omitted).

<sup>75</sup> The only mention of Congressional findings justifying the Bipartisan Campaign Reform Act of 2002 (BCRA) exemption limitation in the opinion itself occurred in the discussion upholding disclosures, and that was to claim that the BCRA disclosure scheme itself eliminated that concern. *Citizens United*, 130 U.S. at 916. Justice Stevens's dissent has a discussion of legislative findings and regulations regarding free speech, including findings for the BCRA. *Id.* at 953-57 (Stevens, J., dissenting).

<sup>76</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

<sup>77</sup> *Id.* at 2712. The law in question in *Humanitarian Law Project* was 18 U.S.C. § 2339B, which made it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). Congress gave the Secretary of State the authority to designate foreign terrorist organizations in 8 U.S.C. §1189(a)(1) and d(4).

<sup>78</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724.

actions.<sup>79</sup> However, the Court said it should defer to Congress and the Executive's findings of fact and conclusions.<sup>80</sup> Nowhere in the decision does the Court reconcile its holding in *Humanitarian Law Project* with that of *Citizens United*, other than to baldly assert that the speech at issue in the former is not political speech.<sup>81</sup>

The Court's approaches to deference to the protection of political speech and deference to the legislative branch are not consistent. It all depends, on all sides of the political spectrum, on what type of First Amendment activity is being curtailed. As such, the *Citizens United* result is not based on the protection of content-based speech, regardless of the form it takes, but only "political speech," which seems to be, like pornography, something the court recognizes when it sees it.<sup>82</sup>

### C. Zealous Defense of Property Rights

A final question is whether there is a principle that provides a clear distinction between when individual rights must be supported and when they can be safely set aside. Such a principle must be of a nature that "pre-

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<sup>79</sup> *Id.* at 2727 ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government's 'authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants individuals.'").

<sup>80</sup> *Id.* ("But when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked' and respect for the Government's conclusions is appropriate." (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

<sup>81</sup> *Id.* at 2724 ("The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech."). Justice Breyer's dissent points this out, citing *Citizens United v. FEC*, 130 S. Ct. 876 (2010) for support that Congress overstepped its authority. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting).

<sup>82</sup> The court rejected that giving money to organizations was not pure political speech because the defendants could do anything else but provide "material support, which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *Id.* at 2723 (internal quotation marks omitted). The court seems to be saying that pure political speech is like pornography; the court will know it when it sees it.

The Court has considered the degree to which there should be judicial deference to legislative bodies in other areas as well. In *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 483, 488-89 (2005), the Court deferred to the conclusion of city and state governments that taking property from one private owner and giving it to another private owner was in the public interest. Justice Kennedy joined the opinion, and in his concurrence stressed that the trial court's findings that the city and state's desire to improve the economy of the area was part of the reason he joined the opinion. *Id.* at 491-92 (Kennedy, J., concurring). He stressed the stare decisis aspects of the decision as well. *Id.* at 493. (Kennedy, J., concurring).

dates” and supports the *Buckley* and *Bellotti* decisions in such a way that *Austin* does not. There is such a principle: property rights.

Property rights have a central place in the development of Western political thought. It was the protection of property, according to John Locke, that caused people to abandon the state of nature and cede power to a sovereign.<sup>83</sup> His *Second Treatise on Civil Government* posited that the protection of property was a reason why:

[M]en give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will be at the same uncertainty, as it was in the state of nature.<sup>84</sup>

This bedrock principle of modern western political thought was incorporated into law by Blackstone:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled [*sic*] by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange.

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<sup>83</sup>JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT passim* (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690).

<sup>84</sup>*Id.* at 190.

All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.<sup>85</sup>

The defense of property can be seen as part of the motivation behind *Citizens United* based on Justice Kennedy's quoting of Justice Scalia's opinion in *McConnell*: "The government has 'muffle[d] the voices that best represent the most significant segments of the economy.'"<sup>86</sup> If these voices cannot speak, they cannot protect their property.

However, the case of *Kelo v. City of New London, Connecticut* shows that property rights in themselves are not to be zealously protected at any point. Justice Kennedy joined the opinion allowing the City of New London to take private property and transfer it to another private party. His concurrence was based on both legislative deference and *stare decisis*.<sup>87</sup> His position can be distinguished by his understanding that the correct test in *Kelo* for Fifth Amendment takings is the very deferential rational basis test,<sup>88</sup> while political speech requires strict scrutiny.<sup>89</sup> Therefore, Justice Kennedy views property rights to be different from other constitutional rights.

Justice O'Connor's dissent in *Kelo*, in fact, presented a property rights argument for restricting the political actions of corporations:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.<sup>90</sup>

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<sup>85</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (1765). This section of Blackstone was cited by Justice Thomas in his *Kelo* dissent. See 545 U.S. at 510 (Thomas, J., dissenting).

<sup>86</sup> *Citizens United*, 130 S. Ct. at 907 (quoting *McConnell v. FEC*, 540 U.S. 619, 725-26 (2003) (Scalia, J., dissenting)).

<sup>87</sup> *Kelo*, 545 U.S. at 491-93.

<sup>88</sup> *Id.* at 490.

<sup>89</sup> *Citizens United*, 130 S. Ct. at 898.

<sup>90</sup> *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

This position is consistent with Justice O'Connor being the co-author of the portion of the *McConnell* that sustained BCRA § 203. She was concerned in both instances that those with greater resources would use those resources to further their own position against those who have fewer.<sup>91</sup>

The protection of property rights has some value to some members of the *Citizens United* majority, but not all of them. For some Justices, the property right protection only keeps the legislature from acting arbitrarily, but the legislature can still transfer property between private owners so long as it provides a rational basis for doing so. More importantly, there is debate within the Court whether property rights are best protected by allowing corporations greater or lesser participation in the political process. Therefore, the protection of property rights cannot be an overarching principle justifying *Citizens United*.

The *Citizens United* decision cannot be grounded in the procedural principles of judicial restraint and stare decisis, an utmost respect for individual rights regarding political speech in a myriad of circumstances, or in the overarching principle of protecting property rights. It stands or falls solely within the realm of the campaign finance jurisprudence. The absence of an overarching jurisprudence underpinning the *Citizens United* decision makes the shareholder protection argument more important. It may perform the same function as these doctrines in other areas: resolve an intractable argument by introducing new paradigms.

#### IV. WHAT ROLE SHAREHOLDERS PLAY IN CORPORATE POLITICAL ACTIVITIES

Unlike the arguments discussed above, all sides agree that shareholders, like corporations, have important First Amendment rights, in particular, the right of association. In the shareholder context, this right manifests as the right to not have their personal resources used to support positions with which they disagree.<sup>92</sup> Where the sides differ is whether federal or state

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<sup>91</sup> See *McConnell*, 540 U.S. at 94-106. O'Connor's part of *McConnell* sustained § 203 of the BCRA. *Id.* at 104-05. It was explicitly overruled by *Citizens United*. *Citizens United*, 130 S. Ct. at 913.

<sup>92</sup> See *Citizens United*, 130 S. Ct. at 911; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 709 (1990) (Kennedy, J., dissenting); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978).

Justice Kennedy, in his opinion in *Turner Broad. Sys., Inc. v. FCC*, stated that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.” 512 U.S. 622, 641 (1994).

governments may act to protect shareholders, or if shareholders can protect themselves through the mechanisms of shareholder democracy.<sup>93</sup>

*A. The Argument Made: Protecting Shareholder Rights Is a Compelling Interest*

Justice White first discussed protecting shareholders as a compelling government interest in his dissent in *Bellotti*:

There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business property, or other affairs of the corporation. . . . Massachusetts *has* chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issue on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what in the last analysis are the purely personal views of the management, individually or as a group.<sup>94</sup>

Justice White elaborated on his position later in his opinion:

The interest which the state wishes to protect here is identical to that which the Court has previously held to be protected by the First Amendment: the right to adhere to

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<sup>93</sup> Compare *Citizens United*, 130 S. Ct. at 911 (citing *Bellotti*, 435 U.S. at 794) ("There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through 'the procedures of corporate democracy'"), *Austin*, 494 U.S. at 709-11 (Kennedy, J., dissenting) (arguing that protecting shareholders is not a compelling interest and is not within the purpose of the statute), and *Bellotti*, 435 U.S. at 795 ("Assuming, *arguendo*, that protecting of shareholders is a compelling interest"), with *Citizens United*, 130 S. Ct. at 977 (Stevens, J., dissenting) ("Interwoven with *Austin* . . . is a concern to protect the rights of shareholders from a kind of coerced speech"), *Austin*, 494 U.S. at 673 (Brennan, J., concurring) ("Michigan law protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders oppose the use of their money . . . for political campaigns"), and *Bellotti*, 435 U.S. at 812 (White, J., dissenting) ("There is an additional overriding interest . . . : assuring that shareholders are not compelled to support and financially further beliefs with which they disagree").

<sup>94</sup> *Bellotti*, 435 U.S. at 812-13 (White, J., dissenting).

one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose.<sup>95</sup>

Justice White based his argument on two cases, *International Association of Mechanics v. Street* and *Abood v. Detroit Board of Education*.<sup>96</sup> These cases, Justice White acknowledged, involved state action because union membership was required under state and federal law.<sup>97</sup> This is not the case with a corporation's use of shareholders' property.<sup>98</sup> But until the *Bellotti* decision:

States have always been free to adopt measures designed to further rights protected by the Constitution even when not compelled to do so. It can hardly be plausibly contended that just because Massachusetts' regulation of corporations is less extensive than Michigan's regulation of labor-management relations, Massachusetts may not constitutionally prohibit the very evil which Michigan may not constitutionally permit.<sup>99</sup>

Faced with a First Amendment right at least as important as the "right to receive information" that the Court announced in *Belotti*, Justice White argued that the Court's opinion must reconcile *Bellotti* with *Street* and *Abood*.<sup>100</sup> Since this could not be done, in Justice White's view, the Court needed to defer to the Massachusetts legislature and sustain the regulation.<sup>101</sup>

Justice Brennan echoed and added to this argument in his *Austin* concurrence:

[T]he resources in the treasury of a business corporation . . . are not an indication of popular support for

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<sup>95</sup> *Id.* at 815-16.

<sup>96</sup> *Id.* at 813-14 (citing *Int'l Assn. of Mechanics v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

<sup>97</sup> *Bellotti*, 435 U.S. at 814.

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

<sup>99</sup> *Id.* at 814-15.

<sup>100</sup> *Id.* at 815. The Court's opinion distinguishes those cases on the basis that shareholders were not compelled to contribute money the way that closed shops are. *Id.* at 794 n.34. Justice White responded by saying that this is akin to saying that jobholders can always choose a different job. *Id.* at 818.

<sup>101</sup> *Id.* at 822.

the corporation's political ideas. Instead, these resources reflect the economically motivated decisions of investors and customers. A stockholder might oppose the use of corporate funds drawn from the general treasury—which represents, after all, *his* money—in support of a particular political candidate. . . .<sup>102</sup>

While the State may have no constitutional *duty* to protect the objecting Chamber member and corporate shareholder in the absence of state action, the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message. 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.<sup>103</sup>

Justice Stevens continued this argument in his *Citizens United* dissent:

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<sup>102</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 670 (1990) (citations omitted) (internal quotation marks omitted).

<sup>103</sup> *Id.* at 675 (citations omitted) (internal quotation marks omitted). Justice Brennan was echoing the famous formulation from *Calder v. Bull* of acts that a legislature cannot do: "a law that takes property from A and gives it to B." 3 U.S. 386, 388 (1798). Justice Brennan was probably being deliberately provocative, given Justice Scalia's dissent in the case based in part on originalism arguments. *Austin*, 494 U.S. at 692-94 (Scalia, J., dissenting).

Justice Brennan was also engaged in a particularly prickly rebuttal to Justice Kennedy's dissent here.

Moreover, none of the alternatives proposed by Justice Kennedy would protect a captive stockholder of a business corporation that used the Chamber as a conduit. While the State may have no constitutional *duty* to protect the objecting Chamber member and corporate shareholder in the absence of state action, *cf.* *Abood v. Detroit Board of Education*, 431 U.S. 209, 232-237 (1977), the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message. "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." Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 *YALE L.J.* 235, 247 (1981). *Cf.* *Comm'n Workers v. Beck*, 487 U.S. 735 (1988); *Machinists v. Street*, 367 U.S. 740 (1961). We have long recognized the importance of state corporate law in "protect[ing] the shareholders" of corporations chartered within the State. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 91 (1987).

*Austin*, 494 U.S. at 674-75.

When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions . . . .

*Austin's* acceptance of restrictions on general treasury spending simply allows people who have invested in the business corporation for purely economic reasons—the vast majority of investors, one assumes—to avoid being taken advantage of, without sacrificing their economic objectives.<sup>104</sup>

The argument about political speech must be answered after *Citizens United*. The dissents and concurrences discussed above were written to supplement the anti-corruption rationale of *Austin*. They provide collateral constitutional support for the positions taken by legislatures in limiting corporate political activity. But once the constitution invalidates the legislature's actions, the question of conflicting constitutional rights must be addressed, unless, of course, campaign laws that limit corporations fail to meet other constitutional tests.

#### B. Rebuttals and Replies

The Justices on the other side of this debate disagreed that shareholder rights allowed the government to limit a corporation's political speech. As stated above, there is agreement on all sides that shareholders do, at least arguably, have some First Amendment rights.<sup>105</sup> As such, the reasons for not supporting the argument lay elsewhere. Initially, the Justices who favored corporate speech argued that shareholder protection could not, even implicitly, be the purpose of the statutes. The statutes were both underinclusive and overinclusive for that purpose. They also argued that there were factual differences from the cases their colleagues supporting shareholder protection relied upon that justified a different result: a lack of

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<sup>104</sup> *Citizens United*, 130 S. Ct. at 977 (Stevens, J., dissenting) (quoting Adam Winker, *Beyond Bellotti*, 32 LOYOLA L. REV. 133, 201 (1998)) (internal quotation marks omitted).

<sup>105</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal"); See *Citizens United*, 130 S. Ct. at 911; *Bellotti*, 435 U.S. at 792 (lacking a refutation of the existence of the right, but finding that protecting the right is not the purpose of the regulations).

state compulsion. On both these points, the Justices supporting corporate speech were not very persuasive.

The *Bellotti* opinion found the statute at issue underinclusive because some political activity, such as lobbying the legislature, was permitted while advocating during a referendum was not.<sup>106</sup> The underinclusive arguments, if taken seriously, would require that all political activities of corporations be banned in order to protect corporate shareholders. Justices Brennan and Stevens argued that such an extreme approach ignores the role of nuance (and indirectly, legislative discretion) in creating an election (or any other) regulatory scheme.<sup>107</sup> Justice Brennan noted that, if

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<sup>106</sup> Justice Powell, in his *Bellotti* opinion, argued that the shareholder protection argument was essentially a straw man argument. The Massachusetts statute could not actually mean to protect shareholders because it was both under- and over-inclusive to support that goal. *Bellotti*, 435 U.S. at 793.

The underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

*Id.* (citation omitted). Justice Scalia supported this position in his *Austin* dissent, “such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not in assistance of, or in opposition to, the nomination or election of a candidate.” *Austin*, 494 U.S. at 686 (Scalia, J., dissenting) (internal citations omitted). Justice Kennedy also supported the position in his *Citizens United* majority opinion, “if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder’s interests would be implicated by speech in any media at any time.” *Citizens United*, 130 S. Ct. at 911.

<sup>107</sup> Justice Brennan, in his *Austin* concurrence, disputed the underinclusive arguments.

The Michigan law is concededly underinclusive insofar as it does not ban other types of political expenditures to which a dissenting Chamber member or corporate shareholder might object. . . . A corporation remains free, for example, to use general treasure funds to support an initiative proposal in a state referendum.

I do not find this underinclusiveness fatal, for several reasons. First, as the dissents recognize, discussions on candidate elections lie at the heart of political debate. But just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech. The State’s decision to focus on this especially sensitive context is a justifiable one. Second, in light of our decisions . . . a State cannot prohibit corporations from making many other types of political expenditures.

*Austin*, 494 U.S. at 675-77 (Brennan, J., concurring) (citations omitted) (internal quotation marks omitted). Justice Stevens stated in his *Citizens United* dissent:

anything, the statutes are underinclusive because to sweep broader would violate past decisions of the Court.<sup>108</sup> Justice Stevens viewed the argument as illogical for condemning one statute because a legislature has failed to pass all the possible regulations that could be justified.<sup>109</sup>

The overinclusive arguments are, to be blunt, hyperbolic: the examples they use are unique, such as unanimous shareholder consent, or easily distinguishable situations, such as non-profit or single shareholder corporations.<sup>110</sup> The hypothetical facts have never been directly challenged, perhaps because these are situations that are so unique or so clearly distinguishable that they are properly subject to exceptions within a statutory scheme.<sup>111</sup>

The next argument against the need to protect shareholders is that there is a basic difference in the union dues cases relied upon by Justices White,

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The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which “the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech” “are at their zenith.”

*Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting) (quoting *Austin*, 494 U.S. at 677 (Brennan, J., concurring)).

<sup>108</sup> See *Austin*, 494 U.S. at 675-77 (Brennan, J., concurring):

One purpose of the under-inclusiveness inquiry is to ensure that the proffered state interest actually underlies the law. But to the extent that the Michigan statute is “underinclusive” only because it does not regulate corporate expenditures in referenda or other corporate expression (besides merely commercial speech), this reflects the requirements of our decisions rather than the lack of important state interests on the part of Michigan in regulating expenditures in *candidate* elections. In this sense, the Michigan law is not “underinclusive” at all.

<sup>109</sup> *Citizens United*, 130 S. Ct. at 978-79 (Stevens, J., dissenting) (“And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications might similarly be conditioned on voluntariness.”).

<sup>110</sup> Justice Powell’s argument that “the overinclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure” represents a particularly unique situation in a large corporation. *Bellotti*, 435 U.S. at 794. Justice Kennedy’s argument from *Citizens United* expands on Powell’s position: “the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.” *Citizens United*, 130 S. Ct. at 911.

<sup>111</sup> See *Citizens United*, 130 S. Ct. at 935-38 (Stevens, J., dissenting) (explaining that narrower grounds exist for deciding the case, including that non-profit organizations are exempt from key provisions); *Austin*, 494 U.S. at 673-74 (Brennan, J., concurring) (noting that Justice Kennedy was focused on non-profit corporations in his dissent and pointedly wondering why he could not support restrictions regarding for-profit corporations).

Brennan, and, implicitly, Stevens. *Street* and *Abood* involved situations where the Court struck down state actions that compelled individuals to contribute union dues as a condition of employment.<sup>112</sup> The union then used the dues for political activities.<sup>113</sup> These cases are distinguishable because the union members had no choice but to join the union and pay the dues as a condition of employment.<sup>114</sup> This is quite different from the shareholder who voluntarily invests in a corporation and can choose to divest upon disagreement with any of management's actions, including the corporation's political activities.<sup>115</sup>

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<sup>112</sup> *Bellotti*, 435 U.S. at 794 n.34, cited in *Austin*, 494 U.S. at 709-10 (Kennedy J., dissenting).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* Justice Powell and Justice White's dispute might be seen in this way. Justice Powell does not want the Court to go looking for problems to solve that do not exist. In Justice Powell's view, *Bellotti* state action violated the First Amendment. The Court should not reach out and find a group whose rights might also have been violated to justify the denying others their right to speak. *Bellotti*, 435 U.S. at 795. Justice White is also suspicious of the Court's finding rights, especially when there is no historic support for those rights and the new right overrules legislative action. *Id.* at 804-05 (White, J., dissenting). However, once the Court has determined rights that should be protected, it should not back away from those protections merely because it has grown uncomfortable with the scope of the action needed to remedy it (as opposed to deciding that the legal right was wrong). *Id.* at 813-15.

This dispute between Justices Powell and White in *Bellotti* reflects a dispute in what might strike some as an unrelated area of law: school segregation. In the 1970s, an argument was raised that the landmark *Brown v. Board of Education* decision implied a distinction between those school districts that engaged in *de jure* segregation, where the explicit intent was to separate schools by race, and *de facto* segregation, which occurred without that intent. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (discussing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971)). Until *Keyes*, it was widely held that the courts could not act to remedy *de facto* segregation. *Id.* at 193. But Justice Brennan, writing for the Court, asserted that because the districts were practicing *de jure* segregation at the time of the *Brown* decision, they had an affirmative duty to dismantle such a system, not just let it stand. *Id.* at 203. He then shifted the burden to school districts to show there was no discrimination, so as to prevent *de jure* segregation from becoming *de facto* segregation over the course of time. *Id.* at 209.

Justice Powell was at first a supporter of the result from *Keyes*. *Id.* at 217 (Powell, J., concurring in part and dissenting in part). His dissent was based on usage of the distinction between *de jure* and *de facto*. *Id.* at 219-20. However, by 1979, he had become alarmed by the scope of the remedies required to fix long-established segregation and viewed the cure to be worse than the disease. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 480 (1979) (Powell, J., dissenting). Justice Powell also dissented from *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979), decided on the same day. He believed that the courts were doing too much to try to fix society's ills. *Penick*, 443 U.S. at 487. His belief came from the fact that the remedy for segregation was not just confined to a particular district that had segregated, but involved multiple districts to include vast geographic areas. *Id.*

The author of both the *Penick* and *Brinkman* decisions was Justice White. In *Brinkman*, he followed *Keyes* in asserting that it was not enough that a school board did not intend to segregate in the present, but that it must act to correct the wrongs of the past. *Dayton*, 443 U.S. at 535. If the harm of segregation was found to be statewide, the remedy must be equally far reaching. See *id.* at 537-38.

Of course, the particular facts and law of *Bellotti* and *Brinkman* are too different for the positions of the two justices to be identical across both cases. But this comparison does show Justice Powell and Justice White were acting consistently across the spectrum of constitutional rights: Justice Powell was concerned with finding new rights for the courts to protect, and Justice White determined that a

The Justices favoring shareholder protection have several responses to these counter arguments. First, there are substantial economic costs to divest from a corporation.<sup>116</sup> Furthermore, many shareholders invest indirectly, often as part of retirement savings plans, and therefore do not have the ability to monitor and divest from individual corporations.<sup>117</sup> Finally, the free market should concern itself with the allocation of resources, not political ideology.<sup>118</sup> It is also not helpful to the functioning of a capitalist society to consider non-economic issues such as the political disposition of a company as part of investing.<sup>119</sup>

#### V. PROTECTING THE SHAREHOLDER AND DELAWARE CORPORATE GOVERNANCE LAW

Thus far, the argument between the Justices regarding shareholder protection results in the same stalemate seen in other areas of the law: the Justices agree on the facts, but disagree about the legal consequences of the facts. However, the next argument of the Justices favoring corporate

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constitutional right, once found, could not be ignored simply because the consequence led to unfortunate results.

<sup>116</sup> *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting) (“[shareholders] may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like”); *Austin*, 494 U.S. at 674 (Brennan, J., concurring) (“[A] stockholder could divest from a business corporation that used the Chamber as a conduit, but these options would impose a financial sacrifice on those objecting to political expenditures.” (internal citations omitted)); *Bellotti*, 435 U.S. at 818 (White, J., dissenting) (“It is no answer to respond, as the Court does, that the dissenting shareholder is free to withdraw his investment at any time and for any reason. The employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened.” (internal citations omitted)).

<sup>117</sup> *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting) (“Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings.” (internal citations omitted)).

<sup>118</sup> *Bellotti*, 434 U.S. at 818-19 (White, J., dissenting):

The State has an interest not only in enabling individuals to exercise freedom of conscience without penalty but also in eliminating the danger that investment decisions will be significantly influenced by the ideological views of corporations. While the latter concern may not be of the same constitutional magnitude as the former, it is far from trivial. Corporations, as previously noted, are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society’s resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities.

<sup>119</sup> *See id.*

speech creates a conflict between two important principles: the ability of corporations to engage in political speech and the ability of corporate management to lead corporations without excessive input from non-management shareholders.

The Justices favoring corporate political speech argued that protecting shareholder rights did not reach the level of a compelling interest needed to justify state action. Shareholders have the means to protect themselves. “There is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”<sup>120</sup> “Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders normally are presumed competent to protect their own interests.”<sup>121</sup>

The Justices who favor greater restrictions on corporate political speech have never accepted shareholder democracy as a justification for ignoring a state’s compelling interest.<sup>122</sup> Furthermore, the dissenting Justices in *Citizens United* were skeptical that corporate democracy can be used to stop corporate management from interfering with shareholders’ First Amendment rights:

By “corporate democracy,” presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that “these rights are so limited as to be almost nonexistent,” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.<sup>123</sup>

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<sup>120</sup> *Citizens United*, 130 S. Ct. at 911 (quoting *Bellotti*, 435 U.S. at 794).

<sup>121</sup> *Bellotti*, 435 U.S. at 794.

<sup>122</sup> See *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting) (“I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today’s ruling, and I fail to understand why the Court is so confident in these mechanisms”); *Bellotti*, 435 U.S. at 815 (White, J., dissenting) (“[The Court] proposes that the aggrieved shareholder assert his interest in preventing the expenditure of funds for nonbusiness causes he finds unconscionable through the channels provided by ‘corporate democracy’ . . . It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional adjudication is no more able to satisfy the State’s interest than a ruling in *Street* and *Abood* leaving aggrieved employees to remedies provided by union democracy would have satisfied the demands of the First Amendment.”).

<sup>123</sup> *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting) (internal citations omitted).

This argument presents two shifts in the corporate speech debate. First, the concern with shareholder protection is not whether limitations on one speaker would diminish or enhance the right of information. Rather, it is a conflict between two sets of rights-holders: those who have a right of information against those who have a right not to have their assets used to promote ideas they do not support. Second, it presents a clear fact issue. The basis for not finding a compelling government interest, according to the *Citizens United* majority, is that corporate democracy is as robust as civil democracy and that suitable judicial remedies are equally available to dissident shareholders as to the litigants in *Bellotti* and *Citizens United*.<sup>124</sup> The dissenting Justices disagreed. Our attention now turns to which side is correct.

*Citizens United* clearly states its vision of shareholder democracy. The Court upheld the disclosure requirements in BCRA § 203 because it believed those disclosure provisions were necessary for corporate democracy to be effective.<sup>125</sup> This information allows shareholders to see a corporation's political activities.<sup>126</sup> Advances in technology that give shareholders more information in a timely manner are one reason for overturning the *McConnell* decision regarding BCRA § 203.<sup>127</sup> If the shareholders are displeased with a corporation's political activities, they can organize to either prevent the corporation from engaging in any political activities or replace directors who do not support the shareholders' viewpoint.<sup>128</sup>

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<sup>124</sup> *Id.* at 911 (citing *Bellotti*, 435 U.S. at 794).

<sup>125</sup> *Citizens United*, 130 S. Ct. at 916 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (“Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” (citation omitted)).

<sup>128</sup> It seems clear that should shareholders take these actions and still find corporate directors and officers engaging in political activities, they could sue the directors in court for breach of fiduciary duty. The specific duty is the duty of loyalty because management would be putting their own political agendas ahead of the interests of the shareholders. *Guth v. Loft*, 5 A.2d 503, 510 (1939) (“Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.”).

The other major fiduciary duty is the duty of care, whereby directors and other officers “have informed themselves, ‘prior to making a business decision, of all material information reasonably available to them.’” *E.g.*, *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1983)). While *Van Gorkom* is best known as being overruled by statute regarding the personal liability of directors for breaches of duty of care, the case still stands for the

The fact question presented is whether current corporate governance law allows the kind of robust corporate democracy required by this approach: Can shareholders change corporate policy through shareholder democracy practices? If that answer is no, the additional fact questions have to be addressed: 1) What changes in corporate law are required to create a robust system; and 2) what would the impact of such changes be?

#### A. Information Failure

Unfortunately, *Citizens United's* corporate democracy approach cannot meet this first step. The decision envisions corporations forthrightly indicating to whom and what they contribute.<sup>129</sup> However, political action committees (“PACs”) do not work that way. If a corporation wishes to keep its contributions anonymous, it can set up a shell corporation or foundation and make donations to other PACs through it, thereby causing any disclosures to be in the name of that shell corporation.<sup>130</sup>

But corporations’ forthright disclosures are only one way shareholders could find out about a corporation’s political expenditures. Shareholders have a right to investigate the records of a corporation.<sup>131</sup> Could concerned shareholders find out if their corporation had supported specific political causes through shell PACs through such a mechanism? Yes, but only if corporate management reveals that information, and it does not have to. In *City of Westland v. Axcelis Technologies, Inc.*, the defendants refused an extension of time for a third party to conduct due diligence regarding a

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existence of the duty of care, as well as very narrow situations in which this duty is actually breached. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 925 (Del. 2003).

<sup>129</sup> *Citizens United*, 130 S. Ct. at 916 (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests. The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”) (internal quotations omitted) (citations omitted).

<sup>130</sup> This type of concealment has already occurred with regard to individual donations. A company, W Spann LLC, formed and then made a one million dollar donation to a PAC that indirectly supports Mitt Romney’s presidential candidacy. W Spann LLC was then dissolved. So while the list of donors to the PAC listed W Spann, there was nothing that indicated where W Spann got the money for its donation. Ultimately, Edward Conard, an executive at an investment group co-founded by Romney, voluntarily came forward as the person behind W Spann. Jack Gillum, *Mysterious donor to pro-Romney PAC identified*, SALON (Aug. 8, 2011) available at [http://www.salon.com/politics/war\\_room/2011/08/08/us\\_pro\\_romney\\_pac](http://www.salon.com/politics/war_room/2011/08/08/us_pro_romney_pac).

<sup>131</sup> DEL. CODE ANN., tit. 8, § 220(b) (2010).

possible takeover.<sup>132</sup> Plaintiffs requested that the board produce the records regarding the refusal to determine if the board's actions were improper.<sup>133</sup> The Supreme Court of Delaware held that the defendant's denial of this information was proper<sup>134</sup> and the record request was not for a "proper purpose."<sup>135</sup> Such a request had to be based on more than just general allegations of mismanagement, and the "record provide[d] no credible basis" to infer the board's actions "were other than good faith business decisions."<sup>136</sup>

The question now, of course, is how a shareholder plaintiff is supposed to provide a credible basis unless it has access to information. It is not enough that shareholders suspect that a corporation is engaged in political activities; they must provide specific examples of the activities that breach a fiduciary duty before they can gain access to information that will confirm or disprove their concerns.

#### *B. Inability of Charter and By-Laws To Limit Management Action*

But what if management did provide information that disclosed a corporation's political activities? It is possible that management would disclose its political activities as part of its ordinary business practices. There is almost no question that some shareholders would object. It is equally likely that such objections would not change management's actions.

Current corporate governance law has barriers in place that hinder shareholder actions regarding a corporation's activities. First, corporate management has a fairly free hand in deciding how corporate assets will be used.<sup>137</sup> Furthermore, boards of directors are elected not as individuals in contested elections, but as a slate proposed by corporate management.<sup>138</sup>

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<sup>132</sup> *City of Westland Police & Fire Ret. Sys. v. Axcelis Tech, Inc.*, 1 A.3d 281, 284 (Del. 2010). This case resulted from failed takeover talks between Axcelis and Sumitomo Heavy Industries ("SHI"). During the course of the talks, the offer was as high as \$6 a share and the stock reached a price high of \$5.45 a share on March 17, 2008. *Id.* at 283. However, the board resisted, or at least hindered, the takeover. SHI broke off talks in September, at which time Axcelis stock was selling at \$1.43 a share. *Id.* at 284. After Axcelis failed to make required payments on its notes, the company was sold to SHI with all proceeds going to pay off the notes. *Id.* at 285.

<sup>133</sup> *Id.* at 285.

<sup>134</sup> *Id.* at 288.

<sup>135</sup> *Id.*

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

<sup>137</sup> *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991) illustrates this point. The Occidental Petroleum Corporation, at the instigation of its founder and CEO Armand Hammer, agreed to construct an art museum to house Hammer's extensive art collection. *Id.* at 52-54. Shareholders sued and a settlement provided that Occidental could spend up to \$50 million to construct the building. *Id.* at 55-57.

Objectors to the settlement argued that the expenditures violated the duty of loyalty—that is, Hammer was causing the directors to use corporate assets for his personal benefit—and duty of care—

One possible route for shareholders would be to advocate for protective provisions of the corporation's charter or by-laws. Corporate charters often include a list of matters that must be brought to a vote of shareholders. This is probably the component of a charter that Justice Powell was addressing in his *Bellotti* opinion.<sup>139</sup> But the *Bellotti* opinion ignores the limitation that shareholders cannot vote for a charter amendment unless the board approves it.<sup>140</sup> This means that a board must agree to shareholders' changes, including amendments that the corporation must not engage in political actions, and that shareholders must negotiate with a board that is acting in a way with which they disagree. As a result, when shareholder activists do change a corporation's charter, changes take the form of new procedures management must follow, not required business decisions.<sup>141</sup> Thus, amending a corporate charter cannot protect a right on which our political system rests.<sup>142</sup>

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in not being aware of the harm to corporate assets beyond the \$50 million expenditure—and thus were not protected by the business judgment rule. *See id.* at 59-60. They argued that the sheer amount of the donation and its tax consequences amounted to corporate waste. *Id.* at 61.

The Court of Chancery determined that the Delaware code did not place any limitations upon the amount of charitable giving a corporation may engage in and that, given the net value of Occidental, the amount was reasonable. *Id.* at 61-63. The Court of Chancery said that the business judgment rule would apply and the Delaware Supreme Court affirmed. *Id.* at 63.

<sup>138</sup> *E.g.*, *Yucaipa Am. Alliance Fund II v. Riggio*, 1 A.3d 310, 314-15 (Del. Ch. 2010), *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1029-30 (Del. Ch. 2004).

These boards also often have a "classified" structure, meaning that only a certain number are elected at a particular annual meeting, so that it can take two proxy seasons for a new majority to be installed. *E.g.*, *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 283 (Del. 2010); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 156 (Del. Ch. 2005). But there is nothing "undemocratic" in having a system designed to ensure that the passions of the moment do not adversely affect long-term projects. *See* U.S. CONST. art. I, § 2 for the structure and election of the U.S. Senate.

<sup>139</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978).

<sup>140</sup> DEL. CODE ANN. tit. 8, § 242 (2010). *See Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996); *AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188, 1192 (Del. Ch. 1999).

<sup>141</sup> The Intel Corporation agreed to create a board committee on sustainability in April 2010. This was done in the face of shareholder activism to create such a committee. Robert Kropp, *Intel Agrees to Board-Level Consideration of Sustainability*, SOCIALFUNDS (Apr. 5, 2010), <http://www.socialfunds.com/news/article.cgi/2921.html> (last visited Jan. 11, 2012).

<sup>142</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). It is true that management must allow shareholder proposals to be voted on using proxy contests, including changes to management. Shareholders might then seek to have a resolution put to a vote at the annual meeting seeking to stop the company from engaging in political activities. But, as mentioned above, management is not required to act upon such proxy resolutions and frequently does not. *See* DEL. CODE ANN. tit. 8 § 141(a) (2010) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."). The Delaware Court of Chancery at least tacitly accepts that this general grant of authority means that shareholders cannot directly order management to perform specific actions; they can only control the processes under which decisions are made. *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1079 (Del. Ch. 2004). *See also* Randal S. Thomas & James Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response*,

### C. *The Poison Pill Barrier to Shareholder Action*

If management resists shareholder demands to stop a corporation's political activities, changing that activity means changing management. And management has a very powerful defense against shareholder interference: the poison pill. The poison pill is employed as a defense against hostile takeovers. Commonly called a "shareholder rights plan," a pill dilutes the shares a potential acquiring party has by either directly issuing shares of stock to all other current shareholders or by offering new shares at huge discounts.<sup>143</sup> Pills are "triggered" when a threatening shareholder acquires a designated percentage of a corporation's outstanding shares.<sup>144</sup> The effect of the pill reduces both the percentage of votes the acquiring party might have and the value of the stock to cause a loss should it be immediately sold.<sup>145</sup>

The current approach to pills makes them effective deterrents to shareholders who seek to change a corporation's political activities. First, the combined stock holdings of groups of shareholders acting together against corporate management count toward activating a pill's "trigger."<sup>146</sup> Furthermore, depending on the consequences of a change of control, the triggering threshold could be very low.<sup>147</sup>

Two cases from 2010 illustrate this. In *Yucaipa American Alliance Fund II, L.P. v. Riggio*, the Court of Chancery of Delaware addressed whether a pill could be triggered when groups of shareholders act. The case involved an ongoing conflict between the head of the Yucaipa American Alliance Fund, Ronald Burkle, and Barnes & Noble founder and chairman Leonard Riggio.<sup>148</sup> Throughout this litigation, Riggio and his allies controlled one-third of outstanding Barnes & Noble shares.<sup>149</sup> Burkle

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*and Market Reaction*, 13 J. CORP. FIN. 368, 378 (2007), reprinted in *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS* 382, 384 (Melvin Aron Eisenberg & James D. Cox eds., 2011) ("Board reaction to majority vote shareholder proposals varies substantially. . . . Of the 333 corporate governance proposals that received more than 50% of shareholder votes, companies announced that 103 were fully implemented by the board. . . .").

<sup>143</sup> *E.g.*, *Versata Enters., Inc v. Selectica, Inc.*, 5 A.3d 586, 594 (Del. 2010); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1348 (Del. 1985); *Yucaipa American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 320 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011).

<sup>144</sup> *See Versata*, 5 A.3d at 594; *Yucaipa*, 1 A.3d at 313.

<sup>145</sup> *Versata*, 5 A.3d at 590 (acquiring party stock ownership share diluted from 6.7% to 3.3% when rights plan triggered). Poison pills are also useful anti-takeover devices because they do not devalue corporate assets the way that other measures, such as buybacks or share option agreements, do. *Moran*, 500 A.2d at 1354.

<sup>146</sup> *Yucaipa*, 1 A.3d at 343.

<sup>147</sup> *Versata*, 5 A.3d at 607.

<sup>148</sup> *Yucaipa*, 1 A.3d at 312.

<sup>149</sup> *Id.* at 314.

had acquired Barnes & Noble shares and was badgering Riggio with suggestions.<sup>150</sup> Riggio rejected Burkle's advice and pursued strategies that Burkle disagreed with.<sup>151</sup> Burkle then doubled his stake in a short period of time to eighteen percent and began taking steps to engage in a leveraged buyout.<sup>152</sup> At the same time, Burkle's partner in a potential proxy contest, Aletheia Research and Management, increased its holdings to over seventeen percent.<sup>153</sup>

Barnes & Noble adopted a pill that would be triggered if "any person or group acquire[d] beneficial ownership of more than 20% of Barnes & Noble common stock."<sup>154</sup> The board viewed Yucaipa and Aletheia as coordinating their efforts and indicated they would group their combined shares to determine if the pill had been triggered.<sup>155</sup> Yucaipa then filed suit.<sup>156</sup> Part of its argument was that the pill could only be triggered if the various parties explicitly stated they would be working together, because otherwise they could not engage in even preliminary discussions with other potential parties.<sup>157</sup>

The court held that the board was justified in adopting the pill.<sup>158</sup> The court applied the test from *Unocal Corp. v. Mesa Petroleum Co.* that a defensive measure such as a poison pill must be adopted in the face of a reasonable threat, be neither coercive nor preclusive, and be within a "range of reasonableness."<sup>159</sup> It then examined the board's actions. First, the court found that the board acted in good faith and loyalty to the shareholders as a whole.<sup>160</sup> Second, it found that the company did face a legitimate threat, in that Yucaipa was capable of seizing control of the company thorough a proxy contest without paying a "control premium."<sup>161</sup>

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<sup>150</sup> *Id.* at 316-17.

<sup>151</sup> *Id.* at 317-18.

<sup>152</sup> *Id.* at 318-19.

<sup>153</sup> *Id.* at 324.

<sup>154</sup> *Id.* at 320-21. The pill initially would be triggered if any group acquired twenty percent beneficial ownership. *Id.* at 320.

<sup>155</sup> *Id.* at 323-25.

<sup>156</sup> *Id.* at 325.

<sup>157</sup> *Id.* at 329.

<sup>158</sup> *Id.* at 360. The court followed the *Unocal* test for determining if a board had acted according to its fiduciary duties: that the board faced a legitimate threat and that the response was in proportion to that threat. *Id.* at 345 (discussing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)).

<sup>159</sup> *Id.* at 336 (citing *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 50-51 (Del. Ch. 1998)).

<sup>160</sup> *Id.* at 346. This holding was in spite of the court's own awareness that the controlling shareholder, Riggio, was present at key board meetings. *Id.* Indeed, the court seems to be saying that since Riggio was already in control and always was, he did not owe the shareholders any premium to maintain that control. *Id.* at 352.

<sup>161</sup> *Id.* at 351.

Third, the court found that it was reasonable for the board to threaten to trigger the pill when the two block shareholders appeared to be collaborating to take over the company.<sup>162</sup> It did not matter if the dissenting shareholders said they were not interested in taking over the company; if it was reasonable for a company's *management* to see the dissenting shareholders as a threat, the board's actions would be upheld.<sup>163</sup>

*Versata Enterprises v. Selectica, Inc.*, presents a case where circumstances allowed a company to all but guarantee that its board could not be replaced. Selectica was a failed company, whose share price dropped from a high of twenty-three dollars to one dollar.<sup>164</sup> Various Selectica investors had resolved to cut losses and sell the company's assets.<sup>165</sup> Selectica had three things of value: its patent portfolio, its cash reserves, and net operating loss carry forwards ("NOLs").<sup>166</sup> The last asset is subject to a severe decline in value if there is a "change in control" under the tax code.<sup>167</sup> Selectica management determined that to protect the NOLs, it needed to enact a poison pill that had a threshold of 4.99%.<sup>168</sup> This threshold was in place in order to assure that a new owner could not reach the five percent threshold that could threaten the NOLs.<sup>169</sup>

Selectica adopted the pill because of the actions of Trilogy, Inc, the owner of Versata.<sup>170</sup> Trilogy refused to participate in a process Selectica had in place to purchase the company.<sup>171</sup> Instead, Trilogy purchased

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<sup>162</sup> *Id.* at 359-60. The justification used by the court was that even if the pill kept the plaintiff from gaining a matching stake against the management block, it could still win the upcoming proxy contests. *Id.* at 356-59.

<sup>163</sup> *Id.* at 349-51. Ultimately, Burkle acquired up to nineteen percent of the company and did put forward a slate of candidates. Riggio won the contest, being re-elected to the board with fifty-three percent of the vote out of a turnout of eighty-three percent of outstanding shares being voted. Thus, if Burkle had been allowed to buy outright up to the thirty percent he wanted to, he probably would have won the contest. Matt Townsend, *Barnes & Noble Investors Side With Riggio Over Burkle*, BLOOMBERG NEWS SERV. (Sept. 28, 2010) available at <http://www.businessweek.com/news/2010-09-28/barnes-noble-investors-side-with-riggio-over-burkle.html>.

<sup>164</sup> *Versata*, 5 A.3d at 590.

<sup>165</sup> *Id.* at 591.

<sup>166</sup> *Id.* at 590. NOLs are a tax benefit whereby operating losses of a company can be discounted from a company's overall income for tax purposes. *Id.* at 589. A company with NOLs could be bought by another company, which could then use the NOLs to reduce its overall tax burden. *Id.* at 589. Thus, a company could see a net gain if it paid less than the overall value of the NOLs. *Id.*

<sup>167</sup> *Id.* at 589. The very rough gist of how this works is that any NOL that was generated prior to an "ownership change" is diminished. Such a change of control occurs if fifty percent or more of the shares change hands within a three-year period. But only those who have a five percent or more of shares are examined. Thus, if carefully managed, a company can be sold with its NOLs intact.

<sup>168</sup> *Id.* at 595.

<sup>169</sup> *Id.* at 593-94. The previous five percent owners were grandfathered in so as to not trigger the pill.

<sup>170</sup> *Id.* at 590.

<sup>171</sup> *Id.* at 593.

Selectica stock in the open market.<sup>172</sup> After Trilogy had bought through the pill trigger, which probably reduced the value of the NOLs, it demanded that Selectica buy back stock and accelerated debt repayments in exchange for stopping the hostile actions.<sup>173</sup>

The court, applying the *Unocal* test,<sup>174</sup> upheld the low threshold.<sup>175</sup> The court said that the threshold was proper because of the potential harm that might result if a new shareholder gained five percent of the company's shares, and that Trilogy presented such a threat to company assets.<sup>176</sup> The particularly low threshold was reasonable, given that the principal purpose of the pill was not to entrench management, but to protect a valuable asset of the company.<sup>177</sup> The plan was not preclusive because it was still possible for a hostile takeover of the company to succeed.<sup>178</sup> The action itself was within the range of reason because Trilogy was not actually interested in acquiring the company, but in damaging a long-standing competitor.<sup>179</sup>

The reasoning behind the courts' decisions is really quite clear: protect the vast majority of shareholders from parties who seek to use the mechanisms of corporate governance for their own gain. In *Yucaipa*, Burke had a very good chance of seizing control of a successful business without paying an appropriate "control premium" to the rest of the shareholders.<sup>180</sup> *Versata* involved a plaintiff who was using the mechanics of corporate governance to do serious financial harm to a competitor.<sup>181</sup> The court's

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 595-96. This represents the only time that a poison pill has been triggered.

<sup>174</sup> *Id.* at 599, 601.

<sup>175</sup> *Id.* at 607.

<sup>176</sup> *Id.* at 600-01.

<sup>177</sup> *Id.* at 602.

<sup>178</sup> *Id.* at 602. The court continues to refuse to speculate on the results of a particular proxy battle and simply notes that hostile takeovers have been successful when the main actor had less than ten percent of the shares. *Id.* Commentators who have written in opposition to *Selectica* have done so on the basis of this holding. It appears that this part of the *Unocal* standard has been raised so that only if a successful proxy contest would be impossible for a plaintiff is a pill found to be preclusive.

<sup>179</sup> *Id.* at 606-07. It is important to note that corporate entrenchment does not have to be the result of an outside force such as the United States Tax Code. Corporate entrenchment can also be created by the company itself. For example, in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, the board of Amylin entered into an agreement which would allow the holders of debt notes to redeem those notes at face value in the event of a "change of control" not approved of by "continuing directors." 983 A.2d 304, 307 (Del. Ch. 2009), *aff'd*, 981 A.2d 1173 (Del. 2009) (mem.). The court said that such actions did not violate the duty of care because the board exercised appropriate procedures in adopting the instrument. *Id.* at 318. Thus, the board had inadvertently entrenched itself because of the severe economic consequences of a hostile takeover.

<sup>180</sup> *Yucaipa Am. Alliance Fund II v. Riggio*, 1 A.3d 310, 351 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011).

<sup>181</sup> *Versata*, 5 A.3d at 606.

operating theory is that most investors would prefer to keep in place the management at the time shares were purchased.<sup>182</sup>

#### D. A Political Exception

As it currently stands, corporate democracy is not robust enough for shareholders to protect themselves. The lack of democracy is appropriate given the almost pure *laissez faire* approach that many private equity firms, such as Yucaipa and Trilogy, practice. These firms represent very real threats to shareholder value. The Delaware courts are justifiably cautious at giving them too many weapons.

Testing this argument would involve shareholder activism and litigation. Using disclosure requirements, for-profit corporations making political contributions could be discovered.<sup>183</sup> Once these donors are found, shareholders can demand that corporations stop making political contributions. If the corporations do stop, then the *Citizens United* majority's faith in corporate democracy will be justified.

But some corporations will refuse to disclose their activities, or a majority of shareholders will vote to allow the corporation's political actions. Suits can be brought, perhaps because of a breach of the duty of loyalty when managers have appropriated corporate assets for their own political activities.

The Delaware courts might decide to take Justice Kennedy's statement about the importance of shareholder democracy seriously. There could be a "political question" exception. After all, the crux of corporate governance law is the business judgment rule, and the crux of that rule is that corporate management, not judges, is in the best position to determine what is in the

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<sup>182</sup> This approach to Delaware corporate governance law has a long been supported within the academy by scholars known as contractarians.

The contractarians, following law and economics theory, hold that fiduciary duties are best regarded as a default rule in the "contract" formed between a corporation and its shareholders. That is, there is "nothing special" about them. In this model, to reduce transaction costs, investors can "opt out" of monitoring duties simply by purchasing stock in a corporation with none. Further, contractarians hold that courts should refrain from interfering and let each party in the fiduciary relationship determine what mix of benefits and costs is appropriate.

Paul S. Miller, *Congress, Corporate Boards, and Oversight: A Public Law/Private Law Comparison*, 44 U. RICH. L. REV. 771, 793 (2009) (internal citations omitted).

<sup>183</sup> If it is not possible to find these corporations, then suit can be brought in Delaware seeking the records of campaign contributions from the corporations themselves. If Delaware courts grant the request, the first part of *Citizens United* corporate democracy will be shown to work. If not, it is one reason to overturn *Citizens United*.

best business interests of a corporation.<sup>184</sup> But whether something falls into the realm of politics is an entirely different matter. Judges are well versed in answering this question, particularly because speech of a political nature receives the most constitutional protection.<sup>185</sup> If the Delaware courts grant the shareholders this relief, *Citizens United* and corporate democracy would be vindicated.

Delaware corporate governance law, though, would be upended. The outlines of a political exception are easy to see: if a shareholder seeks a proxy contest because of a political position taken by management, then the various defense mechanisms employed by management should be removed. The consequences of such an exception would be considerable. For example, in *Yucaipa*, one board member, Michael Del Giudice, in the words of the court “had a high profile career as a key staffer in New York politics.”<sup>186</sup> Barnes & Noble chairman Leonard Riggio regularly made contributions to Democratic candidates that Del Giudice recommended.<sup>187</sup> Suppose that Burkle was a Republican (or could find a Republican willing to front for him). Suppose he went to the Delaware courts and said that, among other things, he wanted to change control of the board of directors because Barnes & Noble, as a corporation, supported Democratic causes and he did not want them to do so. He would then asked the court to stay the Barnes & Noble poison pill because the political exception should allow him to explicitly ask other like-minded shareholders to follow him. In addition, he would ask that the court suspend the poison pill so that he could use his money to purchase the shares needed to ensure that the company acted in a manner consistent with his political beliefs. After all, shareholder democracy is not about majority rule of the individual shareholders, but majority rule of the majority of shares.

Burkle would get his thirty percent share of all Barnes & Noble stock and win the proxy contest by fifty-seven percent of the vote, if all other shares vote the same way in the proxy contest.<sup>188</sup> As a result, he would take

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<sup>184</sup> *E.g.*, *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“The judges are not business experts.”).

<sup>185</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>186</sup> *Yucaipa Am. Alliance Fund II v. Riggio*, 1 A.3d 310, 314 (Del. Ch. 2010), *aff’d*, 15 A.3d 218 (Del. 2011).

<sup>187</sup> *Id.*

<sup>188</sup> It may be that most shareholders who sell to Burkle already agree with him. But there would be shareholders who sell because Burkle offers a high price. The point is that the political exception can change the results of a close proxy contest.

over the company without paying the control premium to the other shareholders.

But Riggio, in light of the announced political exception, could seek to out-manuever Burkle. He could have the Barnes & Noble board write into its bylaws that it would not engage in any activity which might be seen as having political overtones and remove Del Giudice from the board. This would mean that Burkle would be denied access to the political question protection. But in the political marketplace, corporations have “valuable expertise, leaving them the best equipped to point out errors or fallacies in . . . the speech of candidates and elected officials.”<sup>189</sup> And the Barnes & Noble board will be denied the insights that a connected political player could bring to the business world. This seems a steep price to pay.<sup>190</sup>

But Delaware judges could require that the political exception have extensive facts to support its application: that the political issue be the sole reason for a plaintiff’s motion, and that there be no other possible reason for the request. If the Delaware courts choose such an approach, their past decisions indicate that the exception might simply exist on paper. In *Yucaipa*, Chancellor Strine found that the members of the board who responded to Burkle’s actions were independent and acted in good faith despite noting that Riggio was often present at their deliberations and that the director leading the deliberations, Michael Del Giudice, was independent in name only.<sup>191</sup> Furthermore, the burden of proof for plaintiffs could be that the political exception applies only when political motivation is the sole basis for the action. Such deference to corporate management would prove Justice Stevens’ assertion that shareholder “rights are so limited as to be almost nonexistent.”<sup>192</sup>

Should shareholder suits fail in Delaware, either immediately or over time, an appeal can be taken to the Supreme Court. The basis for the breach of loyalty is based on shareholder association rights as interpreted by *Citizens United*: corporate democracy is the vehicle to vindicate those

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<sup>189</sup> *Citizens United*, 130 S. Ct. at 912.

<sup>190</sup> The political exception could impact a company’s ability to advocate in areas that are part of its business. It is not far fetched to see environmental organizations purchasing stock in oil companies. The organizations could then sue to stop the company from using funds to advocate for oil drilling in environmentally sensitive areas. The courts could say that a person should not invest in an oil company to disrupt its business and prevent the action. But the courts could also say that a group has a right to invest in a company to change the way it does business, in much the same way as other private equity funds do.

<sup>191</sup> *Yucaipa*, 1 A.3d at 346. Del Giudice, in addition to being a political operator, received a substantial part of his personal income running an investment group in which Riggio invested. *Id.* at 314-15.

<sup>192</sup> *Citizens United*, 130 S. Ct. at 978 (Stevens, J., dissenting).

rights.<sup>193</sup> The Court would face a choice to either forcefully interject itself into Delaware corporate law or revisit the corporate democracy premise. The former course would upend Delaware law for the reasons stated above. The latter course would likely involve an analysis similar to the Court's actions in *Turner Broadcasting System, Inc. v. FCC*.<sup>194</sup> Where there are two competing rights at issue, the Court should defer to Congress even with issues that involve the First Amendment.<sup>195</sup> This would involve examining legislative history and events that occurred since both the enactment of BCRA and the *Citizens United* decision. Such an analysis would show that Delaware corporate law cannot be a means for shareholders to vindicate their rights. As such, BCRA § 203 or its future incarnation would need to be upheld as a matter of constitutional law.<sup>196</sup>

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<sup>193</sup> *Citizens United*, 130 S. Ct. at 911, 916.

<sup>194</sup> *Turner Broad. Sys., Inc. v. FCC* ("Turner I"), 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. FCC* ("Turner II"), 520 U.S. 180 (1997). This case involved a conflict between rights similar to those involved with corporate speech. The plaintiffs were cable broadcasters who claimed that laws requiring that they carry local broadcasters violated their rights of association. *Turner I*, 512 U.S. at 626. The court ultimately found that there was a competing right to the broadcasters' rights, a freedom of information. *Turner II*, 520 U.S. at 189-90. In deciding which right must prevail, the court found that it should be highly deferential to the findings of Congress, provided that Congress has drawn reasonable inferences based on substantial evidence. *Id.* at 195.

<sup>195</sup> *Turner II*, 520 U.S. at 196.

*Turner II* focused on the extensive legislative record developed to support the legislation at issue. The Court ruled that when there were competing rights, Congress must show that it "has drawn reasonable inferences based on substantial evidence." *Id.* at 195 (quoting *Turner I*, 512 U.S. at 666) (citation omitted). The legislative history of BCRA focused on the way corporate political activities corrupted the election process. This is not surprising given that *Austin* and its progeny were the guidelines that Congress followed. The court may bring back BCRA § 203 directly because of this lack of history. The very least it should do is signal Congress that if it does re-enact § 203 based upon the evidence, such as this proposed legislation, that Delaware corporate law does not allow shareholders to protect themselves, it will sustain that law.

<sup>196</sup> The above scenario addressing the association rights issue assumes that a majority of shares could be reasonably within the reach of the dissenting shareholders. But the idea of a rights scheme is to protect minority interests. The results of *Street* and *Abood* are based on the idea that monies cannot be spent "against the expressed wishes of [dissenters]." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 770 (1961). Thus, potential problems (and perpetual litigation) exist as the courts address situations that involve the rights of a minority of shareholders when a majority supports a corporation's political activities. Problems may get even worse if the majority of shares that support an action only represents a small number of individual shareholders and the minority of shares represents a majority of individuals: which should matter when considering a corporation's actions in the political sphere of the nation?

Both *Street* and *Abood* stress that the appropriate remedy in such circumstances is to balance the rights of the dissenter and the rights of those who wish to engage in advocacy. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977) (citing *Street*, 367 U.S. at 772-73). The way out of this remedy is to allow PACs to be operated by a corporation that solicits money from the shareholders but does not use general corporate funds. *McConnell v. FEC*, 540 U.S. 93, 204 (2003).

## VI. CONCLUSION

These potential scenarios show the weakness of *Citizens United*. If the political exception occurs, it will disrupt decades of Delaware corporate governance jurisprudence. The exception could allow “fishing expeditions” into a corporation’s records to locate other potential fiduciary violations. The exception could be a corporate governance weapon used by those who wish to harm the corporation and its long-term investors. The political exception may also cause corporations to leave the political debate for fear of shareholder suits.

If there is no political exception in Delaware corporate law, then there is no means to protect shareholders outside of state action. The proponents of corporate political speech must then choose between a legal Scylla and Charybdis. Either they acknowledge that there is a compelling state interest in protecting shareholder rights and no other means available to protect them other than state action,<sup>197</sup> or they state that a corporation’s political speech is more important than shareholders’ political speech as it resides in their right of association. This amounts to favoring one speaker over another, undercutting the doctrine that it is the speech, not the speaker that matters; the speaker’s identity, not the speech, becomes the key issue. Either position is fatal to *Citizens United*.

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<sup>197</sup> The solution used to protect shareholder rights, BCRA § 203, would prove to be a narrow remedy. As *McConnell* noted when it initially upheld § 203, corporations would still be allowed to form PACs, solicit donations, and engage in political speech through the PAC. *McConnell*, 540 U.S. at 204-05.

Concerns about media companies being limited can be addressed by limitations for the act as applied, in the same manner as the application of BCRA § 203 would be limited by the *Citizens United* dissenters with regard to *Citizens United* itself as a non-profit corporation. *Citizens United*, 130 S. Ct. at 936-37 (Stevens, J., dissenting). Arguments regarding the underinclusive and overinclusive nature of the legislation are essentially window dressing arguments for the reasons discussed above. *See supra* Section IV.B.