

# Expressive Rights for Shareholders After *Citizens United*?

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To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.

—Thomas Jefferson<sup>1</sup>

## Introduction

ON JANUARY 21, 2010, in a 5-4 opinion, *Citizens United v. Federal Election Commission*<sup>2</sup> struck down section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>3</sup> The BCRA prohibited corporations and unions from using general treasury funds for “electioneering communications”—defined as broadcast, cable, or satellite communications that are publicly distributed<sup>4</sup>—within thirty days of a primary election or sixty days of a general election and that advocate for or against a particular candidate in a federal election.<sup>5</sup> The vibrant commentary emerging from the opinion focuses, as one might expect, on whether the majority correctly bestowed broad First Amendment rights upon corporations and unions.<sup>6</sup>

This Article, however, emphasizes an undertheorized and often overlooked issue that *Citizens United*, perhaps unwittingly, brings to the fore: the First Amendment rights of shareholders. The core of my argument is simple: the opinion all but ignores shareholders’ rights,

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1. Thomas Jefferson, 12 Hening’s Va. Stat. 85 (1823).

2. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

3. See 2 U.S.C. § 441b (2006).

4. See 11 C.F.R. § 100.29(a)(2) (2001).

5. See 2 U.S.C. § 434(f)(3)(A).

6. See, e.g., Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649 (2011); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

and in doing so, is a signpost in the march away from shareholder capitalism.

The argument is developed in two principal sections: Part I explores the fundamental problem in *Citizens United*—the oversized First Amendment rights bestowed upon organizations such as corporations and unions—and the thoughtful critiques that have emerged in response to the majority’s bold rhetoric. Part II argues that shareholders, like union members, have First Amendment rights that are trampled upon if corporations are given free reign to engage in political speech. It concludes by responding to three powerful critiques of the notion that shareholders should have free speech rights: (1) corporate law already protects them; (2) they can simply divest their holdings if they do not agree with the corporation’s speech; and (3) corporations are not state actors against whom constitutional rights may be asserted.<sup>7</sup>

## I. Problems *Citizens United* Poses

*Citizens United* is ostensibly about a corporation’s “freedom of speech.”<sup>8</sup> As Samuel Issacharoff observes, “[t]he most striking and perhaps the oddest feature of *Citizens United* is the extravagant endowment of rights upon corporate actors . . . .”<sup>9</sup> Not only is such a posture difficult to support theoretically,<sup>10</sup> it does not accord with basic common sense. After all, “unlike individuals, corporations are not voters and so have no inherent right to influence elections.”<sup>11</sup> Further, “[a]rtificial legal entities do not assemble to protest, to hold signs, to

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7. One important caveat is in order before proceeding: Given current fashion in constitutional interpretation, I have no illusion that my proposal will be implemented soon. My point, at least for now, is simply to foster discussion and debate.

8. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010) (“The Court has recognized that First Amendment protections extend to corporations . . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” (citations omitted)).

9. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 130 (2010).

10. See, e.g., Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1651 (1982) (“The notion that soulless, inarticulate corporations could even hold a political view, let alone insist on the right to express it, would be incomprehensible to the scholastic philosophers and the classical economists who provided the conceptual ground for earlier explanations of corporate personality.”).

11. Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 126 (2009). As Justice Stevens laments, “[u]nder the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.” *Citizens United*, 130 S. Ct. at 948 (Stevens, J., concurring in part and dissenting in part).

sing songs, etc., though the few who rule them may hire people to do these things. [Corporations] don't speak or write either, though they may hire people to do these things for them."<sup>12</sup> Thus, as various commentators have noted over the years, treating corporations as natural persons for constitutional purposes is illogical,<sup>13</sup> inconsistent with constitutional history,<sup>14</sup> and bad public policy.<sup>15</sup> As Justice Stevens reminds us in the dissent, the overall point is simple: "[t]he fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it."<sup>16</sup>

A "corporation" is merely a legal fiction—a piece of paper that cannot "speak." In the words of one commentator, "[e]xpression is possible only by natural persons, not by corporations. Only a natural person may express himself through a political expenditure. Any expenditure of corporate assets for political purposes must be an expression of the natural persons who authorize and direct the expenditure."<sup>17</sup> As Victor Brudney presciently observed thirty years ago, this reality "leaves to be solved the crucial questions of the state's

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12. Michael Kent Curtis, *Citizens United and Davis v. FEC: Lochner on Steroids and Democracy on Life Support* 17 (Sept. 30, 2010) (unpublished manuscript) (available at <http://ssrn.com/abstract=1685459>).

13. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting) ("The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same."). It becomes unsurprising, then, that the initial sweeping grant of constitutional rights to corporations dates back to all of two sentences from a Supreme Court headnote in 1886 that simply states: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of the opinion that it does." *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

14. See, e.g., Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863 (2007) ("When the Founders established the principle of free speech in both the Federal and state constitutions, corporate speech was far from their minds.").

15. See, e.g., Bezanson, *supra* note 6, at 96 ("Indeed, the size and power of corporations would more likely lead to the conclusion that corporations are a sector in need of popular control rather than in need of actively participating in the political discourse.").

16. *Citizens United*, 130 S. Ct. at 971 (Stevens, J., concurring in part and dissenting in part). As one scholar notes, "[s]emantic sleight-of-hand insufficiently justifies treating corporations like human beings under the Constitution." Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 35 (2001).

17. Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1351 (1979); see also *id.* at 1373.

power to decide *who*, within the corporation, may authorize *it* to utter that speech . . . .”<sup>18</sup>

Rather than explore Brudney’s question, the majority simply postulates that corporations should be conceptualized as “associations of citizens.”<sup>19</sup> Yet who are these “citizens”? One would be tempted to posit shareholders; unfortunately, shareholders are not the constituency that decides upon the speech of large public corporations.<sup>20</sup> As those with even a passing familiarity with these entities will recognize, corporate insiders—the board and management—determine what is said.<sup>21</sup> Allowing a “corporation” to speak enhances the power of corporate insiders to use shareholders’ money:

Instead of “corporations” deciding to “speak,” a few in control of the corporation will make the decision. Far from a “corporation” “deciding” to spend “its” money for political purposes, the few will decide to spend *other people’s money* (that of the shareholders or money generated from creditors or customers, for example) in political causes the few choose to support. In effect, many customers and shareholders will end up subsidizing political causes to which they object.<sup>22</sup>

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18. Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235, 236, 248 (1981).

19. *Citizens United*, 130 S. Ct. at 883; *see also 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.”). The associational notion also appears in Justice Scalia’s concurrence. *See, e.g., id.* at 928 (Scalia, J., concurring) (“All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak *in association with other individual persons.*”).

20. *See, e.g., Curtis, supra* note 12, at 18 (“The majority in *Citizens United* implied that corporations were simply groups of citizens united for political purposes. That is not what is going on. Shareholders do not typically unite for ideological reasons. Customers do not typically buy products to support one candidate or oppose another.” (footnote omitted)); Joo, *supra* note 16, at 6 (“Because corporate election-related spending decisions are not made in consultation with a corporation’s shareholders or other constituents, such spending does not constitute individual expression.”).

21. *See, e.g., Aleta G. Estreicher, Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 275 (1990) (“Nevertheless, corporations are not natural beings; when a corporation ‘speaks’ it speaks through the voice of its officers and directors, who are agents exercising derivative power on behalf of their widely dispersed shareholder-principals.”).

22. Curtis, *supra* note 12, at 13 (footnote omitted); *see also Joo, supra* note 16, at 81 (“Shareholders (and other corporate constituents other than managers) have no meaningful input into the decision-making process regarding election-related spending. Rather, such spending is controlled by managers with no real accountability.”); O’Kelley, *supra* note 17, at 1377 (“The expression in such a case is that of management, or whoever authorizes and directs the expenditure. The individual shareholder has in no sense engaged in an act of expression. He and the other shareholders have merely continued to hold shares in the corporation from which management has, for its own expression, extracted assets.”).

Or put succinctly in Adam Winkler's words, "[m]anagement, not shareholders, makes the determination of what to say, where to say it, and how much to spend. In terms of substance, corporate speech is really corporate management's speech. Yet it is the shareholders who pay for it."<sup>23</sup> Other commentators have echoed these significant concerns.<sup>24</sup>

Privileging management's political speech to the detriment of shareholders' speech presents at least two major problems. First, increased corporate political activity is associated with poor corporate governance and destruction of firm value<sup>25</sup>—creating, after *Citizens*

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23. Adam Winkler, *Beyond Bellotti*, 32 *LOV. L.A. L. REV.* 133, 165 (1998) [hereinafter Winkler, *Beyond Bellotti*] (footnote omitted). Winkler even suggests that the concern over misuse of "other people's money" provided a prime impetus to regulate corporate electoral speech. See Adam Winkler, "Other People's Money": *Corporations, Agency Costs, and Campaign Finance Law*, 92 *Geo. L.J.* 871, 873 (2004) [hereinafter Winkler, "Other People's Money"] ("At the turn of the century, when Congress and the states first adopted bans, corporate political contributions were also understood to be corrupt because they amounted to a misuse of 'other people's money': company executives were opportunistically misappropriating the company owners' money to purchase legislation benefiting the executives themselves.").

24. See, e.g., C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 *U. PA. L. REV.* 646, 676 (1982) ("[D]emocratic theory still would not justify granting corporate executives discretionary control over the massive corporate resources, which were gathered for commercial purposes, in order to pursue their political objectives."); André Douglas Pond Cummings, *Procuring 'Justice'? Citizens United, Caperton v. Massey, and Partisan Judicial Elections*, 95 *IOWA L. REV. BULL.* 89, 109 (2010), available at [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_95\\_cummings.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_95_cummings.pdf) ("Now, corporate executives, who have proven reckless and negligent repeatedly, are now able to freely assign corporate funds and shareholder value to campaigning and electioneering. There is little evidence to suggest that these executives will be careful, thoughtful, or responsible with the new ability to spend shareholder funds at their disposal."); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577, 656 (1990) ("Another broad objection to granting corporations Bill of Rights protections is that to do so unfairly promotes the power of corporate managers while diminishing that of shareholders, workers, and communities."); Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach* 44 (Feb. 28, 2010) (unpublished manuscript) (available at <http://ssrn.com/abstract=1474421>) ("The first risk posed by total deregulation is that corporate managers who were restrained by the corporate [Political Action Committee] requirement will spend much more on politics—using the corporate treasury as a personal piggy bank.").

25. See John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 16 (Harv. L. & Econ., Discussion Paper No. 684, 2010), available at <http://ssrn.com/abstract=1680861> ("In sum, not only does corporate political activity correlate with weak corporate governance, it also correlates (negatively) with firm value. Firms with corporate governance provisions giving shareholders more power engage in less political activity. Corporations that engage in political activity generate lower value for their shareholders relative to the value of assets they control.").

*United*, new risks for investors.<sup>26</sup> Second, giving corporations a political voice actually forces shareholders who disagree with the corporation's views to speak—a form of coerced expression.<sup>27</sup> As Justice Stevens eloquently notes in dissent:

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.<sup>28</sup>

To be sure, one might try to address these concerns through the securities and corporation laws by requiring, for example, that corporations disclose more fully their political spending<sup>29</sup> or requiring shareholders' approval of such spending.<sup>30</sup> Along these lines, Lucian

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26. See *Additional Discussion of H.R. 5175, the Disclose Act, Democracy Is Strengthened by Casting Light on Spending in Elections: Hearing Before the H. Comm. on H. Admin.*, 111th Cong. 17, 18 (2010) (testimony of Professor John C. Coates IV, John F. Cogan, Jr. Professor of Law and Econ., Harvard Univ.) ("Put simply, *Citizens United* created a massive new risk for investors in US companies, one that is not currently addressed in any meaningful way by existing corporate governance mechanisms, or by state law, or by SEC regulations, or stock exchange rules.").

27. Cf. *Citizens United v. FEC*, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in part) ("Interwoven with *Austin's* concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech . . ."); Brudney, *supra* note 18, at 237 ("But the number of shareholders who are likely to disagree with some of management's political expenditures is not trivial . . .").

28. *Citizens United*, 130 S. Ct. at 977 (Stevens, J., concurring in part and dissenting in part); see also *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 810 (1978) (White, J., dissenting) ("Corporate political expression, however, is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas express are held by the communicator.").

29. See, e.g., DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

30. For instance, Adam Winkler asks:

Can the corporation show that it has unanimous support from shareholders for its electoral speech? If it can, and corruption stems from the misuse of shareholders' money, it would be appropriate to allow an evidence-based exemption from the general prohibition on general treasury funding. A law narrowly tailored to meet the state's interest in curbing other people's money corruption would seem to need an allowance for shareholder consent.

Such a requirement might also turn on the nature of the relevant corporation. A closely-held corporation may be able to surmount the difficulty associated with unanimous shareholder consent with ease; a large publicly held corporation will have considerably more trouble gaining unanimity.

Winkler, *Beyond Bellotti*, *supra* note 23, at 193. Rather than unanimity, Lucian Bebchuk and Robert Jackson suggest a supermajority of shareholders approve political spending. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010). See generally Brudney, *supra* note 18, at 264 ("Economic theory, as well as

Bebchuk and Robert Jackson suggest that lawmakers consider adopting rules that:

- (i) provide shareholders a role in determining the amount and targets of corporate political spending; (ii) require that independent directors oversee political speech decisions; (iii) allow shareholders to opt out of—that is, either tighten or relax—each of these first two rules; and (iv) mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation’s political spending, whether made directly by the company or indirectly through intermediaries.<sup>31</sup>

These proposals are thoughtful yet fall short. Thus, Part II argues a more basic proposition: the First Amendment itself should protect shareholders.

## II. Ignored Shareholders

Shareholder interests have been ignored in the discussion about corporations and their First Amendment rights. Here, I argue for shareholders’ First Amendment rights and respond to possible objections to the acknowledgement of these rights.

### A. A Case for Shareholders’ First Amendment Rights

When a corporation engages in political speech, its shareholders’ First Amendment rights are abridged. Phrased slightly differently, shareholders, as individuals, should have a First Amendment right not to speak: when a corporation makes a political statement, shareholders are effectively being coerced into speaking. Coerced speech violates the First Amendment.

Such a position remains undeveloped. A number of scholars have even made at least passing reference to such a concept.<sup>32</sup> For example, in the dissent of *Bellotti*, Justice White observes that the “First Amendment concerns of stockholders are directly implicated, how-

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political science, suggests a legitimate government interest in requiring stockholder consent for corporate political action.”).

31. Bebchuk & Jackson, *supra* note 30; *see also* Torres-Spelliscy, *supra* note 24, at 7 (“This paper is about changing the U.S. securities laws to require publicly traded corporations to report their political spending to their shareholders, as well as to require shareholder authorization for corporate political spending before it is done.”).

32. *See, e.g.*, Bebchuk & Jackson, *supra* note 30 (“Some might go further and argue that shareholders, rather than corporations, are the actual bearers of the speech rights described in *Citizens United*.”); Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 143 (2009) (“[I]t has been suggested that the constitutional guarantees of the Bill of Rights should be extended to shield individuals from corporate power.”); Torres-Spelliscy, *supra* note 24, at 44 (“Furthermore, shareholders’ First Amendment rights could be trampled.”).

ever, when a corporation chooses to use its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support.<sup>33</sup>

There is considerable Supreme Court precedent to support Justice White's perspective. In *West Virginia Board of Educators v. Barnette*, dating back to 1943, the Court ruled that the Free Speech Clause prohibited a school board from forcing students to salute the flag and recite the Pledge of Allegiance.<sup>34</sup> More recently, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court reiterated that:

The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.<sup>35</sup>

Perhaps of even greater interest is *Pacific, Gas & Electric v. Public Utilities Commission of California*, which emphasized that even corporations have a right not to be coerced into speaking.<sup>36</sup> The Court ruled that the California Public Utilities Commission could not force a public utility, Pacific Gas & Electric, to include a newsletter from third parties in its billing envelopes.<sup>37</sup> As the opinion noted, "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set."<sup>38</sup> After all, "[f]or corpora-

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33. *Bellotti*, 435 U.S. at 816 (White, J., dissenting). As Justice White noted with respect to the state statute in question:

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.

*Id.* at 812.

34. *See* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

35. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (1968)) (internal quotation marks omitted).

36. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986).

37. *See id.* ("The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.").

38. *Id.* at 9; *see also id.* at 15 ("The Commission's access order also impermissibly requires appellant to associate with speech with which appellant may disagree.").



tions as for individuals, the choice to speak includes within it the choice of what not to say.”<sup>39</sup> Why should human shareholders not enjoy, at least, the same rights that an artificial corporation has?

Consider also that union members have greater rights than shareholders vis-à-vis unwanted political speech. In *International Association of Machinists v. Street*, the Supreme Court held that “§ 2, Eleventh [of the Railway Labor Act] is to be construed to deny the unions, over an employee’s objection, the power to use his exacted funds to support political causes which he opposes.”<sup>40</sup> Additionally, in *Abood v. Detroit Board of Education*, the Court held that unions cannot compel their members to contribute to political causes with which members disagree, noting that “[t]he fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.”<sup>41</sup> As a consequence, “[s]hareholders in the corporate context are less protected than employees in the union context, since unions must refund the portion of agency fees [for example, union dues] from non-member employees that are used for political activity.”<sup>42</sup> Oddly, even though *Street* and *Abood* are in tension with *Citizens United*,

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39. *Id.* at 16; see also Joo, *supra* note 16, at 32 (“The Court has also stated without elaboration that business corporations have negative speech rights—the rights against being compelled to express a viewpoint—equivalent to those of individual persons.”).

40. *Int’l Ass’n of Machinists v. S.B. Street*, 367 U.S. 740, 768–69 (1961). As Justice Douglas elaborated in his concurrence:

But even such a selective use of union funds for political purposes subordinates the individual’s First Amendment rights to the views of the majority. I do not see how that can be done, even though the objector retains his rights to campaign, to speak, to vote as he chooses. For when union funds are used for that purpose, the individual is required to finance political projects against which he may be in rebellion.

*Id.* at 778 (Douglas, J., concurring).

41. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977); see also *id.* at 235–36 (“[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”). See generally Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386, 415 (1977) [hereinafter, Comment, *Union Political*] (“[T]he *Abood* Court held that compelled contributions by dissenters violated the dissenters’ first amendment rights.”).

42. Torres-Spelliscy, *supra* note 24, at 15; cf. Winkler, *Beyond Bellotti*, *supra* note 23, at 210 (“The lesson of the organizational dues cases is that the financial supporters of an association do not give up their own First Amendment rights of freedom of association and speech simply because they supply money to the group.”); Comment, *Union Political*, *supra* note 41, at 388 (“Even if the tension between the state’s regulatory interest and the first amendment rights of the union is resolved, an even more delicate question remains concerning the degree to which the union’s exercise of its first amendment rights may infringe upon the first amendment rights of its dissident members.”).

there is no mention of either case in the opinion. Sadly, it seems as if only Justice White's dissent in *Bellotti* acknowledges this crucial inconsistency between unions and corporations.<sup>43</sup>

Why should corporations and union members enjoy rights that shareholders do not? The problem runs deeper than First Amendment doctrine. As Victor Brudney eloquently observes:

To permit corporate funds to be used to influence the exercise of government power forces a person seeking profits from market transactions, for which he must delegate decisionmaking power, to relinquish power to determine the extent and character of governmental compulsion on himself and the rest of society. It fractures his power to influence government decisions, on a range of issues—such as environmental or health and safety regulations, taxation, race relations, or the conduct of the nation's foreign affairs—that affect his welfare and that he may oppose. It also requires him to permit the use of his assets to support social views and generate social attitudes that may impinge upon his individual preferences.<sup>44</sup>

As strange as it may seem, an analogy to the famous *Cohen v. California*<sup>45</sup> free speech case is useful:

Had Cohen, for example, known of the lettering, objected to it, but been left with no alternative but to wear the jacket given the cold temperature, we would not ordinarily credit him with the act of speaking any more than we would consider burning a flag to start a fire to keep warm an act of speaking. Similarly, had Cohen been forced to wear the jacket against his will, perhaps by means of a bribe or threat, we would not ordinarily conclude that the message communicated by the jacket was *his* speech, as it was not a product of his communicative free will.<sup>46</sup>

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43. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 814–18 (1978) (White, J., dissenting).

44. Brudney, *supra* note 18, at 264. In the words of another scholar:

Even less connected to resulting speech than political contributors are the investors in a corporation. Investors, generally, have no knowledge or intention that their contributions to a corporation (in the form of stock and partial ownership interests) may be used to fund political, and especially partisan, speech unrelated to its general business interests in the name of the corporation, which they own. Would an investor in Microsoft be willing to buy shares only on the condition that the individual political preferences of the management be published in the investor's name? I think it is fair to say that a corporation that placed such a condition on investment would be shunned in the market—unless the corporation was a known vehicle for the expression of speech on behalf of the membership, like the ACLU or NRA and so on.

Bezanson, *No Middle Ground?*, *supra* note 6, at 666.

45. 403 U.S. 15, 26 (1971) (holding that Mr. Cohen's arrest in a courthouse for wearing a jacket bearing a four-letter expletive violated his rights to free speech under the First Amendment).

46. Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 774 (1995).

Similarly, when a corporation engages in political speech, it does not represent its shareholders' "free will." Shareholders have diverse viewpoints; many of them might disagree with the corporation's political positions.<sup>47</sup>

To make matters worse, the corporate insiders, not the corporation, are speaking.<sup>48</sup> Yet the actual bearers of speech rights should be the corporation's shareholders as owners, not the managers as agents. When a corporation engages in political speech, it violates its shareholders' rights. Corporate political speech could even be analogized to expropriation, raising concerns under the Fifth and Fourteenth Amendments.<sup>49</sup> Going one step further, one might argue that such political speech is de facto theft. Consider that a principal impetus behind the first federal campaign finance law, the Tillman Act of 1907,<sup>50</sup> was "[t]he notion that corporate managers were *thieves or embezzlers for spending corporate funds on election campaigns* . . . [since] those funds belonged to the policyholders."<sup>51</sup> It is immaterial whether such political speech is characterized as expropriation or theft; the central point is that shareholders' property rights are being violated.

Ironically, while shareholders' rights are ignored, there has been quite an aggressive use of constitutional arguments to protect corporations. For example, both credit rating agencies trying to stave off lawsuits for inaccurate ratings<sup>52</sup> and companies wishing to prevent

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47. This concern helped fuel the initial adoption of federal campaign finance laws following an insurance company scandal in New York. As Adam Winkler summarizes it:

The purchase of management-protective laws was not the only evil stemming from executives' use of "other people's money" in elections. *To some, the greater evil came from the forced political association of diverse owners with particular partisan or political leanings.* In corporations like insurance firms, with so many and such geographically dispersed owners, corporate general treasury funds reflected the investments of people of every different political philosophy.

Winkler, "Other People's Money," *supra* note 23, at 896–97 (emphasis added).

48. See, e.g., Joo, *supra* note 16, at 72 ("Because the business judgment rule fails to constrain managerial discretion, using it to justify managerial control over election-related spending does not merely exalt wealth. It suggests that management's political preferences are more worthy of respect than those of shareholders."); Torres-Spelliscy, *supra* note 24, at 15 ("the shareholder's First Amendment right to remain silent in a political debate or to support a candidate of his or her choosing is also at risk when a manager uses corporate money to support political causes which are antithetical to the shareholder's wishes"); see also O'Kelley, *supra* note 19, and accompanying text.

49. See Brudney, *supra* note 18, at 250 ("It is restricted because the act of utterance is, by definition, an expropriation of the collective assets of *all* the owners.").

50. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

51. Winkler, "Other People's Money," *supra* note 23, at 894 (emphasis added).

52. See, e.g., Caleb Deats, Note, *Talk That Isn't Cheap: Does the First Amendment Protect Credit Ratings Agencies' Faulty Methodologies from Regulation?*, 110 COLUM. L. REV. 1818

limited shareholder ability to nominate directors<sup>53</sup> turned to the First Amendment. This suggests that the First Amendment is at its most muscular when it is part of a deregulatory agenda. Justice Rehnquist recognized this crucial point in his dissent in *Central Hudson Gas & Electric v. Public Service Commission of New York*; he warns that the majority has, “by labeling economic regulation of business conduct as a restraint on ‘free speech,’ gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson* . . . .”<sup>54</sup> One scholar echoes Rehnquist’s point well:

[T]he First Amendment principle of abstention has expanded beyond a program of making politics safe to become a primary vehicle in a post-New Deal attempt to reduce the scope of conscious collective control over the market. The First Amendment, understood in this way as a fundamental limitation on the scope of government, has become the locus of a new *Lochnerism*—or rather, a revival of the old *Lochnerism* under a new doctrinal label. The courts have increasingly begun to use the First Amendment to restrict economic regulation . . . .<sup>55</sup>

In the end, one could be forgiven for comparing *Citizens United* to *Lochner*:<sup>56</sup> the latter invalidated regulation based on Fourteenth Amendment due process claims;<sup>57</sup> the former, based on the First Amendment.<sup>58</sup>

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(2010); David Segal, *A Matter of Opinion*, N.Y. TIMES, July 18, 2009, at B1 (discussing prominent First Amendment attorney Floyd Abrams’ representation of the credit rating agency Standard & Poors).

53. See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Bus. Roundtable, Securities Act Release No. 9149, Exchange Act Release No. 63,031, Investment Company Act Release No. 29,456*, 2010 WL 3862548 (Oct. 4, 2010).

54. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N. Y.*, 447 U.S. 557, 591 (1980) (Rehnquist, J., dissenting). As Frederick Schauer reminds us, “economic libertarians now . . . gravitate to the First Amendment rather than to the Due Process or Contracts Clauses . . . . They have identified and seized upon the First Amendment’s rhetorical place in American political and legal argument, and have sought, hardly irrationally, to use this phenomenon in support their causes.” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1809 (2004).

55. Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661; see also Brudney, *supra* note 18, at 295 (“[T]he First Amendment should not become the vehicle for restoring the lenses of the *Lochner* court to judicial scrutiny of economic regulation of either legislative or executive origin.”).

56. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidated a New York statute that prohibited employers of bakers from allowing their employees to work in excess of ten hours per day, sixty hours per week).

57. See *id.* at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

58. See Curtis, *supra* note 12, at 51 (“*Citizens United* . . . share[s] a number of common themes with *Lochner* era jurisprudence.”). Even the rhetoric of the two opinions is eerily similar: both rely on slippery slopes, with the purported autonomy of early twentieth-cen-

Yet, when it comes to the basic task of protecting shareholders, the First Amendment is seemingly nowhere to be found amid these creative and aggressive arguments. Adam Winkler sums up the situation eloquently:

To the extent the corporation uses a shareholder's money to support political causes he disagrees with, the shareholder may end up feeling abused and powerless. His own money has fought against him in the electoral arena. Yet, helplessness and being taken advantage of are hardly the character traits the Constitution was designed to encourage through its First Amendment guarantee.<sup>59</sup>

Regrettably, *Citizens United* does not use the First Amendment to support the free speech rights of shareholders rather it restricts their use. Deregulation has become seemingly more important than shareholder rights.

## B. Three Powerful Critiques

On the surface, there are three strong critiques that might emerge in response to my proposal: (1) shareholders can protect themselves through “corporate democracy”; (2) shareholders can simply divest their holdings in companies whose speech they disagree with; and (3) corporations are not public entities against whom constitutional rights may be asserted. None of these responses withstand careful scrutiny.

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tury bakers apparently similar to that of twenty-first century voters. *See Lochner*, 198 U.S. at 58 (“If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, [sic] to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.”); *id.* at 57 (“There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.”).

59. Winkler, *Beyond Bellotti*, *supra* note 23, at 200; *see, e.g.*, *First Nat'l Bank of Bos v. Bellotti*, 435 U.S. 765, 815–16 (1978) (White, J., dissenting) (“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 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.”); Torres-Spelliscy, *supra* note 24, at 16 (“Corporate managers are effectively hijacking shareholder money for political spending when the shareholders are generally under the impression that their investment will not be used for politics. This tramples on shareholders' free speech and associational rights by making them unwittingly subsidize speech that they may disagree with.”).

## 1. Corporate Democracy

To begin with, one might argue that the structure of corporate law already provides means for shareholders so that they may protect themselves against the unwanted speech of corporations. Indeed this is the rationale that the majority trumpets in *Citizens United* when it suggests that “[t]here is . . . little evidence of abuse that cannot be corrected by shareholders ‘though the procedures of corporate democracy.’”<sup>60</sup> Those familiar with corporate law, on the other hand, recognize that such democracy is a “common myth.”<sup>61</sup>

While they may also sell their shares, shareholders have two powers within the structure of corporate law: voting and suing.<sup>62</sup> Judges versed in corporate law will admit that voting rights are notoriously ineffectual.<sup>63</sup> Shareholders can also sue for a violation of fiduciary duties, but these seemingly impressive fiduciary obligations are, in the end, little more than eloquent, rhetorical flourishes. Courts have watered down these duties through the business judgment rule (“BJR”), which presumes that “in making a business decision the directors of a corporation acted on an informed basis . . . and in the honest belief that the action taken was in the best interests [sic] of the company.”<sup>64</sup> As Delaware Vice Chancellor Leo Strine candidly observes, “corporate law generally permits corporate managers wide flexibility and errs on the side of managerial freedom.”<sup>65</sup>

60. *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (quoting *Bellotti*, 435 U.S. at 794).

61. Joo, *supra* note 16, at 76.

62. See, e.g., Robert B. Thompson, *Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law*, 29 DEL. J. CORP. L. 779, 781 (2004).

63. See William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections from Two Residents of One Small State*, 152 U. PA. L. REV. 953, 999 (2003) (“As of now, incumbent slates are able to spend their companies’ money in an almost unlimited way in order to get themselves reelected. As a practical matter, this renders the corporate election process an irrelevancy, unless a takeover proposal is on the table and a bidder is willing to fund an insurgent slate.”).

64. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). In effect, the BJR shifts the duty of care from negligence to gross negligence: violations are found only where there is “reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders,” or actions that are without the bounds of reason. *Allaun v. Consol. Oil Co.*, 147 A. 257, 261 (Del. Ch. 1929). As Mark Roe notes, the BJR “has courts refusing to directly help shareholders who attack managerial mistake.” Mark J. Roe, *Corporate Law’s Limits*, 31 J. LEGAL STUD. 233, 235 (2002).

65. Leo E. Strine, *Delaware’s Corporate-law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar’s Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1279 (2001). Delaware is the leading jurisdiction in American corporate law. See, e.g., *Why Choose Delaware as Your Corporate Home?*, DEL. DIVISION CORPS., <http://www.state.de.us/corp/default.shtml> (last visited Nov.

Since “[u]nder existing legal rules, a corporation’s decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority,”<sup>66</sup> “corporate political speech reflects the judgments of corporate officers, and not necessarily the people whose money funds the speech.”<sup>67</sup> As Justice Stevens aptly points out in his dissent:

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>68</sup>

In sum, the corporate democracy defense is an illusion.

## 2. Shareholders Can Divest

A second seemingly seductive critique is that shareholders can simply sell their shares if they disagree with the political speech of a corporation whose shares they own.<sup>69</sup> Again, this is much easier said than done for two principal reasons. First, as Adam Winkler notes, even assuming that shareholders know when a corporation is involved

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1, 2011) (“More than 900,000 business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500.”); see also J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L. REV. 317, 318–19 (2004).

66. Bebchuk & Jackson, *supra* note 30, at 1.

67. Winkler, *Beyond Bellotti*, *supra* note 23, at 200; see also Joo, *supra* note 16, at 70 (“A shareholder derivative suit, however, is a drastic and costly course of action likely to be worthwhile only in cases of massive abuse of funds . . . . Moreover, even if shareholders bring suit, the business judgment rule renders management’s business decisions largely immune to judicial review.”); Torres-Spelliscy, *supra* note 24, at 25 (“Corporate law provides no panacea for the problem of managers’ spending corporate money on politics because courts are very deferential to managers under the business judgment rule.”).

68. *Citizens United v. FEC*, 130 S. Ct. 876, 978 (2010) (Stevens, J., concurring in part and dissenting in part) (citations omitted) (quoting Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999)); see also Torres-Spelliscy, *supra* note 24, at 41 (“The idea that shareholders could react to political spending about which they are unaware, or that derivative suits might be successful when so far no modern court has punished a manager for political spending, is completely divorced from reality.” (emphasis added)).

69. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) (“The critical distinction here [between corporations and unions] is that no shareholder has been ‘compelled’ to contribute anything. Apart from the fact, noted by the dissent that compulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.”).

in political speech:<sup>70</sup> “A shareholder can sell his shares, but by then it is too late: he has already financially supported the corporate speech with which he disagrees. Selling shares may be a symbolic association of disassociation, but it does nothing to prevent the corruption the state fears.”<sup>71</sup> Put bluntly, the harm has already been perpetrated if and when the shareholder learns of the contested speech.<sup>72</sup>

Second, the shareholder may be unable to sell her shares for a variety of reasons. The shares could be owned indirectly through mutual funds or pension funds; as such, “[a] large number of the individuals whose money is invested in corporations through these institutional investors have little, if any, ability to control in which companies their money is invested.”<sup>73</sup> For instance, as Winkler observes, a shareholder:

[E]xercises virtually no control whatsoever over his pension plan; he may be able to withdraw altogether from the plan, but there are often penalties for doing so. How is the pensioned employee who disagrees with the corporate speech to sell his shares? The simple answer is that he cannot—at least not without substantial injury.<sup>74</sup>

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70. Winkler, *Beyond Bellotti*, *supra* note 23, at 167–68 (“[S]hareholders simply will not know when the corporations in which they have invested make political expenditures, much less make them to support causes they disagree with or make them with general treasury funds as compared to [Political Action Committees] or segregated funds.”). A comparison of shareholders to union members is instructive:

A union member may actually be better able to discover the use of his dues than a shareholder because he works with other dues-paying members in a union shop where information may spread easily. While no one would deny that the penalty to a union member who must quit his job to avoid the unwanted political use of his dues is greater than any faced by a dissenting shareholder, the latter faces problems associated with limited control and limited knowledge that make divestment an utterly ineffective remedy for unwanted corporate electoral spending.

*Id.* at 205.

71. *Id.* at 168 (emphasis added).

72. See also *Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (“Even assuming that [shareholders] reliably learn as much . . . [t]he injury to the shareholders’ expressive rights has already occurred . . .”).

73. Adam Winkler, *The Corporation in Election Law*, 32 *LOY. L.A. L. REV.* 1243, 1268 (1999); see also Torres-Spelliscy, *supra* note 24, at 8–9 (“Moreover, because so many shareholders hold their shares through intermediaries like mutual funds, corporations and their shareholders are strangers. The shareholder may not know their holdings day-to-day and the corporation does not know who owns it day-to-day. This distance between corporate managers and beneficial owners magnifies corporate agency problems.” (footnote omitted)).

74. Winkler, *Beyond Bellotti*, *supra* note 23, at 167; cf. *Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (“[Shareholders] might have preferred to keep the corporation’s stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like.”).



Given the move away from defined benefit to defined contribution retirement plans, virtually all workers are now investors who have no choice but to maintain assets in the stock market if they wish to obtain even a modest return on capital for their retirement. To argue that they can monitor the speech of corporations, in which they invest, and adjust their portfolios accordingly, is at best fanciful.<sup>75</sup>

### 3. Corporations Are Not State Actors

The third and most sophisticated critique is that it is difficult to conceive of First Amendment rights for shareholders, given that corporations are not public actors against whom constitutional rights are typically asserted.<sup>76</sup> Even this rationale is left wanting.

This critique simply misses the point. The real question is whether the government should have the power to pass statutes that protect shareholders' constitutional rights—in this case, the First Amendment rights. To the extent that the answer is that the government should have such power, then whether a corporation is “public” or “private” is almost irrelevant.<sup>77</sup>

There are several additional reasons why the lack of state action argument is unconvincing. First, corporations, whose charters are granted by the state, are technically creations of the state.<sup>78</sup> While it has become fashionable to deemphasize this state grant and rely instead on theorizing the corporation as an “association” of individuals

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75. As Adolf Berle observed nearly sixty years ago:

Protection of life, liberty and property contained in the Fifth and Fourteenth Amendments, though speaking the old language of possessory property and of individuals defending themselves against arbitrary feudal government, does at least set up the implication that corresponding protection exists *where the individual derives his economic life not from possessory property, but from position in a modern industrial world.*

Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942 (1952) [hereinafter Berle, *Constitutional Limitations*] (emphasis added).

76. See generally Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703 (2009).

77. Cf. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 814 (1978) (White, J., dissenting) (“Presumably, unlike the situations presented by *Street* and *Abood* [union shop cases], the use of funds invested by shareholders with opposing views by Massachusetts corporations in connection with referenda or elections would not constitute state action and, consequently, would not violate the First Amendment. *Until now, however, the States have always been free to adopt measures designed to further rights protected by the Constitution even when not compelled to do so.*” (emphasis added)).

78. As the first Justice Marshall once famously noted, a “corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

or even an anthropomorphic “real entity,”<sup>79</sup> it is difficult to deny the fundamental reality that corporations “are created by the State as a means of furthering the public welfare.”<sup>80</sup> As such, “[t]he private practice of a corporation (or apparently any aggregate body) taken under or in furtherance of a privilege granted by the state falls within the area of constitutional control.”<sup>81</sup> To the extent that shareholders might be analogized to union members, it is worthwhile to note that the U.S. Supreme Court has found a state action in union shop agreements.<sup>82</sup> In sum, one response to the lack of state action critique is that “the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself.”<sup>83</sup>

Beyond this technical response, it is important to consider whether many corporations have become so powerful that their shareholders—who, in all likelihood, depend on them for economic well-being even more than they do on the government—should be given constitutional protections. As Berle forcefully notes:

It is here submitted that a corporation or concentrate of corporations, so situated that it has power seriously to affect the individual life of a patron or customer, has become an arm of the state so that its actions are reviewable to determine whether or not they accord

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79. See, e.g., Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form* 25 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory, Working Paper No. 10-005, 2010), available at <http://ssrn.com/abstract=1546087> (“Why does the real entity view prevail? In part, this is no doubt due to the fact that it represents the most congenial view to corporate management, because it shields them from undue interference from both shareholders and the state.”).

80. *Bellotti*, 435 U.S. at 818 (White, J., dissenting).

81. Berle, *Constitutional Limitations*, *supra* note 75, at 951; see also *id.* at 952 (“Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself.”).

82. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977); see also Comment, *Union Political*, *supra* note 41, at 415 (“The requisite state action was found in *Abood* because local governments, as employers, entered into the disputed agency shop agreements under a statutory authorization.”). Adam Winkler makes the following general observation:

In practice, the role of the state in each of these circumstances is similar: state law grants an organization the right to charge members for joining and the organization in turn attempts to spend that money on political speech. In the union dues cases, state law allows the union to set dues; in state bar fee cases, state law allows the bar to charge membership fees; in student fees cases, state law allows the university to charge student activity fees; in corporate speech cases, state law allows the corporation to charge individuals for the privilege of investing.

Winkler, *Beyond Bellotti*, *supra* note 23, at 209.

83. Berle, *Constitutional Limitations*, *supra* note 75, at 942.

with the constitutional limitations and requirements imposed on states.<sup>84</sup>

In parallel, one should also think broadly about the goals of the First Amendment. As Justice Douglas notes in his concurrence in *Street*:

This means that membership in a group cannot be conditioned on the individual's acceptance of the group's philosophy. Otherwise, First Amendment rights are required to be exchanged for the group's attitude, philosophy, or politics. I do not see how that is permissible under the Constitution. Since neither Congress nor the state legislatures can abridge those rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgement by government whether directly or indirectly.<sup>85</sup>

Such a perspective also accords with constitutional history. As Adolf Berle wryly observes:

Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States, all of which derived their authority from the states or predecessor colonies, the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument.<sup>86</sup>

Technical considerations, as well as policy and historical ones, counsel that it would be too facile to dismiss the constitutional rights of shareholders on the simplistic theory that corporations are private actors.<sup>87</sup>

## Conclusion

As Victor Brudney presciently warned thirty years ago:

Regardless of whether increased corporate participation in the social and political life of the nation is desirable as a matter of policy,

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84. A. A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 657 (1952) [hereinafter Berle, *Developing Law*].

85. *Int'l Ass'n of Machinists v. S.B. Street*, 367 U.S. 740, 777 (1961) (Douglas, J., concurring) (footnote omitted); see also Winkler, *Beyond Bellotti*, *supra* note 23, at 203 ("In the context of the First Amendment, it has been held that individuals should not be forced to support political ideas they do not believe. Although the relevant cases have arisen out of legal controversies involving state action, judges and Justices have based their reasoning on the maxim that coerced political speech, by its very nature, offends First Amendment values.").

86. Berle, *Constitutional Limitations*, *supra* note 75, at 945; cf. Curtis, *supra* note 12, at 32 ("Changes that empower private power to control dialogue can be a major threat to free speech's historic and functional ideals.").

87. Cf. Berle, *Developing Law*, *supra* note 84, at 658 ("The thrust of the doctrine here propounded is precisely that where the corporation by reason of size or of degree of concentration has acquired power giving it the capacity to impede personality or personal life it has become, tanto qanto, an arm of the state both because it is a state chartered corporation and because it is relied on by the community as a necessary part of its economic function.").

*serious doubts exist regarding the validity of the constitutional support thus given to that movement.* That support could significantly reduce the regulatory power of government over an institution whose existence is uniquely a function of government authorization, whose power and wealth often far exceed those of the government that created it, and that has long been a subject of pervasive government regulation.<sup>88</sup>

It is crucial to remember that “[i]n its origins the free speech system was anti-hierarchical: it empowered many diverse voices to speak, celebrated multiple perspectives, and limited the power of the privileged few to dominate the discourse. The political system was designed to serve the interests of ‘the People.’”<sup>89</sup> By contrast, as Justice Stevens observes in his *Citizens United* dissent, “[t]he Court’s blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve.”<sup>90</sup> What is particularly regrettable about *Citizens United* is the use of the Constitution to further entrench already powerful members of society—the corporate elite.

With seductive rhetoric, the majority in *Citizens United* warns of how upholding § 203 of the BCRA would lead society down a path of “censorship to control thought.”<sup>91</sup> To the extent there is a “slippery slope,”<sup>92</sup> however, perhaps it runs in precisely the opposite direction than the majority suggests. What are the limits, if any, of corporate insiders to arrogate shareholder wealth where the Supreme Court effectively condones coerced speech? Put in James Madison’s eighteenth-century prose, “[w]ho does not see . . . [t]hat the same

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88. Brudney, *supra* note 18, at 236 (emphasis added) (footnote omitted); *cf.* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting) (“It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.”).

89. Curtis, *supra* note 12, at 3.

90. *Citizens United v. FEC*, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in part).

91. *Id.* at 908 (majority opinion); *see also id.* at 928 (Scalia, J., concurring) (“[I]f speech can be prohibited because, in the view of the Government, it leads to ‘moral decay’ or does not serve ‘public ends,’ then there is no limit to the Government’s censorship power.”).

92. As one commentator observes with respect to “slippery slope” rhetoric:

Its proponents for the most part gesture toward a vaguely articulated fear of an erosion of democratic self-rule and the freedoms it secures, and often seem to stop there without specifying how exactly permitting, say, limitations on the amount candidates can contribute to their own campaigns is likely to launch us on an irreversible path to a collapse of democratic self-governance.

James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673, 691 (2011) (footnote omitted).

authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?”<sup>93</sup>

This sorry state of affairs only exacerbates the erosion of shareholder capitalism.<sup>94</sup> In the end, we would be wise to heed Berle’s warning:

History appears to exhibit a cycle in which social organization is sometimes dominated by organization and ascendant power, and at other times by highly individualized life with a high degree of individualized possessory property. The core of the feudal system rested not on property but on power. This was gradually dispersed: the collectivized power of the feudal dukes dissipated into the individual titles of tiny landholders in the nineteenth century. The industrial era appears to have compelled a large measure of recollectivization of property . . . . *In great areas, we have moved away from the individual and possessory property stage into a stage of great organization. But organization, economic as well as political, turns on power, not on title. Protection of individual liberty might possibly be carried out by impeding or preventing recollectivization of economic function with its attendant increase of power in private or public hands or in both working together.*<sup>95</sup>

In their most promising incarnation, First Amendment rights for shareholders would not only counteract the ever-expansive rights given to corporate insiders under the guise of “corporate speech,” but may also promise an avenue toward preventing the “recollectivization of economic function” and fostering the “protection of individual liberty.”

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93. JAMES MADISON, Memorial and Remonstrance Against Religious Assessments, *in* 2 THE WRITINGS OF JAMES MADISON 186 (Gaillard Hunt ed., 1901).

94. As the mutual fund pioneer, John Bogle, laments:

[C]apitalism has been moving in the wrong direction. We need to reverse its course so that the system is once again run in the interest of stockholder-owners rather than in the interest of managers.

. . . .

Our society today, then, is no longer an “ownership society.” It has become and “intermediation society,” and it is not going back.

JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM, at xi (2005).

95. Berle, *Developing Law*, *supra* note 84, at 660 (emphasis added).

