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Essential Speech: Why Corporate Speech Is Not Free

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I. INTRODUCTION

A. POINT

In a democracy, the citizens are the only legitimate sources of law. It follows inexorably that corporations, not being citizens, cannot be legitimate political actors. Like the government itself, corporations are mere tools of the citizenry, political objects rather than political subjects, to be given just as much respect as the citizens deem useful and no more. To grant a tool a right against the citizens who use it is a form of political idolatry that ought to be abhorrent to any democratic regime.[1] Rights are for people, not for their instruments.[2]

1. On political idolatry—treating the instruments of politics as ends in themselves rather than as mere tools—*see generally* Moshe Halbertal & Avishai Margalit, Idolatry 214-36 (Naomi Goldblum trans., 1992); Michael Walzer, Exodus and Revolution, 108-09, 124-29 (1985) (describing the antimonarchal tradition in the Exodus stories); Deuteronomy 13:5, 17:16-19; 1 Samuel 8:7 (limiting instruments of politics on ground that anything else is a rejection of true religion). *But see* J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 Cardozo L. Rev. 829, 831-33 (1991) (detailing some traditional Jewish authorities' re-understanding of Samuel's antimonarchy dictum as in fact an endorsement of monarchy).

2. Immanuel Kant, Groundwork of the Metaphysics of Morals 95 (H.J. Paton trans.,

This is even more true in a mixed economy such as ours, in which businesses are directed to pursue profit and we rely on the government to play the role of the invisible hand, assuring that the pursuit of profit leads to general economic well-being and health and not to the horrors of Dickensian England or of those most free of contemporary markets, the international drug trade or civil war era Beirut.[3] If the pursuit of profit must be guided to eliminate unattractive means (violence), unpleasant externalities (pollution), excess (of poverty or exploitation), or products we would rather not have efficiently produced to meet consumer demand (child pornography, kidnapping, crack cocaine), the spheres of government—the regulators, controlled by the people—and of business—the profit pursuers, controlled by a market structured and directed by the regulators—must be strictly separated.[4] To allow the regulated to capture the regulators threatens the entire system.[5]

Similarly, in a multifaceted culture of manifold and various values, it is inevitable that the pursuit of profit, valuable as it is, will conflict with other important goals. For example, economic efficiency is best promoted by flexibility, rapid adjustments to changing conditions, and a mobile labor market. A sophisticated culture and well-raised children, however, require stable intergenerational families and stable communities. The conflict

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Harper & Row 1964) (1786). A person is an end in itself. A political object or tool, in contrast, is merely a means to some other end. In our Constitution, this ideal is expressed most cogently in the Titles of Nobility Clauses. U.S. Const. art. I, § 9, cl.8; § 10, cl.1(establishing principle that members of government are servants of the people).

3. 1 Adam Smith, The Wealth of Nations 456 (W.B. Todd ed., Oxford Univ. Press 1979) (1776) (stating that in a market economy, an individual while intending only his own gain is "led by an invisible hand to promote an end [the public interest] which was no part of his intention"). Although Smith himself was no advocate of unrestrained markets, 2 Smith, *supra*, at 782 (contending that in every civilized society labor will become "as stupid and ignorant as it is possible for a human creature to become" and advocating government "take[] some pains to prevent" this "necessar[y]" result of the division of labor in a market society), his aphorism has become associated with a view that markets themselves will guide the private pursuit of profit towards the public good. At least since the New Deal, however, we have relied on an extensive regulatory apparatus to assure that the pursuit of profit is socially useful. While the Keynesian thesis that markets do not aggregate to a satisfactory equilibrium is out of fashion, even strong proponents of market-centrism usually acknowledge that markets must be guided to mitigate the problems of monopoly, *see, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1994); externalities, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4347 (1994); invidious discrimination, Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1994); and imperfect information, Securities Exchange Act of 1934, 15 U.S.C. § 78 (1994); *see also, e.g.*, Charles Dickens, Hard Times (Paul Schlicke ed., Oxford Univ. Press 1989) (1854) (describing Choketown); Charles Dickens, Oliver Twist (Peter Fairclough ed., Penguin 1966) (1838) (describing life in London); Robert Kuttner, Everything for Sale (1997) (describing limits of markets as allocation device).

4. *See* Michael Walzer, Spheres of Justice 95-103, 282-84, 291-303 (1983) (describing need to limit money and other forms of power to their proper spheres).

5. Dwight D. Eisenhower, Farewell Broadcast (Jan. 17, 1961), *in* The Oxford Dictionary of Political Quotations, at 129 (Anthony Jay ed., 1996) (warning of the "potential for the disastrous rise of misplaced power" in the military complex, and of the potential that public policy will be "captured" by a technological elite).

cannot be avoided: a mobile and flexible labor market requires families without strong community roots, children raised away from their grandparents (or with their parents late at work), and the worry and stress of actual or threatened unemployment.

Important and widely shared values conflict or are self-contradictory.[6] Citizens must decide how much of the constant revolution of capitalism they are willing to tolerate, or how much of the stultifying stasis of poverty they can stand; they must decide whether they prefer the excitement and challenge of a constantly changing capitalist economy or prefer the comfort of predictability that comes with stability and decline. In a democratic society, the resolution of these conflicts—or at least their debate—is the central task of politics.[7] To allow markets or private bureaucrats with legally determined duties to pursue particular agendas to decide when or to what degree we should be market-driven or legally determined actors is to coopt the central task of democratic politics.

B. COUNTERPOINT

On the other hand, we have long recognized that a democratic society can only survive with the aid of intermediate institutions[8] strong enough to act as countervailing powers[9] against the sometimes irresistible pressures of mass psychology.[10] Moreover, a society in which the government is the only, or the leading, organized force is one that is unlikely to be able to control that government. Democracy, even of the mass variety, is likely quickly to collapse as the governors escape from their supposed servitude to the people. This insight is reflected in our political traditions, particularly our radically decentralized and nonmajoritarian form of democracy: differently defined local majorities can serve as powerful forces to slow down the

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6. *See infra* note 121 (discussing possibility of consistency in morality).

7. *See* Walzer, *supra* note 4, at 310 (describing politics as an ongoing argument in which every citizen is a potential participant).

8. *See* Meyers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (arguing that the distribution of governmental powers was adopted to "preclude the exercise of arbitrary power" by causing "inevitable friction"); 2 Alexis De Tocqueville, Democracy in America 109-13 (J.D. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1945) (1835) (remarking on multiple political and other associations in America as a support for liberty); The Federalist No. 47 (James Madison) (advocating division of powers as a remedy for tyranny of the majority).

9. *See* Andrew S. McFarland, *Interest Groups and the Policymaking Process*, *in* The Politics of Interest 58 (Mark Petracca ed., 1992) (surveying recent theoretical developments in the study of interest groups); *see generally* John Kenneth Galbraith, The Affluent Society (4th ed. 1984); John Kenneth Galbraith, American Capitalism: The Concept of Countervailing Power (1956).

10. *See generally* Hannah Arendt, Origins of Totalitarianism 308-15 (Harvest 1973) (1951); 1 De Tocqueville, *supra* note 8, at 254-88 (discussing problem of tyranny of majority); Gustave Le Bon, The Crowd: A Study of the Popular Mind 35-59 (Viking Press 1960) (1896); Jose Ortega y Gasset, The Revolt of the Masses 18-19, 53, 84, 133 (Kenneth Moore ed., Anthony Kerrigan trans., Univ. of Notre Dame Press 1985) (1930) ("Anybody who is not like everybody [the mass] runs the risk of being eliminated.").

actions of regional majorities, and vice versa.[11] It is similarly fundamental to our First Amendment protection of the press, churches, and the peaceable assembly of citizens: unless citizens can organize, they are unlikely to be able to participate meaningfully in the political process.[12]

Where, then, do business corporations fit in this picture? Are they essential components of civil society, closely analogous to the citizen groups protected by the First Amendment and important to protect for the same reasons, as one of the key ways in which the citizenry protects itself against its protector? Or are they similar to the government itself, a tool that constantly threatens to control us instead of being controlled by us, which we should have rights against and not vice versa?[13]

American political culture often has seen unrestricted large corporations—especially, but by no means exclusively, financial corporations—as key threats to the political well-being of the nation. Jeffersonian agrarianism and the Jacksonian anti-bank movement, the Grange and the Progressive attacks on the railroads and the trusts, and the consumerist movement of the last generation and much of the environmentalist movement today have each seen large corporations as threats to key American political values.[14] The decentralizing impulses of New Deal financial regulation and the enormous relative subsidies extended to small businesses in the tax code and in virtually every modern regulatory regime stem, presumably, from similar skepticism about large corporate enterprise.[15]

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11. *See* The Federalist Nos. 10, 51 (James Madison) (describing use of differing jurisdictions to lessen the probability of oppression by the majority).

12. *See* NAACP v. Button, 371 U.S. 415, 430-31 (1963) (emphasizing importance of organization in advocating rights of its members); *see also* 2 De Tocqueville, *supra* note 8, at 109-13 (discussing importance of intermediate institutions); Alexander Meiklejohn, Free Speech and its Relation to Self-Government 22-27 (1948) (stating that the First Amendment protects against "mutilation of the thinking process of the community" that would be destructive of democratic self-rule); *id.* at 39 (distinguishing between private liberty of speech, which may be abridged, and freedom of public discussion, which may not).

13. The two-sided fear that government is, on the one hand, likely to succumb to a "faction of the majority" and, on the other, likely to be captured by corrupt governors without the public interest in mind, has deep roots in American constitutional theory. *See, e.g.*, The Federalist No. 9 (Alexander Hamilton) (describing fear of corruption); No. 10 (James Madison) (describing fear of faction and of representatives of "sinister designs"); No. 51 (James Madison) (describing multiple constituencies as a remedy to both problems). The distinction between government and civil society is similarly deep rooted. For a discussion, see, for example, Charles Taylor, *Invoking Civil Society*, *in* Philosophical Arguments 213, 222-23 (1995).

14. *See generally* Kuttner, *supra* note 3, at 225-80 (surveying several regulated industries and the deregulation movement of the 1980s and 1990s); Mark J. Roe, Strong Managers, Weak Owners (1994); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. Cal. L. Rev. 1021, 1029 n.13 (1996); Mark J. Roe, *Political Theory of American Corporate Finance*, 91 Colum. L. Rev. 10 (1991) (surveying political opposition to large corporations and financial markets as a defining feature of current law and corporate governance structure).

15. The relative subsidization of small businesses, variously defined, is a ubiquitous

But the courts consistently have disagreed. Nearly every case that has considered the question has concluded that particular constitutional rights (with a few exceptions, most significantly the Fifth Amendment right against self-incrimination) may be claimed by corporations, generally without any consideration of legal or policy issues that might differentiate between large or small, public or close, or financial or nonfinancial corporations, or between corporations and individuals. Hundreds of other cases simply assume the similarity of corporate to individual rights without any consideration at all.[16]

The courts, in short, treat corporations as if they were individuals—by pretending that the corporation itself is an individual under "entity" theories, by looking "through" the corporation to individuals behind it using "aggregate" theories, or by simply treating the corporation as property owned by an individual. By collapsing corporations into individuals, these theories suggest that we need not think about the ways in which organizations work. This Article is an extended attempt to go behind identification of corporations with individuals and, taking seriously the collective nature of the corporation, to examine the effect of one particular corporate right—the right to free speech—on actual human beings and

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feature of American law and practice. For example, by organizing as S-corporations or limited liability companies and assuring that significant assets are encumbered, small businesses may avoid both the corporate income tax, tort obligations and generally obligations to unsecured creditors. *See* Greenwood, *supra* note 14, at 1075 n.111 (discussing Walkovsky v. Carlton, 287 N.Y.S.2d 546 (App. Div. 1968)); *cf.* Lynn LoPucki, *Death of Liability*, 106 Yale L.J. 1 (arguing that larger firms as well are increasingly able to render themselves asset-free).

Similarly, small enterprises are exempt from many regulatory regimes, including, for example, the ADA. They may also often be able to free-load on publicly provided services that larger firms would have to internalize—for example, by using bankruptcy courts as a substitute for internal reallocation of capital from failed projects. Thus, while a large oil company pays the cost of shifting drilling equipment and teams from a dry well to a new opportunity, wildcatters substitute publicly provided bankruptcy courts. *See, e.g.*, Ronald Coase, *The Nature of the Firm*, *reprinted in* The Nature of the Firm 20-21(Oliver E. Williamson & Sidney G. Winter eds., 1991) (contending that firms exist to reduce transaction costs relative to markets, mainly by superseding price mechanism).

Furthermore, social mores make it more acceptable for a small enterprise to fail to provide basic fringe benefits, including pension plans and medical insurance, that large firms must provide in order to retain employees: employees who are aware they are working for a marginal enterprise can be persuaded to work for pay and benefits they would refuse from a more solid one, or to accept breaches of implicit contracts that would cause massive morale problems or defections under other circumstances. This difference in employee attitudes, no doubt, accounts for at least part of the popularity of financing devices such as the leveraged buy-out that have the perceived effect of converting a solid enterprise into one at imminent risk of self-destruction without any change in product or internal organization: it is far easier to obtain employee concessions when the enterprise is on the edge of bankruptcy. Similarly, much of the cost-effectiveness of "out-sourcing" (moving parts of the functional firm into a separate formal/legal corporation) results from the greater willingness of employees and regulators to make concessions to small firms, even when they are not perceived to be in imminent financial trouble.

16. *See infra* Part II.A.1 (discussing application of the state and private actor distinction to corporations).

their relations to one another.

C. A DIFFERENT VIEW

Political action by business corporations, I contend, implicates no First Amendment values.

Not because the distinction between political speech and economic advertising can be revived—it cannot. The most pressing political issues of the day—any day—involve the inevitable trade-offs between economic activity and other values: between, for example, making a living and raising children. So proposals to enter into economic transactions always have political content.

An advertisement for any product, in addition to whatever else it may be, is a political claim that the product is valuable, that society ought to use it, and that alternative social visions in which resources are differently distributed are less valuable. Thus, for example, advertising for cars also implicitly promotes other aspects of an automobile-based culture, including military defense of the sources of cheap oil, highway-based transportation, and suburbanization and its ramifications. Similarly, any product advertisement is an intensely political criticism of many traditional religious views, including those that consider riches to be a danger to moral integrity, regard covetousness as a mortal sin, or advocate using national wealth for purposes other than private consumption—promoting the arts, constructing public monuments, parks or sacred buildings or studying sacred texts, for example.[17]

In a world of finite resources to promote one thing is inevitably to argue that others are worth less.[18] Accordingly, commercial advertising, even of the more narrow variety, properly is seen as participating in the "robust debate" the First Amendment seeks to encourage on these issues.[19]

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17. *See, e.g.*, John Kenneth Galbraith, The New Industrial State, 208-10, 345-48 (1967) (discussing corporate attempts to manage demand and resulting effects on state programs); *see generally* Thorstein Veblen, Theory of the Leisure Class (1979) (discussing consumption as a socially constructed drive to emulation and competition); *id.* at 35-37 (stating that consumption is driven by the "invidious distinction attaching to wealth"); *id.* at 74, 90 (arguing that public giving and private consumption are alternative ways of conspicuous demonstration of wealth). In a world of finite resources, it is in any event evident that any successful advertising increasing demand for private consumption necessarily affects demand for the public-consumption goods of politics.

18. Here, I intend to reject the notion that there exists a "universal means" to every end, and specifically the notion that increased wealth makes everyone better off regardless of their goals or aims. *See infra* note 112. For further discussion, see Daniel Greenwood, Desires and Politics (June, 1979) (unpublished essay, on file with author).

19. While constitutional adjudication has centered on direct corporate intervention in political campaigns, e.g., referenda and candidate contributions, the far larger and surely more influential aspect of corporate political speech is lobbying, in its broadest sense.

This sort of lobbying includes various types of advertising. Corporations engage in significant explicitly political editorializing, along the lines of Mobil Oil's *New York Times* op-ed page advertisements. David Shelledy, *Autonomy, Debate and Corporate Speech*, 18 Hastings Const. L.Q. 541, 541 (1981) (citing estimate that corporations spent $1 billion per year on

The issue is not the nature of the speech but rather the nature of the speaker. Corporate speech is coerced, not free. It is compelled, legally mandated speech, not the result of anyone's autonomous behavior. It does not reflect the views of shareholders, nor, if management is acting in good faith, those of managers or other corporate agents. Instead, corporate speech reflects the hypothetical interests of a creature given reality by the market and the law: the fictional shareholder.[20]

Corporations speak by spending money: they hire others to speak for them. Corporate speech is thus an agency problem. How corporate managers and employees understand their duties to the corporation determines what corporations will do. This much has long been recognized and, as a result, defenses of constitutional rights for corporations often have looked through the entity to underlying citizen-shareholders who are claimed to be the "real" speakers.[21] The corporate-law agency problem is a

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editorial advertising in late 1970s).

Beyond obviously political speech, much product or image advertising is also designed to affect, directly or indirectly, the political views of citizens in directions useful to the corporate bottom line. Cigarette advertising, for example, necessarily promotes not only a particular brand of cigarettes but also the fundamentally political position that cigarettes should be supplied by the market rather than banned by law. Thus, Philip Morris's $1.6 million soft money donation to the Republicans and $.4 million to the Democrats in the last election cycle, *Soft Money, Big Stakes*, Newsweek, Oct. 28, 1996, at 31, is dwarfed by its far larger and ultimately perhaps more important commercial advertising and lobbying expenses. *See e.g.*, Jeffrey Birnbaum, *The Lobbyists*, The Economist, Feb. 8, 1997, at 23 (stating that 10 U.S. corporations had advertising budgets exceeding $1 billion each).

Accordingly, I do not rely on a notion that corporate speech is automatically lesser-valued commercial speech. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (invalidating ban on liquor advertising); Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748, 762-65 (1976) (deconstructing First Amendment distinction between commercial and political speech in order to bar economic regulation of pharmaceutical advertising); Bigelow v. Virginia, 421 U.S. 809 (1975) (protecting paid advertisement for abortion clinic). Too much core speech is excluded by the commercial speech test. *See infra* pp. 1058-59 (distinguishing between for-profit speech and corporate speech). *But see* Carl E. Schneider, *Free Speech and Corporate Freedom*, 59 S. Cal. L. Rev. 1227, 1259 (1986) (suggesting that corporate speech is always commercial speech because it is motivated by pursuit of profit); Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 Yale L.J. 1833 (1981) (criticizing First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), as a revival of Lochnerian due process jurisprudence).

Paradoxically, the leading corporate speech case, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), defends extending First Amendment rights to corporations, in part, by claiming that corporate-funded speech is unimportant. *Id.* at 789 ("There has been no showing that the relative voice of corporations has been . . . even significant in influencing referenda."). Were there convincing evidence that the enormous sums spent by corporations to influence others had no effect, surely the proper response would be to seek to discover which legal and market structures created such a monumental waste and then to regulate them out of existence. To constitutionally protect allegedly wasteful expenditure of billions of dollars seems perverse, at best. For purposes of this Article, I will assume that much commercial corporate speech is both political and important.

20. *See generally* Greenwood, *supra* note 14 (arguing that corporations are controlled by agents acting on behalf of a one-sided legal fiction, not a collection of human beings).

21. *See infra* note 37 and accompanying text (discussing Bank of the United States v.

peculiar one, however, because the fiduciaries who control the corporation do so on behalf of a principal that is a legal fiction, not a citizen.

While conventional views emphasize the rights of supposedly human shareholders, in fact publicly traded business corporations are legally and practically barred from speaking on behalf of any human being. The shareholders in whose interests corporations must speak are not the human beings who own (or, more often, on whose behalf other institutions own) the shares. Indeed, they are not citizens at all, but rather moments in the market, legal abstractions that have interests quite different from those of real citizens in their full complexity. Unlike real people, the fictional shareholder is an entirely one-sided abstraction; it seeks to increase the value of its shares without regard for any other value. Corporations, then, when they act as they are supposed to, pursue only one goal of the many that are important in a civilized society. Corporate agents, in short, work for a principle, not a principal.

As a consequence, the firm's agents and employees are asked to set aside their own views, while the views of the individuals who own its securities, the human beings behind the shares, are largely irrelevant to the positions a properly run corporation takes. This picture of the corporation acting on behalf of a fictional shareholder leads to the conclusion that corporations are defined by the law and the market in a way that makes them inappropriate participants in the political debate.

The paper proceeds as follows: In Part II, I review the current law regarding corporate speech. In general, the Supreme Court has rarely viewed the corporate status of a petitioner as relevant to a discussion of its constitutional rights. In the speech area, the leading case, *First National Bank v. Bellotti*,[22] explicitly rejects the notion that a corporation might have different speech rights from a human speaker, and insists that it is the speech, not the speaker, that determines constitutional protection. While later cases have modified this position in limited areas concerning campaign finance, it remains the basic law.

Conversely, the Supreme Court has never referred to, let alone cited, the basic law regarding governmental lobbying. For reasons quite similar to those I raise with respect to corporations, it has long been the law that governmental units have no claim to First Amendment protection. The institutions of the people should not use the privilege granted to them in order to expand that privilege—but the Court has never explained why the same reasoning should not apply to corporations.

In Parts III and IV, I explain the theory of corporate speech that results from the theory of the fictional shareholder and distinguish corporations from other groups that participate in our political process. Part III reviews the general problems of group speech and speech by agents; those problems are present in corporations as well, but are neither

Deveaux, 9 U.S. (5 Cranch) 61 (1809)).

22. 435 U.S. 765 (1978).

the distinctive feature nor a reason for denying constitutional protection to group or agent speech in general. Readers familiar with the literature on group speech generally may wish to skip Part III.

Part IV turns to the distinctive character of corporate speech. Corporate speech is compelled speech, not free speech. When a corporation "speaks," it allocates money according to the norms of corporate law to pay a corporate agent to speak on behalf of corporate interests. In sharp contrast to ordinary speech by agents on behalf of voluntary organizations, in the publicly traded corporation, none of the human actors involved is in a position to control the speech. None of them is likely to view it as his or her own speech. As a result, the speech is not properly understood as made on behalf of any one of them. Instead, corporate speech is better understood as the expenditure of money in accordance with dictates of the law and the market on behalf of the imaginary interests of a legal fiction: the fictional shareholder. I review my more detailed discussion of the fictional shareholder published elsewhere to point out the aspects most salient here.

Finally, in Part V, I argue that allowing corporate resources to be used to lobby on behalf of the interests of the fictional shareholder is presumptively illegitimate in a self-governing community and contrary to the political goals of the First Amendment. Both the law and the market force corporate actors to run the corporation on behalf of the interests of fictional shareholders rather than in the interest or views of any citizen. While the fictional shareholder is a useful simplification of the interests of the people behind the shares for many purposes, it is not for others. In particular, the legally created fiction will consistently take one side of a series of hotly contested and difficult issues regarding the economy, market, workplace and regulation, because fictional shareholders, unlike real people, can have no loyalty to particular places, relationships, or ways of doing things and place no weight on any nonmarket value. Fictional shareholders, thus, will sacrifice almost anything in the interests of higher profit (in their not-always intuitive understanding of profit); in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on these important political struggles.

Accordingly, extending First Amendment protection to corporate speech forces corporate actors to spend corporate money to advocate a consistent series of positions not defined by the free, autonomous or self-governing choices of any citizen. Corporate money, accordingly, distorts the political process, becoming a political force not necessarily tied to any class, party, national interest or opinion. Social resources aggregated for an entirely different purpose become independent creatures controlling their own creators rather than serving them.

Finally, I distinguish some issues that are different from the ones central to my analysis: how, for example, to distinguish between the corporate lobbying with which I am concerned and individual (or group) authors who use corporate publishers to distribute their speech.

II. THE SUPREME COURT'S LAW: THE IRRELEVANCE OF CORPORATIONS

Under current constitutional law, a corporation's expenditure of money to promote its financial or political interests by lobbying, political advertising, or other attempts to influence the political process or legislative, judicial or administrative lawmaking, is considered "core First Amendment protected speech." Accordingly, neither the states nor the Federal government may restrict or regulate such lobbying in the absence of a compelling state interest. Furthermore, First Amendment doctrine treats corporations indistinguishably from citizens: with the sole exception of expenditures in connection with campaigns for political office, corporations have the same speech rights as citizens.

The law with respect to campaigns for political office is somewhat confused. The Court has acknowledged an important state interest in preventing corruption or the appearance of corruption through "quid pro quo contributions."[23] In *Buckley v. Valeo*,[24] the Court distinguished between campaign contributions and direct expenditures, whether those expenditures were made by the candidate out of personal funds or by independent third parties in support of the candidate. Corruption concerns, the Court reasoned, arise only with campaign contributions, not with direct expenditures, and thus only campaign contributions may be regulated consistent with the First Amendment.[25] Later cases have added to this contribution-expenditure distinction an additional corporate-noncorporate distinction: corporate expenditures in connection with a candidate's campaign for office may be restricted more strictly than individual ones, apparently because the Court perceives the accumulation of corporate wealth to be more state-assisted than the accumulation of private wealth.[26]

23. In *Bellotti*, the Court explicitly rejected any fear of corruption in referenda. *Id.* at 790.
24. 424 U.S. 1, 20-22 (1976).
25. *Id.* at 45.
26. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); *cf.* Federal Election Campaigns Act, 2 U.S.C. § 441(b) (1998) (barring corporate campaign contributions and expenditures). Since most large accumulations of private wealth in this country surely originated as corporate wealth, the Court's distinction seems analytically insufficient. This Article contends that corporate wealth is different from private wealth not because its accumulation was more state supported, but because state corporate law determines the ends to which it will be used. In contrast, the use of private wealth, however accumulated, is subject to the idiosyncratic whims of its private owners. Thus, while the private fortunes of Mr. Perot and Mr. Forbes are surely no more or less the result of state aid than the corporate fortunes from which their private fortunes derive, Mr. Perot and Mr. Forbes, unlike the boards of directors of the respective corporations, may spend their fortunes in any way they wish without regard for state law fiduciary duties to fictional shareholders and legally determined markets that enforce those duties.

Citizen-owned assets may be derived from corporations without raising the concerns central to this Article. The issue raised here is not whether private wealth distorts the political process or is derived from governmentally created privilege (although surely much is and it is hard to imagine any private wealth without, at a minimum, governmental enforcement of its existence). Rather, the problem is whether the legal system permits the decision-maker in

A. THREE STRANDS OF CONSTITUTIONAL DOCTRINE

The constitutionalization of the regulation of corporate lobbying stems from three disparate and largely independent lines of cases.

1. Forcing Corporations into the Public/Private Distinction

First, chronologically if not necessarily logically, is a long line of cases in which the Court has refused to take seriously the entity or organizational character of corporations, treating them instead as if they were analogous in a simple way to individual human beings.[27] Instead of thinking about corporate functioning, corporate sociology, or corporate law, and then considering how constitutional norms designed to protect citizens from the power of the state should apply to powerful nonstate organizations, the Court often has seen its task as deciding whether corporations are "persons" entitled to protection from the state, and, in general, has concluded that they are.[28]

Our Constitution assumes a great divide between the state—feared as a collective entity able to exercise unwarranted power over individual citizens—and society, understood as relatively helpless and unorganized citizens. Modern corporate law is quite a bit younger than our Constitution: the notion that limited liability and perpetual legal existence should be available on demand dates back only to the middle of the last century, while the modern structure of corporate law, including the abandonment of

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charge of those assets to exercise his or her faculties as a citizen. (Because PACs are not bound by the state-law fiduciary obligations that govern business organizations, they require separate analysis.) In a republican democracy in which citizens, not the organizations they create to govern or enrich themselves, are the ultimate source of the law, the distinctive voice of corporations is not a justification for granting such corporations rights against citizens.

27. For discussions of the constitutional history of corporate law, see generally Morton Horwitz, Transformation of American Law 1780-1860 at 63-108 (1977); Schneider, *supra* note 19, at 1253.

For surveys of corporate rights under the Constitution and corporate personality theory generally, see William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 Stan. L. Rev. 1471 (1989); Howard Jay Graham, *An Innocent Abroad: The Constitutional Corporate "Person,"* 2 UCLA L. Rev. 155 (1955); Mark A. Gregory, *The Personification of the Business Corporation in American Law*, 54 U. Chi. L. Rev. 1441 (1987); Horwitz, *supra*; Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1640-51 (1988); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 4 Hastings L.J. 577 (1990); Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. Rev. 1425, 1450-65 (1992); Note, *Constitutional Rights of the Corporate Person*, 91 Yale L.J. 1641 (1982).

28. Courts' treatment of groups as identical to individuals is not restricted to questions regarding corporations. *See, e.g.*, Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 Utah L. Rev. 537, 542 (arguing courts treat family as a "free-standing thing" that "must be given some decisional space" without considering that "spouses were not free to vary their arrangements materially from the public definition of marriage").

minimum capital requirements and stated purpose, the right to hold shares of other corporations, and the location of virtually all ultimate authority in the board, is largely a product of the turn of this century.[29] Thus, there is no reason to believe that the constitutional categories—which predate the modern corporation—will fit the problems raised by modern corporate law in any simple way.[30]

Despite the variety of doctrinal labels—often appearing within the same case and sometimes in the same opinion—the U.S. Reports are virtually bereft of any serious discussion of where corporations fit within the categories of 18th century liberalism that underlie our Constitution. The modern publicly traded multinational corporation, superficially at least, appears to be as large and well organized, as in control of resources and potential instruments of coercion or power over individuals as are most local governments.[31] Furthermore, modern corporate law, by locating the

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29. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 578 (1839) (argument) (stating that a corporation as an "artificial body politic" is "*always* confined to defined purposes") (emphasis added).

30. For extended discussions of the difficulties of fitting new problems into old doctrinal categories, see Daniel J.H. Greenwood, *Akhnai*, 1997 Utah L. Rev. 309 [hereinafter Greenwood, *Akhnai*]; Daniel J.H. Greenwood, *Beyond Dworkin's Dominions*, 72 Tex. L. Rev. 559 (1994) [hereinafter Greenwood, *Beyond Dworkin's Dominions*].

31. Thus, for example, "private" police forces are now significantly larger than governmental ones. *See, e.g.*, David H. Bayley, Police for the Future 10 (1994) (discussing rise of private police and reporting that number of private security guards in 1990 was three times larger than number of publicly funded police and growing faster); Les Johnston, The Rebirth of Private Policing 101 (1992) (quoting estimate that for every bugging device used by government agents, 300 are used by private security personnel); Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23, 69 (1998) (discussing use of private police); Jerry A. Usher, *Privatization in Criminal Justice: One Perspective in Southern California*, *in* Privatizing the United States Justice System 138, 151 (Gary W. Bowman et al. eds., 1992) (stating that Los Angeles area had more private security officers licensed to carry guns than there were uniformed L.A. police that can be put on the street); William F. Walsh et al., *The Starrett Protective Service: Private Policing in an Urban Community*, *in* Privatizing the United States Justice System, *supra*, at 157, 160-74 (describing corporate owned police force of Starrett City, Brooklyn).

While much of this private policing is not corporate, it seems safe to assume that corporations have a significant part in the legitimate use of force for social control. *See, e.g.*, Utah Const. art. XII, § 16 (repealed 1993) (banning corporations from importing into state "armed persons or bodies of men"); Frank Morn, The Eye That Never Sleeps: A History of the Pinkerton National Detective Agency 103 (1982) (describing 1892 Homestead incident and later history of Pinkerton private police); Clifford D. Shearing, *The Relation between Public and Private Policing*, *in* 15 Modern Policing: Crime and Justice: A Review of Research 399, 405, 412, 423-24 (Michael Tonry et al. eds., 1992) (discussing political opposition to Pinkertons and other private police forces in early twentieth century and radical shift in views by 1980s, leading to a new "corporate feudalism").

More generally, the increasing privatization of America has led to many traditionally public functions being taken over by private industry; corporations often exercise more intense control over public spaces than do governments. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (arguing that while First Amendment does not grant speech rights against shopping mall, state may decide that such rights are necessary or important to a viable political debate); Food Employees v. Logan Valley Plaza, 391 U.S. 308, 319 (1968) (stating that shopping mall serves traditionally public function).

center of corporate authority in a board of directors bound to act in the best interests of the corporation, makes clear that the shareholders—let alone any other group of individuals who might be considered to have an interest in determining how the corporation runs—have no right to run the corporation or determine its goals.[32] On its face, then, the large modern corporation appears to be a sizable aggregation of power uncontrolled by any group of people.

Yet there is no discussion in the cases of why the politically unanswerable business corporation is in need of protection from the state, while municipal corporations—city governments, in ordinary English—even if democratically elected, are scary things from which individuals must be protected.[33] Similarly, one can search the entire corpus of constitutional corporate law for any hint of the possibility that the aggregation and collective-action problems or the other problems of unchecked governmental action that drive the liberal theory of limited government might also affect our other, and often larger, collective enterprises.

Rather, corporations are seen as no different from individuals, or perhaps groups of individuals, petitioning the state from a position of weakness. Thus, the Court saw no need to consider whether business corporations might be any different from Revolutionary American citizen participants in Committees of Correspondence in *Citizens Against Rent Control v. Berkeley*,[34] or from "groups" of citizens in *California Motor Transport Co. v. Trucking Unlimited*,[35] or the "people" itself in *Eastern R.R.*

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32. *See infra* Parts IV.B and IV.C; text accompanying note 109.

33. The early cases emphasize the bilateral public-private distinction—civil and public corporations are governmental, while eleemosynary and private ones are not—without considering the implications of intermediate forms, notwithstanding the obvious examples of the Plymouth Bay Company, the Virginia Company, or Harvard College. *See, e.g.*, Paul v. Virginia, 75 U.S. (9 Wall.) 168, 183 (1868) (mentioning examples of intermediate forms and then forcing them into public/private dichotomy). The post-New Deal cases contain no explanation of the basis for still important distinction between business corporations—which now have nearly complete First Amendment rights—and municipal corporations, which do not. In contrast, the Court has explicitly refused to distinguish between business corporations generally and the press specifically, despite the invitation in the language of the First Amendment. Most importantly for this Article, the Court, without discussion, has assimilated not-for-profit corporations that have no shareholders to business corporations. The analysis in this Article depends on making such a distinction: the NAACP is subject to the general group-speech problems discussed in Part III but not to the special business corporation problems of Parts IV and V. Accordingly, the NAACP is properly protected. *See* NAACP v. Button, 371 U.S. 415, 430-31 (1963) (allowing the NAACP to assert First Amendment). However, the analogy drawn in *First National Bank v. Bellotti*, 435 U.S. 765 (1978), between the NAACP and a publicly traded business corporation is unsustainable. *See infra* note 96 and accompanying text (criticizing *Bellotti* and categorizing the NAACP as a committee of correspondence).

34. 454 U.S. 290, 294 (1981) (comparing political action committee to Committee of Correspondence without discussion of corporate contributors); *cf. id.* at 299 (Rehnquist, J.,) (noting that he concurs notwithstanding that one appellant was a corporation because ordinance was not limited to corporate contributors).

35. 404 U.S. 508, 510 (1972) (extending right of petition and association to business corporations).

Presidents Conference v. Noerr Motor Freight, Inc.[36]

Several theories of the corporation have been used to support the classification of the corporation on the private, nongovernmental, individual side of the great liberal divide between state and civil society. The oldest theory—conventionally referred to as the "aggregate" theory—deemed the corporation to be "really" just its "members" and, accordingly, entitled to the same protection the "members" would have. As Justice Marshall succinctly stated:

> [Natural persons] can [not] be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name.
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> . . . .
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> . . . [T]he corporate name represents persons who are members of the corporation.[37]

A more recent example of this reductionist theory can be seen in *Central Hudson Gas & Electric v. Public Service Corp.*,[38] where Justice Stevens characterized the corporation's promotional advertising as "expression by an informed and interested group of persons of their point of view"—the corporation, in this view, is just a "group of persons." Similar disregard for the institutional existence of the corporation can be seen in Justice Brennan's *Austin* concurrence when he stated, in apparently blind disregard of the applicable corporate law, that funds in the general corporate treasury are "his [a shareholder's] money."[39]

A variant of this theory views the corporation as nothing but property, so that protecting the corporation is seen as protecting the property rights

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36. 365 U.S. 127, 137 (1961) (holding the Sherman Antitrust Act inapplicable to an association of two or more corporations attempting to persuade the legislature or the executive with respect to a law that would produce a restraint or monopoly). Further examples could be multiplied. For a particularly dramatic one, see the discussion of Justice Black's dissenting opinion in *Bell v. Maryland*, 378 U.S. 225, 318 (1964) (Black, J., dissenting), in Greenwood, *supra* note 14.

37. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87-91 (1809).

38. 447 U.S. 557, 581 (1980) (Stevens, J., concurring).

39. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 670 (1990) (Brennan, J., concurring) (emphasis removed). Individual shareholders, of course, have no right to withdraw money from the corporate treasury, and have no right to control its use, except via their right to participate in the election of the board of directors. Even the right of election is quite limited, since directors, once elected, owe a fiduciary duty to the corporation and all its shareholders that bars them from taking actions in violation of that duty regardless of the platform on which they were elected. *See, e.g.*, Rev. Model Bus. Corp. Act § 8.30(a)(3) (1984). Thus, shareholders have few or none of the characteristics of common-law "ownership" of funds in the corporate treasury.

In addition, Justice Brennan's comment evokes the simplistic group theory in his reference to a shareholder as a gendered "hi[m]." *See Austin*, 494 U.S. at 670 (Brennan, J., concurring). Most shares in publicly traded corporations are held by corporate entities (including institutional shareholders), not human beings. *See infra* note 111 and accompanying text.

and thus freedom of the (presumably human) owners.[40]

The complementary "entity" theory of corporate personality treats the corporation not as a group but as an individual itself—the corporate person, a rights-bearing individual with its own interests and goals.[41] This seems to underlie the announcement, without any analysis, in *Santa Clara County v. Southern Pacific Railroad Co.*,[42] that corporations are entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and the barely more reasoned application of the Due Process Clause to railroad corporations in *Minneapolis & St. Louis Railway v. Beckwith.*[43]

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40. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 630, 645-46 (1819) (analogizing directors of charitable corporation to personal representatives of the donors, whose property the corporate funds "really" are). Of course, most of the assets of any successful business corporation (or college) are likely to have been generated by corporate activities rather than contributed by shareholders or their equivalents.

41. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964) (anthropomorphizing corporate entity to justify granting it rights); Louisville R.R. v. Letson, 43 U.S. (2 How.) 497, 555 (1844) ("[A] corporation created by a state . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."); *Dartmouth College*, 17 U.S. (4 Wheat.) at 636-37 (opinion of Marshall, C.J.) (describing a corporation as "an artificial being" with "only those properties which the charter confers upon it," but "it is no more a state instrument than a natural person exercising the same powers [or immortality] would be"); *id.* at 667 (Story, J.) (stating that a corporation "is an artificial person . . . endowed with certain powers and franchises which . . . are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage").

42. 118 U.S. 394, 396 (1896) (Waite, C.J., introductory comments) (stating that the Court does not wish to hear argument on the issue).

43. 129 U.S. 26, 28 (1889). *Santa Clara* and *Beckwith* have become central pillars of constitutional jurisprudence without significant further discussion, notwithstanding their obvious weaknesses. *See, e.g.*, Wheeling Steel Corp. v. Glander, 337 U.S. 562, 575 (1949) (Jackson, J., concurring) (listing cases that assume corporations are Fourteenth Amendment persons to justify Court's decision not to address *Santa Clara* or *Beckwith* despite dissent questioning constitutional status of corporations). The dissent by Justices Black and Douglas in *Wheeling* and a similar one by Justice Black in *Connecticut General Life Insurance v. Johnson*, 303 U.S. 77, 83-90 (1937), remain the only reasoned questioning of the basic principle that corporations are "persons" for Fourteenth Amendment purposes—plain language, history, original intent, and policy notwithstanding. *But see* First Nat'l Bank v. Bellotti, 435 U.S. 765, 778-80 (1978) (rejecting liberty/property distinction); *id.* at 822 (Rehnquist, J., dissenting) (arguing that prior departures from *Northwestern National Life* rule have been narrow); Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906) (holding that Fourteenth Amendment "liberty" is only the liberty of natural persons; corporations are protected only in property interests).

Occasionally, entity theory is invoked to the opposite effect. Thus, Justice Rehnquist's dissents in *Central Hudson Gas*, 447 U.S. at 587 (1980), and *Bellotti*, 435 U.S. at 825-26, each relies on the artificialness of corporate entity theory to argue that because the corporation exists only by virtue of the state, the state has plenary power to regulate it. This is an instance of Justice Rehnquist's more general theory that lesser powers are included in greater ones, a theory that has not won general acceptance in free speech or other contexts. Thus, for example, black-letter civil rights law holds that an employer may fire an at-will employee for no reason at all, but not for a discriminatory reason; similarly, a state may arbitrarily refuse to create a public forum, but having created one, may not restrict access to it to particular viewpoints. *See generally* Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964) (arguing

As the Fourteenth Amendment grew to incorporate much of the Bill of Rights, the Court has from time to time considered whether rights extended to human beings should also be extended to corporations. In most cases, the Court simply applied doctrines designed for individuals to the corporation, with no discussion or consideration of how the corporation, as a collective entity, would use them or to what end, or of whether protecting corporations was supportive of, compatible with, or antagonistic to protecting human freedom.[44] Thus, in *United States v. Martin Linen Supply Co.*,[45] the Court extended Fifth Amendment double jeopardy rights to corporations in a discussion that assumed that moral arguments justifying the importance to human beings of freedom from excessive "anxiety," "insecurity" and "personal strain" can be applied to corporations without

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for property-like protections for state-created privileges). In the corporate law area, the theory that the state's creation of the corporation gives it plenary power over it was rejected early on. *See, e.g., Dartmouth College*, 17 U.S. (4 Wheat.) at 636-37 (Marshall, C.J.) (using artificial entity theory to reject state control over corporation).

44. The Old Court granted corporations protection (sometimes via the Fourteenth Amendment) under the First Amendment, *see* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), the Fourth Amendment, *see* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920) (providing to a corporation Fourth Amendment protections from producing corporate documents), the Due Process and Takings Clauses of the Fifth Amendment, *see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Takings Clause); Missouri Pac. R.R. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (Takings Clause); Noble v. Union River Logging R.R., 147 U.S. 165, 176-77 (1893) (discussing the Due Process Clause as applied to a railroad company), the Sixth Amendment, *see* Armour Packing Co. v. United States, 206 U.S. 56 (1908), and the Commerce Clause, see Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 291 (1921) (invoking Commerce Clause to require state to allow foreign corporation to enter state and do business without authorization).

The New Deal constitutional revolution left most of these existing corporate rights undisturbed and added more. Corporations were protected under the Double Jeopardy Clause, *see* Fong Foo v. United States, 369 U.S. 141 (1962); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (referring to corporation as "him"), and, at least in dicta, the Seventh Amendment, *see* Ross v. Bernhard, 396 U.S. 531 (1960).

The modern rule has been to equate corporations and individuals for First Amendment purposes. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (protecting right not to aid another's speech); Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (protecting right to advertise); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1980) (upholding utility company's right of political advocacy); Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976) (voiding a statutory ban on advertising prescription drug prices); NAACP v. Button, 371 U.S. 415 (1963) (upholding NAACP's right to solicit persons seeking legal redress). Thus, current federal constitutional interpretation bars regulation of core political advocacy by corporations, *Bellotti*, 435 U.S. at 776, 784, particularly when "corporate" or "shareholder" interests are at stake. *Id.* at 805-06, 816, 821 (White, J., dissenting from Court's finding that corporate political speech is always protected but agreeing that when corporate interests are at stake, First Amendment protection would be warranted). However, the bar is less stringent in the context of direct contributions to political candidates. *Austin*, 494 U.S. 652 (limiting corporate contributions to political candidates because of appearance of corruption); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (holding nonprofits have a greater right to political speech than business corporations in the candidate-contribution context).

45. 430 U.S. 564.

modification.[46] In a few cases, the Court labeled particular rights—most prominently, the right against self-incrimination—"personal" liberties and did not extend protection to corporations.[47]

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46. *Id.* at 569; *cf.* Dow Chemical Co. v. United States, 476 U.S. 227, 236 (1986) (assuming that Dow has a "reasonable, legitimate and objective expectation of privacy" in a discussion that distinguished between commercial and personal premises but not between corporate and human proprietors); Marshall v. Barlows, Inc., 436 U.S. 307, 312, 315-16 (1977) (stating that purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals" in their personal and business affairs and extending protections to a corporation without further discussion and referring to corporation as a gendered individual). A particularly clear example of treating the corporation as an individual is Justice Black's dissenting opinion in *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (Black, J., dissenting), which analogized a corporate decision to refuse to serve Black customers to an individual's right to decide whom to invite into his living room, while referring throughout the opinion to the corporation by the name of its CEO, Mr. Hooper. *See* Greenwood, *supra* note 14, at 1090-92 & n.138 (discussing personification of corporation in *Bell*).

47. *Northwestern Nat'l Life*, 203 U.S. at 255 (limiting corporate "liberty" interests). The doctrine was that the liberties protected by the Fourteenth Amendment are personal and so unavailable to corporations, which could claim due process protection only for their property. In the First Amendment context, the "liberty" limitation of *Northwestern National Life*, 203 U.S. 243 already narrowed by *Pierce*, 268 U.S. at 535 (allowing corporations to assert First Amendment claim on ground that they have protected business and property, not just liberty, interests), was virtually abandoned in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (newspaper may invoke full First Amendment rights) and *Bellotti*, 435 U.S. at 776 (corporate speech is protected without regard to the speaker). *See, e.g.*, Hale v. Henkel, 201 U.S. 43 (1906) (stating that a corporation lacks Fifth Amendment privilege against self incrimination). *See* California Banker v. Schultz, 416 U.S. 21, 65 (1974); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (stating that a corporation has only limited Fourth Amendment right to conduct its affairs in secrecy); FTC v. American Tobacco Co., 264 U.S. 298 (1924) (holding that corporations do not have same right of privacy as individuals but still should have protection from unlawful and unreasonable demands made in the name of public investigation). The *Hale* holding was even extended to a three-person partnership, where the entity theory clearly has no application. Bellis v. United States, 417 U.S. 85, 92 (1974). *But see* GM Leasing Co. v. United States, 429 U.S. 338 (1976) (holding that a Fourth Amendment warrant was required to "invade" corporate offices); *Dow Chemical*, 476 U.S. at 236 (holding that Dow Chemical has a "reasonable, legitimate and objective expectation of privacy" precluding warrantless airplane surveillance). Outside of the "regulatory warrant" area, corporations continue to have protected Fourth Amendment privacy interests despite the limitations.

Similarly, the old doctrine that corporations lack "liberty" or "personal" rights continues to be repeated from time to time. Hague v. CIO, 307 U.S. 496, 527 (1939) (holding that a labor union and nonprofit corporation lack First Amendment rights), United States v. White, 322 U.S. 694, 698-701 (1944) (stating that a Fifth Amendment right against self-incrimination is "personal" and not available to union or, in dicta, corporations).

Additionally, the Fourteeth Amendment's Privileges and Immunities Clause, which by its terms applies only to "citizens," is unavailable to corporations. *See, e.g.*, Hague v. CIO, 307 U.S. 496, 514 n.22 (1939) (listing other cases that have held that natural persons alone are entitled to the privileges and immunities of the Fourteenth Amendment). Corporations are not "citizens" for Fourteenth Amendment purposes, Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181 (1888); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), or for purposes of Article IV's Privileges and Immunities Clause, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839), although they are for diversity purposes, Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844). In light of the aborted promise of

But the analysis remained unsophisticated. Corporate entity theory was invoked to call corporations "artificial persons" that should be treated as if they were private individuals. Aggregate theories were invoked to label them private, not the result of governmental action, and to claim that they are no different from the individuals who own their shares. Property theories were invoked to assimilate corporations to real estate, as if the corporation were a thing owned by a human being whose freedom is protected by protecting his control over his objects. Or the corporation was simply ignored, and the entity treated as if it were a human being or as if it were its shareholder.

Strand one, then, is an ancient tradition of seeing the world as composed of private individuals and governmental entities, with the corporation firmly on the former side of the great divide.

2. The Reification of Speech

The second constitutional strand is the combined effect of the reification of speech in First Amendment doctrine with the simple equation of money and speech. In *Buckley v. Valeo*,[48] the Court equated contributions of money with protected speech: spending money to hire someone else to speak, to publicize a third party's speech, to run an advertisement, to litigate a case, or to lobby an administrative body—all are the same, for constitutional First Amendment purposes, as writing the Great American Novel, investigating a political scandal, publishing an editorial, or for that matter distributing dirty (but not obscene) pictures.

Without this equation of speech and spending money, an issue might have arisen as to whether a corporation even could speak.[49] Some view

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the Privileges and Immunities Clause, this limitation of corporate rights has proved of no practical significance.

On the other hand, American corporations have an important right, apparently also constitutionalized, that no human being has: they have the right to choose their constitutive law (parallel, perhaps, to a human being's personal law) without regard to their place of residence or any other restriction. *See* Bank of Augusta v. Earle, 38 U.S.(13 Pet.) 519 (1839) (determining that corporations created by one state may operate in another under principles of comity); Edgar v. MITE Corp., 457 U.S. 624, 645-46 (1982) (holding that "Illinois has *no* interest in regulating the internal affairs of foreign corporations" even if they are headquartered in Illinois and have a substantial impact on the Illinois economy, presumably because the Constitution somehow requires states to allow corporations to choose the law applicable to them) (emphasis added). A corporation, thus, may choose to be ruled by the law of Delaware by simply so declaring (and paying Delaware's fees and meeting a few nonburdensome formal requirements). To get a Nevada divorce, a human must do more than that. This corporate choice-of-law rule is rejected by most of the continental jurisdictions under the siege reel doctrine. *See, e.g.*, Case 81/87 The Queen v. H.M. Treasury *ex parte* Daily Mail and General Trust PLC, 1988 E.C.R. 5483; Terence L. Blackburn, *The Unification of Corporate Laws: the United States, the European Community and the Race to Laxity*, 3 Geo. Mason Indep. L. Rev. 1, 86-87 (1994).

48. 424 U.S. 1, 19-23 (1976).

49. *See, e.g.*, J. Skelly Wright, *Politics and the Constitution: Is Money Speech*, 85 Yale L.J. 1001, 1006 (1976) (arguing that expenditures of money should not be protected as speech

corporations as a pure legal creation with no existence outside the law or our over-heated imaginations: how can a fiction, even a legal fiction, speak? Others, more plausibly, admit that corporations exist; after all, most of us get our paychecks from one. Still, even on this realistic view,[50] a corporation is not obviously the sort of thing that can speak: some human must speak on its behalf, and there might have been some issue whether it was the human speaker or the corporate entity that was entitled to the protection, particularly on views of the First Amendment that emphasize the personal creativity or autonomy of the speaker.

In contrast, it is quite a familiar notion that corporations can possess and spend money; indeed, among the strongest evidence that corporations do exist is that they spend quite a bit of money. Furthermore, while one might argue that the human who actually creates the corporation's "speech" is the speaker, corporate money belongs to the corporation and no one else. (Theorists and cases seeking to show that corporations do not exist often refer to the corporate money as shareholder money. However, this characterization is simply wrong as a matter of corporate law: one of the most fundamental characteristics of a corporation is that the shareholders have no right to corporate assets.)[51] Thus, the idea that the "corporation" is the spender is a far less troubling one than the idea that the "corporation" is a speaker: while a corporation may have "no soul to damn, no body to kick"[52] and no mouth with which to speak, it undeniably has a bank account from which to spend.

The assimilation of spending money to speaking, then, points in the same direction as the general constitutional amalgamation of corporations with individual citizens: both suggest that corporations should be given the same protection as speakers as are citizens.

3. Protecting Speech Instead of Speakers

First Amendment doctrine also points in the same way in its increasing shift from protecting the freedom of people to protecting "speech." The traditional notion that freedom of speech involved freedom of speakers from censorship seemed to lead to some troubling results: citizens might want to hear nonresident foreigners, whose rights presumably are not

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under the First Amendment because of the distinction between speech and "speech related conduct"). Effectively all corporate speech is purchased (with the possible exception of direct statements by the Board) and thus would be unprotected under Wright's analysis.

50. A view not shared by the legal realists. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 811 (1935) ("Nobody has ever seen a corporation. What right have we to believe in corporations if we do not believe in angels?"). For further discussion, see generally Greenwood, *supra* note 14.

51. See *supra* note 39. The exception, of course, is when the corporation's board decides to distribute corporate funds to shareholders, in the form of dividends or at dissolution. But shareholders have no authority to compel such distributions.

52. John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick,"* 79 Mich. L. Rev. 386, 386 (1981).

protected by our Constitution, or at least by our courts.[53] One solution to this problem would have been to focus on the limited powers of our governments, which do not include censorship. That, however, would have led to difficult standing issues: censorship injures the entire citizenry.

The court went in a different direction, emphasizing not the duty of the government but the rights of listeners. In *Lamont v. Postmaster General*,[54] the Court unanimously held that Americans who wanted to read foreign magazines—not just the purveyors of the stuff—were entitled to protection. As the concurrence put it, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."[55] Then, in *Kleindienst v. Mandel*,[56] a case involving the attempt of a foreigner to enter the country despite a U.S. blacklist, the Court again focused on the rights of the Americans who wished to hear and debate with Mr. Mandel, assuming that as a nonresident alien Mr. Mandel had no relevant rights of his own.

If the foreign-speech cases emphasized the rights of listeners, the commercial-speech cases quickly seemed to center around the rights of the speech itself or the marketplace for speech without regard for speakers or listeners. Thus, in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*,[57] the Court held that the First Amendment bars a state from banning pharmaceutical price advertising, stating that the First Amendment's protection "is to the communication, to its source and to its recipients both."[58]

Virginia State Board of Pharmacy's transformation of the First Amendment to a protector of "speech" rather than "freedom" again eases the simple extension of First Amendment rights to corporations. Were the First Amendment thought of as protecting personal freedom, an issue would immediately arise as to whose freedom is protected by creating a corporate right to free speech. Is such a right similar to an individual right

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53. The Due Process Clause extends its protections to "persons," not merely citizens. Thus, it seems clear that resident foreigners are entitled to the protection of the Free Speech Clause. Hague v. CIO, 307 U.S. 496, 519 (1939) (Stone, J., concurring). Although the language of the Clause offers no reason to think that our government is permitted to deny the due process rights of "persons" located abroad, the Court has consistently held that congressional power is plenary in this area. *See* Kleindienst v. Mandel, 408 U.S. 753, 766-67 (1972) (quoting Galvan v. Press, 347 U.S. 522 (1954)); The Chinese Exclusion Case, 130 U.S. 581 (1889). Perhaps the Court's decision, that in this area it is *not* "emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), stems from a understandable fear that sovereign-immunity doctrine alone would not be able to withstand a rash of lawsuits from deposed dictators, rejected immigration applicants or other self-designated victims of American foreign-policy actions. If indeed that was the motivation for holding that our government may disregard its Constitution providing it does so with respect to foreigners, it might more appropriately have been achieved by requiring that suit be brought by a U.S. citizen with standing and injury.

54. 381 U.S. 301 (1965).

55. *Id.* at 308.

56. 408 U.S. 753 (1972).

57. 425 U.S. 748 (1976).

58. *Id.* at 756.

of free speech, or is it more similar to a right of a governmental agency to spend tax dollars lobbying for more tax dollars?[59] The governmental agency's right has rarely been thought to be included in the First Amendment, and indeed generally has been considered a threat to the very values of democratic self-rule the First Amendment is meant to promote;[60] corporate lobbying might also have been considered potentially dangerous as well, had the issue been so framed.[61] If the issue is the rights of the "speech" rather than the freedom of the speaker, however, the focus shifts to considering whether corporate lobbying is the type of subject matter that might come within First Amendment scrutiny.

Virginia State Board of Pharmacy also made a substantial contribution to the subject-matter issue. Prior cases had suggested that commercial speech might be outside the scope of the First Amendment. Perhaps seeking to distinguish its constitutionalization of a particular theory of free-market economic regulation from the *Lochner* Court's,[62] the *Virginia State Board of Pharmacy* Court rejected any distinction between political debate and pharmaceutical price advertising: the "free flow of commercial information is indispensable" both to the functioning of a free market economy and "to

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59. For an argument that corporate and government speech rights are similar and that because corporate speech is constitutionally protected, municipal speech should be as well, see Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv. L. Rev. 535 (1980).

60. The argument is simply that, as Dean Yudof put it, that "a ban on [governmental expenditures to create public support for governmental activities] is a reasonable prophylactic measure to insure that consent processes are not distorted." Mark G. Yudof, When Government Speaks: Politics, Law and Government Expression in America 49 (1983) [hereinafter Yudof, When Government Speaks]. For examples, see 18 U.S.C. § 1913 (1994) (barring Agriculture and Interior Departments from campaigning for or against pending legislation with appropriated funds); 22 U.S.C. 1461 (1994) (barring United States government agencies from distributing in U.S. propaganda produced for distribution abroad); Williams v. Mayor, 289 U.S. 36 (1933) (holding that a municipal corporation has no constitutional rights against the state that created it); City of Boston v. Anderson, 380 N.E. 2d 628 (1978) (finding no federal question where state barred municipal corporation from some public relations and advertising activities). For further discussion, see Yudof, When Government Speaks, *supra*, at 6-9, 42-50, which I follow here. *See also* Steven Shiffren, *Government Speech*, 27 UCLA L. Rev. 433 (1980); Mark Yudof, *When Governments Speak: Toward a Theory of Governmental Expression and the First Amendment*, 57 Tex. L. Rev. 863 (1979) [hereinafter Yudof, *Theory*].

61. The potential distorting effect of corporate attempts to modify the rules that regulate them are at least as serious as similar governmental attempts. Governmental officers generally view themselves as obligated to act in the public interest (even if they may not agree with the public's view of that interest). In contrast, corporate officers are specifically directed to ignore the public interest and even the interests of corporate participants, except for the single interest in increasing the present discounted value of returns to stock ownership.

62. As the Court noted, almost identical economic regulation had been upheld against substantively (though not doctrinally) identical arguments in the classic anti-*Lochner* cases, *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Semler v. Dental Examiners*, 294 U.S. 608 (1935) . *See* Note, *supra* note 19 (criticizing *Bellotti* as a revival of Lochnerian due process jurisprudence); *cf. infra* note 160 and accompanying text (discussing problem with the state-society distinction).

the formation of intelligent opinions as to how that system ought to be regulated and altered."[63]

The third constitutional strand, then, is a broad shift in First Amendment theory from a focus on the freedom of citizens from censorship directed at imposing social conformity or suppressing political dissent, to disembodied notions of the "free flow of information." The speech clauses of the First Amendment were no longer understood as extensions of the religion clauses, protecting dissenters from governmental pressures to conform, but rather as a radically separate, Lochnerian enactment of a free market of information.[64]

B. Joining Together in Bellotti: *Ignoring the Speaker*

These various analyses united in the case that continues to define corporate speech law: *First National Bank v. Bellotti*,[65] which held definitively that corporations are entitled to the same First Amendment protection as individual citizens. *Bellotti* reached this conclusion without any explicit discussion of corporate theory by focusing on the speech rather than on the speaker. The "speech" in question—corporate expenditures to finance advertisements in a referendum campaign—unquestionably would be protected speech were it not corporate financed, said the Court.[66]

63. *Virginia State Bd. of Pharmacy*, 425 U.S. at 765. The Court offered no explanation of how this doctrine can be squared, constitutionally, with the constitutionally mandated patent and copyright systems, each of which is based on the assumption that governmental limitations on the "free flow of commercial information" are necessary to the functioning of the economy. *See generally* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 Cal. L. Rev. 1415 (1992) (discussing the problem of commodified information in a market system that assumes information is free).

64. The usual phrase, "free market of ideas," is strained to its limits by *Virginia State Board of Pharmacy*: the issue in that case was price advertising, not ideas at all in any ordinary sense of the word.

65. 435 U.S. 765 (1978).

66. The Court had already, in *Buckley v. Valeo*, 424 U.S. 1 (1976), rejected the theory (accepted in many other democracies) that democracy requires limits on campaign financing to assure that the rich do not have undue influence over the decisions of the people. *Cf.* Walzer, *supra* note 4, at 310-11 (deploring the dominance of money in electoral politics); Pierre Avril, *Regulation of Political Finance in France*, *in* Comparative Political Finance Among the Democracies 89-95 (Herbert Alexander & Rei Shiratori eds., 1994) (describing detailed French regulation of campaign contributions and expenditures); Thomas F. Gede, *Comparative Study of U.S. and West German Political Finance Regulation: The Question of Contribution Controls*, 4 Hastings Int'l & Comp. L. Rev. 543, 544 (1981) (explaining German law is designed to provide a "floor" of campaign funding); Christina Holtz-Bacha & Lynda Lee Kaid, *A Comparative Perspective on Political Advertising*, *in* Political Advertising in Western Democracies 8, 14 tbl. 2.4 (1995) (finding that France, Denmark, Germany, Netherlands, U.K., and Israel provide for equal or proportional television time rather than allocating by purchase); Sanford Levinson, *Electoral Regulation: Some Comments*, 18 Hofstra L. Rev. 411, 417 (1989) (pointing to diverse views among democracies on campaign finance); Rod Stanton Fiori, Note, *A Comparative Analysis of English and American Campaign Finance Laws*, 11 Hastings Int'l & Comp. L. Rev. 289, 293 (1988) (explaining U.K. law bans virtually all third party ("soft money") expenditures on behalf of candidates and parties). Nonetheless, the Court's framing of the question is quite disingenuous: the issue in fact involved only corporate financing, not speech

Accordingly, the issue, as the Court saw it, was whether this "speech" loses its protection because of the identity of the speaker (or, more precisely, the funding source).[67]

In keeping with the general tradition of constitutional corporate law, the opinion then simply concluded that corporate financed speech is not relevantly different from human speech. Two assumptions appear to underlie the Court's presentation of this claim as if it were self-evident. First, here as in many First Amendment decisions, the Court is abstracting from the power struggle that is part of the essence of politics. The statute in question did not bar the distribution of factual information: any corporation remained free to respond to press or citizen inquiries regarding its corporate view on the benefits or lack thereof of the tax at issue. Rather, the legislation was an attempt to suppress corporate attempts to persuade by advertising—it was directed not at information so much as at rhetoric.

The distinction between rhetoric and information is itself largely rhetorical in most areas of First Amendment law. If a purpose of the First Amendment is to protect the processes of self-government in a democracy, it is precisely rhetorical persuasion that it must protect most closely, for it is rhetoric, not information, that drives the process of democratic decision making. But rhetoric and information do have critical differences, one key one being that money and the volume it buys make more of a difference in the former sphere than in the latter. By characterizing the issue as one of "informing the public," the Court avoided the difficult question of whether a debate can be distorted by imbalances in wealth. At least on a rhetorical level, more information seems obviously better, even if the information is one sided or repetitive.[68] The same cannot be said of more propaganda, more rhetoric, more advertising or more persuasion: the side that has greater access to those tools has an obvious advantage. Thus, the Court trivialized the important issue at stake, which is not the neutral distribution of information but rather a political power struggle in which rhetorical volume is extremely important—and in which corporate agents will view their duty as requiring them to purchase the profit-maximizing volume using money with no clear owner and with only narrow marginal cost

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itself. As the Court pointed out, no one suggested that these advertisements would be improper if they were funded by noncorporate sources.

67. *Bellotti*, 435 U.S. at 787.

68. Modern economic and psychological theories of behavior under conditions of limited rationality suggest that decision making processes will be distorted by quantities even of pure information, so that it is never true that more is unequivocally better. In an information cascade, for example, people seeking to make decisions but aware of their own limited capacities use decisions of others as checks on, or substitutes for, their own independent research and analysis. Under the right circumstances, this process can lead to a cascade, in which a small change in the initial starting points results in a huge change in the end point: a relatively small amount of well-placed advertising at an early stage can make the difference between the movie that everyone must see and the also ran. *See, e.g.*, Richard H. Thaler, Quasi-Rational Economics (1991); W. Brian Arthur, *Positive Feedbacks in the Economy*, Sci. Am., Feb. 1990, at 92; *Yes, Ten Million People Can Be Wrong*, The Economist, Feb. 19, 1994, at 81(1).

considerations providing limitations.

Second, the Court appears to be assuming that the corporation in question is a legitimate and independent participant in the political debate. Indeed, Justice Powell's opinion appears to have relied on an implicit theory of the corporation as an individual citizen with a mind and will of its own, entitled to the deference due to an autonomous, self-governing individual in a liberal democracy. Thus, in footnote 22, he claimed that closely held corporations arguably "might welcome" a shift in the tax burden to impose a greater share on wealthy individuals—presumably including the very owners of these closely held firms. This presupposes an extraordinary degree of independence for the closely held corporation and its managers.

But once it is admitted that a political debate involves more than just information, surely no one would claim that it is self-evident that it is "indispensable" that a democracy allow its political process to be influenced by the paid advertising of, for example, a domestic governmental entity,[69] a foreign communist,[70] or a paid lobbyist for the Libyan government. We commonly allow the democratic process to protect itself from its own creature by restricting governmental participation in the political process—barring governmental agencies (and sometimes even private grantees) from using tax money to lobby for additional tax money, for example.[71] In contrast, many people ultimately will conclude that the well-known problems of censorship outweigh any benefit that might result from limiting foreign propaganda. Whichever way one comes down in the end, however, there is a potential problem if institutions that are meant to be controlled by the political process or outsiders who have no right to participate at all come to have excessive influence on the internal debate. The *Bellotti* Court assumed, without discussion, that corporations are legitimate participants in our political debate, more like citizens than the government or foreigners.

Similarly, Justice Powell's lack of interest in the claim that corporations may take positions different from their shareholders again suggests that he simply assumed that the corporation as an entity is a legitimate participant in the debate, as if it—not the people who work for it or own its securities—were a citizen. If no "greater solicitude"[72] for the views of shareholders is warranted when the corporation enters into politics than when it makes a more ordinary investment decision, then very little solicitude for those views indeed is warranted: it is black letter corporate law

69. *See* Yudof, When Government Speaks, *supra* note 60, at 45 ("[I]t is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community."); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States*, 31 Law & Contemp. Probs. 530, 536-40 (1966) (arguing that the government should not be allowed to prevent propaganda from abroad).

70. *See supra* text accompanying note 56 (discussing Kleindienst v. Mandel, 408 U.S. 753 (1972)).

71. *See supra* note 60.

72. *Bellotti*, 435 U.S. at 794 n.34.

that shareholders have no right at all to determine ordinary business decisions.[73] It must follow, then, that Justice Powell's protection of the lobbying rights of the corporation was not based on the rights of the shareholders to join together to amplify their collective voice.

On the other hand, the opinion clearly attempted to avoid the problem of corporate theory altogether. Speech, not speakers, said the Court, is what is protected. Thus, one need not consider the speaker at all: we are relieved of the obligation of thought.

C. THE RELEVANCE OF CORPORATE GOVERNANCE

Finally, the constitutional doctrine remains studiously ignorant of state and federal law regulating corporations. The Court holds that corporations have a right to speak—without regard for who makes them speak, or with what resources they speak, or, most important for our purposes, how the law directs them to speak.

The remainder of this Article seeks to demonstrate why the speaker does matter: speech rights given to business corporations are quite different from speech rights given to human beings and can be expected to distort the political process in ways that are antithetical to any theory of the First Amendment.

The Court's First Amendment jurisprudence requires that states allow corporations to lobby. Ordinary corporate law and market pressures then require management to lobby whenever it is profit maximizing to do so, regardless of whether management—or shareholders—believe that doing so is in the best interests of the system, the economy or even the people who are the ultimate beneficiaries of the shareholders.[74] Corporations, as a result, become a massive force for the right to externalize one's costs onto others,[75] legally required to distort the political decision making process of the people, without any citizen being in a position to exercise political

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73. Del. Code Ann. tit. viii, § 141(a) (1998) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); Rev. Model Bus. Corp. Act § 8.01(b) (1984) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . . ."); 17 C.F.R. § 240.14a-8(c)(7) (1998) (allowing corporations to exclude from proxy statements shareholder proposals "deal[ing] with a matter relating to the company's ordinary business operations"). See the discussion in Greenwood, *supra* note 14, at 1038-40 & n.49.

74. I do not propose changing this rule. By setting a single goal and holding managers to it, the legal directive allows corporate executives to be administrators rather than politicians. *See infra* Part IV.

75. This can take the form of advocating lower safety, environmental, labor protection, or antitrust standards ("deregulation"), but can also include advocacy of greater governmental intervention, whether in the form of governmentally created monopoly or subsidy (e.g., crop subsidies, public land use, the ICC, and so on) or the imposition of regulations designed to hurt competitors. The common denominator is not an attitude toward "big government" but rather that the corporation is required to advocate these laws (or absence of law) based on a calculation of the most cost effective way to increase the value of its shares, rather than on a judgment regarding the interests of society or any human subsection of it.

judgment regarding the desirability or limits of this strange program.

III. GROUP SPEAK

As we have seen, constitutional law largely ignores the special character of corporate speech. At most, it treats corporate speech as an instance of ordinary group speech and the corporation as an intermediate institution like those to which the accolades of de Tocqueville are directed. In this Part, I review some of the problems commonly seen in group speech generally; in Part IV I then argue that corporations are distinctively different from the other intermediate organizations of civil society in constitutionally significant ways.

By now, many of the problems of group speech are well known.[76] I discuss just a few: the boundary problem, the aggregate problem, and the leadership problem.

A. THE BOUNDARY PROBLEM

Any time a group makes a collective decision or an individual purports to speak on behalf of others, questions arise regarding the composition of the group—who is in and who is out, whether the boundaries could have been drawn in a different way and how the boundary drawing decision affects the substantive decision.

When the group is making a collective political decision, the boundary issue arises because defining the group often determines its majority and thus the group decision. Thus, for example, a referendum on the status of Northern Ireland would have predictable, and different, results depending on whether the group entitled to decide is understood as the inhabitants of Ireland, the citizens of Northern Ireland, or the Irish Protestant and Catholic communities taken separately.[77] Similarly, the character of American schools and urban/suburban areas appears to be heavily influenced by the boundaries of the groups that fund and govern them; were our schools, zoning, social welfare or transport systems regionally or nationally funded or planned, they surely would be quite different.[78]

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76. For a recent and sympathetic review of the proper role of group speakers, including special interest lobbyists, in our democracy, see Peter Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 Yale L. & Pol'y Rev. 553 (1997).

77. Greenwood, *Akhnai*, *supra* note 30, at 336-37.

78. *See, e.g.*, Yael Tamir, Liberal Nationalism 117-25 (1993) (discussing problems of boundary setting in liberal state and theory); Walzer, *supra* note 4, at 31-64 (defining characteristic of group is its ability to define and police its boundaries); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 Notre Dame L. Rev. 615 (1992); Nathaniel Berman, *But the Alternative Is Despair*, 106 Harv. L. Rev. 1792, 1842-59 (1993) (discussing approaches to group definition); Richard Briffault, *Our Localism*, 90 Colum. L. Rev. 1, 73-75 & nn.311-13, 322 (discussing importance of boundaries); Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775 (1992) (discussing importance of voting boundaries in determining results); Allen Buchanan, *Toward a Theory of Secession*, 101 Ethics 322 (1991) (discussing difficulties of determining group boundaries);

Even when no formal political voting process is involved, the boundary issue arises. Crenshaw, for example, has criticized Black leaders for speaking on behalf of African-Americans in a way that hides the voice of women and feminists for speaking on behalf of women who do not ever seem to be African-American: she is centrally concerned with the critique and definition of these and other group boundaries by which we define ourselves.[79]

In these spheres, then, the boundaries of a group can profoundly affect the legitimacy of speech or other actions on "its" behalf. A group defined too broadly may have permanent minorities within it that have needs or wills that are never met; one defined too narrowly will tend to ignore the interests and desires of those outside it.

B. THE AGGREGATION PROBLEM

The decision of a group, as everyone who has ever participated in a committee knows, can be quite different from the decisions of the members taken individually. Political theorists have long struggled with a version of the aggregation problem as a central part of the theory of legitimacy—how can an individual be free and also subject to the law of the group? They have responded with two general families of solutions: either the laws must reflect the inner nature of a uniform group, as Plato, Rousseau and various nationalists, including the liberal nationalists, have suggested, or the laws must be limited to minimalist goals that all rational beings would agree on, as the social contract tradition has argued since Hobbes. In either case, the aggregation problem drops out because of general agreement on at least the important political issues.

Thus, classic liberal nationalism assumed that democratic government was appropriate only for a group that was fairly uniform and united to start with—that is, that majority rule is legitimate only if there is substantial agreement on the most important issues.[80] The aggregation problem, then,

Perry Dane, *Maps of Sovereignty*, 12 Cardozo L. Rev. 959 (1991); Owen Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); Jerry Frug, *Decentering Centralization*, 60 U. Chi. L. Rev. 253 (1993) (arguing that allocation of functions to municipalities be changed to reduce tendency to act like competitive maximizers); Paul Gewirtz, *Remedies and Resistence*, 92 Yale L.J. 585, 628-31 (1983) (describing importance of school districting boundaries in process of "white flight"); Greenwood, *Akhnai*, *supra* note 30, at 336-39 (arguing problem of boundaries is fundamental to democratic theory).

79. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* After Identity: A Reader in Law and Culture 332, 333, 337-38 (Dan Danielson & Karen Engle eds., 1995).

80. I have in mind such thinkers and leaders as Rousseau, Mazzini, President Wilson, and Ahad Ha-'Am. *See generally* Ahad Ha-'Am, *Slavery in Freedom*, *in* Selected Essays by Ahad Ha-'Am (Leon Simon trans., 1944) (1891) (emancipation in democratic France leads to spiritual slavery due to requirement that Jews adopt French national culture); Jean Jacques Rousseau, The Government of Poland 5-9 (Wilmoore Kendall trans., 1972) (1772); Jean Jacques Rousseau, Social Contract, 16-18 (Charles Frankel trans., 1947) (1762) [hereinafter Rousseau, Social Contract] (describing sovereign); *id.* at 26-27 (distinguishing will of all and general will). These theorists view a "people" as far more than a collection of persons: it has a "spirit" or a

is solved by drawing appropriate boundaries to eliminate significant disagreement. Unfortunately, such boundaries normally cannot be drawn, and even if they are, disunity immediately reappears within the newly defined group.[81]

In contrast, the social contract traditions of Hobbes, Locke, Kant (at least in the Rawlsian reading), Rawls, and of the libertarians of the left and right limit the scope of government to goals to which all rational men would agree.[82] With general agreement on these goals, neither the boundary nor the aggregation problem will be of major importance—a liberal state exists independent of civil society. Instead, politics in the liberal state is reduced to administration: to discussion over the best means to reach an agreed-upon end. In the liberal state, politics is not about collective ends, national purpose, or achievement of the good life. Instead it is limited to relatively noncontroversial topics such as how to increase efficiency so as to allow private citizens to pursue private wealth or whatever such wealth can bring.

Such discussion, of course, need not offer any particularly active role to the population: it may well be best done by the public-minded elite of the Federalist Papers, the brain trusts of the New Deal, or the judges and economists of the Chicago School, with elections serving mainly as a check on potential drift of the elite away from its agency role (that is, to prevent corruption). Alternatively, politics may continue to exist as a sort of log-rolling allocation of divisible goods in a roughly proportional way.[83] In

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"will" that is different from the wills of individual people, although in the ideal situation, shared by each individual as well. *See* Ahad Ha-'Am, *The Wrong Way, in* Nationalism and the Jewish Ethic 34-43 (Hans Kohn ed., 1962) (contrasting unity of "national feeling" to divisiveness of "self-interest"); Hans Kohn, *Introduction* to Nationalism and the Jewish Ethic, *supra*, at 1, 16-17 (1962) (describing how Ahad Ha-'Am thought that Jews could find freedom and dignity only as members of a Jewish nation and not through assimilation). For sophisticated modern discussions of the problems of nationalism see generally Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995); Tamir, *supra* note 78, at 60-63 (discussing the origins and development of the tie between state and nation); *id.* at 79 (describing liberal nationalism as a "direct descendant of cultural pluralism of Herder and the liberal nationalism of Mazzini").

81. *Cf.* Robert Cover, *Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4, 15 (1983), *reprinted in* Robert Cover, Narrative, Violence and the Law 95, 109 (1992) (describing the radical instability of the paedeic nomos and mitosis of jurisgenerative communities).

In partial contrast, the antiliberal nationalists also seek to solve the aggregation problem by creating unity; they differ largely in the degree of unity they see as mandatory and the means they are prepared to use to create and maintain it. Rather than try to draw lines around pre-existing groups, they attempt to create the requisite unity by force (by reeducating, expelling, or simply killing dissidents and deviants); having imposed unity they then see no need for continued democratic or individual freedom (which would simply allow the threatening disagreements to reappear).

82. Typically, the agreed-upon goal is itself a "universal means" to private ends: the liberal state limits politics by agreeing that whatever else anyone wants, each wants laws that can serve as "[h]edges are set, not to stop [t]ravellers, but to keep them in the way." Thomas Hobbes, Leviathan 239-40 (Richard Tuch ed., Cambridge Univ. Press 1991) (1651); *see infra* note 112.

83. *See, e.g.*, Robert A. Dahl, Who Governs 5, 218-20, 226-28, 243 (1961) (describing politics as pluralist competition of interest groups over allocation of spoils).

either event, however, politics in the classical sense—as a public discussion of who we are and a public creation of public values—should simply disappear.

Furthermore, even if actual politics suggests that there is no general agreement on the ends of the state, this tradition suggests that the problem is still not one for politics. Legitimate government is that to which rational men *would* agree, in the subjunctive, not that to which actual people *do* agree, since the latter agreement is likely to be distorted by the unfair power relations of the historical past. What is needed is a correct understanding of what rational individuals would do in a fair bargaining position. That, again, is not an issue for actual messy politics, but rather for expertise—of philosophers and perhaps judges.[84] In the event, however, it has proven difficult to specify a role for government sufficiently limited to satisfy these theoretical requirements yet robust enough to allow a decent society.

Where unity is not available or imposed by boundary drawing or agenda setting, the social choice theorists have pointed out another level of difficulties: the best available group aggregation technique, voting, leads to inconsistent and often perverse results.[85] Even if it is self-evident that majorities should prevail over minorities, once procedural decisions, agenda setting and boundary drawing appear to determine the results, democracy loses its legitimacy.

In corporate law, much of the discussion of the fundamental principles that shareholders do not control the corporation, may not initiate even fundamental changes, and may not even vote on ordinary ones centers around analogous problems: when or whether decision making by management on behalf of a presumably diverse group of investors and other corporate participants is legitimate. If corporate speech is to be corporate at all, there must be a clear explanation of how the group decision legitimately can be made.[86]

84. For a criticism of Ronald Dworkin asserting that he reads the Constitution to displace politics in all significant value issues, see Michael McConnell, *The Importance of Humility in Judicial Review*, 65 Fordham L. Rev. 1269 (1997); *cf.* Greenwood, *Beyond Dworkin's Dominions*, *supra* note 30.

85. *Compare* Rousseau, Social Contract, *supra* note 80 (describing theory of the general will, which seems to assume a consensus among all the individuals involved), *with* Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. Pol. Econ. 328 (1950) (presenting his "Impossibility Theorem"—it is impossible to construct a consistent set of preferences out of the preferences of individual group members and also satisfy conditions of fairness). Arrow's theorem is also frequently called the "voting paradox." *See also* Kenneth J. Arrow, Social Choice and Individual Values 46-60 (2d ed. 1963) (proving that when choices are not binary, the outcome of voting will depend on procedural factors such as the order in which choices are voted on).

86. For discussion of the problems of aggregation in the corporation, see Greenwood, *supra* note 14. For application to the speech problem see *infra* Part IV.B.

C. The Leadership Problem

Here I refer to Michels's Iron Law of Oligarchy: the activists in any group will always end up speaking and acting on behalf of the group, and will always be different in critical and significant ways from their followers.[87] So the leadership of labor unions is significantly more likely to vote Democratic (in the United States) or Labor (abroad) than the rank and file.[88] The leadership in religious organizations is likely to take a significantly different view of the religion or religious issues than ordinary church members: at a minimum, in most church organizations the professionals or leaders are likely to view the church as more central to their lives than will those who are less fully involved. The leadership of ethnic organizations systematically values ethnicity differently from the membership. The interests of corporate managers are less than perfectly aligned with those of shareholders. And so on.

D. The "Exit" Solution

The boundary, aggregation and oligarchy problems are problems of all group activities, both of intermediate institutions and of the state itself. Nonetheless, for most voluntary organizations, they are manageable problems, limited in their effects by the ordinary processes of inter- and intragroup politics and competition.

When the NAACP speaks, its lobbying activities must be at least roughly correlated with the views of its contributors—otherwise they would cease to contribute. Similarly, if the problems of aggregation, boundaries or oligarchy cause a political party, a church or other intermediate institution to drift too far from the views of its constituents, those individuals are likely to cease supporting the group or to break off from it to form a new one.

In Hirschman's well known analysis, the problems of boundary setting, aggregation and oligarchy are all problems of "voice."[89] Voice, in Hirschman's analysis, refers to the internal political mechanisms by which participants direct the organization—voting, participation, debate and other methods of influencing or changing the leadership of the organization.

But institutional politics or "voice" is not the only method to control a voluntary organization. Where the problems of aggregating individual desires into collective action are not adequately resolved—that is, where participants find they need a "voice" but do not have it— participants will simply "exit" from the organization. That is, they can leave and start a new

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87. *See generally* Robert Michels, Political Parties 364-71 (Eden & Cedar Paul trans., Free Press 1962) (1911).

88. *See* Dan C. Heldman & Deborah L. Knight, Unions & Lobbying: The Representation Function (1980) (presenting opinion-poll data indicating the views of union members differs from those of their leaders on a variety of issues).

89. *See generally* Albert O. Hirschman, Exit, Voice & Loyalty (1970).

one that better reflects their goals.[90] By transferring their support to organizations that happen to meet their needs, individuals (in the aggregate) can control the relative strength and viability of institutions even when they have no internal, institutional political voice at all.[91]

Voice and exit, thus, roughly correlate with political and market methods of control over an organization, or, to use a metaphor from a different field, design and evolution. Voice allows the participants to consciously control and design an organization; exit (when combined with competition) allows them to control the system by market or artificial selection mechanisms.

Assuming that we in fact have a fairly broad selection of organizations with which people can affiliate, and leaving aside the various market failures, it seems safe to assume (in the absence of information to the contrary and for most purposes) that any given organizational leadership continues to represent to a reasonable degree of accuracy the views of those who have chosen to continue to affiliate with the organization. Even if we see strong evidence of problems in "voice," we may assume that the "exit" mechanism of artificial selection will keep the leadership relatively representative.

E. THE LIMITS OF "EXIT": MARKET FAILURES

It is relatively easy, however, to identify instances where this comfortable story of evolutionary pressure solving the design problems of Michels's Iron Law of Oligarchy and Arrow's voting paradox will break down. The special status of state politics in liberal theory is perhaps the best known example. There is a key difference between the state itself and the nonstate groups over which it presides: the natural process of competition, growth, and decline that prevents other organizations from moving too far from the views of their constituents may work differently when the group is the state itself. Most obviously, it is extremely difficult, if not always impossible, for citizens to simply leave the state and join another one, so the "exit" option is less likely to provide any useful control on the leadership.[92]

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90. See also Robert Cover's discussion of the processes of communal mitosis and the imperial virtues in Cover, *supra* note 81.

91. I neglect here the well-known problems of free-riding, which will lessen the relative strength of some groups without regard to individual preferences. The standard analysis of the problem is Mancur Olson, The Logic of Collective Action 9-16 (1965); *see also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 724-26 (1985) (discussing implications of collective-action problems for political power of various groups). Corporations are unusually likely to avoid free-riding problems associated with lobbying: the corporate management speaks for the group and individuals members ordinarily have little possibility of free-riding. It is a key aspect of corporate law that individual shareholders never have the right to withdraw their funds from the corporation or otherwise to decline to fund particular corporate activities. Therefore, corporate speech does not seem subject to the collective-action problems that may plague competing participants—it is likely to be relatively loud.

92. Despite this difficulty, the exit option is invoked anyway as a legitimation technique. Locke, for example, based the obligation of a dissenter to obey the law on the "tacit consent"

Similarly, other organizations may be able to free themselves from their constituents in other ways. Indeed, some organizations may not have any obvious constituents at all: consider, for example, a fully funded foundation. As a formal matter, a foundation operates under the direction of its trustees, and they operate under the direction or control of no one, other than their (largely unenforceable) fiduciary duties to the foundation's purposes or beneficiaries. Voice may fail as a mechanism to control such an institution, because other than the trustees, no one has any authoritative voice at all. Exit, in this instance, is irrelevant: if trustees or staff members attempt to control the organization by leaving, the likely result will be that they will be replaced by newcomers more in line with the institution's current direction. Donors denied a voice may stop donating (exit), but that may have little effect if the institution is already well-endowed. The institution, then, may be best understood as a self-perpetuating entity relatively independent of any influences outside the board room, controlled only by the trustees and their sense of obligation to the foundation's purposes.[93]

Another common "exit failure" arises when an institution that exists and maintains its base of support because of one activity is able to enter into other areas as well.[94] Consider a fraternal organization that provides a significant economic benefit to members—financially significant networking, discount insurance or road-side assistance, for example (instances of organizations arguably fitting this model might be the AMA, ABA, AARP, AAA, Rotary, and so on). Even if the organization also engages in significant other activities—lobbying or political advocacy, for example—the enticement of the economic benefits may induce members not to exit if the total package is attractive, even if the advocacy elements are not.

More generally, organizations that offer a diverse package of attractions may be able to maintain large memberships (i.e., avoid exit) even though a significant part of their membership disagrees with various activities of the organization. The inducement to remain need not be financial: many religious organizations, for example, may attract members for reasons that have nothing to do with the political stance the

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evidenced by the dissenter's failure to emigrate. John Locke, Two Treatises of Government 364 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690). The slogan of the prowar camp, "Love it or Leave it," took its power from the same idea: if voice has failed, you should exit, or deem yourself bound by the leadership. And the classic Teiboutian analysis of local governmental politics depends heavily on the ease of exit from local municipalities. *See, e.g,* Frug, *supra* note 31, at 28, 41; Frug, *supra* note 78, at 320-21 (rejecting dichotomous understanding of membership).

93. On the not-for-profit sector generally, see, for example, Henry B. Hansmann, *Role of NonProfit Enterprise*, 89 Yale L.J. 835 (1980); Henry Hansmann, *Why Do Universities Have Endowments*, 19 J. Legal Stud. 3 (1990). On historic perceptions of charitable endowments as self-perpetuating bodies with no outside guides, see Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 Ariz. L. Rev. 873, 918, 921 (1997) (discussing instances of abuse of charitable endowments and of donor restrictions gone wrong).

94. For a discussion of the "by-product theory," *see* Olson, *supra* note 91, at 132-33.

organization takes. Thus, if representation or "voice" mechanisms break down (or, in hierarchical organizations, never existed), the organizational stance may vary quite radically from the views of the members without any significant exit. There is some evidence, for example, that the official views of Jewish communal institutions on Israel-related issues are quite different from the views of ordinary Jews, that the differences between the political positions of the mainstream liberal Protestant organizations and the conservative ones are more extreme than those of their respective congregants, and that the Catholic church's official view on birth control is not shared by most American Catholics. Relatively few people, however, are likely to exit these institutions because of these disagreements, and so the Iron Law of Oligarchy and other representation problems can blossom into their full glory.

This points out another issue—the problem of materiality or bounded rationality. For a member of a church or the AARP, the political activity of the organization may be simply immaterial: the reason why the individual joins is for fellowship, salvation, or discounts, and political action is simply not a large enough part of the package to determine the membership decision. Accordingly, the individual rationally may decide to subsidize political activity with which she or he disagrees—or even to remain ignorant of it—in order to obtain the other benefits of membership.

However, political activity that is immaterial relative to any given member may be quite material in the political sphere. Put crudely, politicians, and political lobbying, are cheap. One percent of the organizational budget will be immaterial to most organization members—indeed, in the corporate world, it would not even appear in public disclosure. But if the budget is large enough, it will generate a very large and powerful lobbying force that is not immaterial in the least in the political sphere.

F. VOICE AND EXIT SUMMARIZED

To generalize, then, unconstrained exit will pressure organizations to reflect the views of their constituents to a reasonable degree. Organizations that depend on ongoing fund raising or membership for their support and that engage exclusively or almost exclusively in political, speech and lobbying activities fit this model best. Exit will assure that the organization continues to represent most members most of the time, even if it is not possible for any set of political activities to match the opinions of all members at any time. Thus, when the ACLU supported the rights of Nazis to march in Skokie and its constituents disagreed, it lost a vast proportion of its membership.[95] Presumably the remaining members and the leadership then became better aligned. Importantly, then, we can assume to

95. *See* Donald A. Downs, Nazis in Skokie: Freedom, Community, and the First Amendment 32 (1985) (estimating the organization lost 15% of its membership as a result of its position).

a reasonable degree of confidence that most of the time political organizations of this type will represent their members even if the organization has no internal democratic procedures. The Court was correct, therefore, in allowing the NAACP to assert the free speech rights of its members in the seminal cases that began the expansion of the First Amendment to include corporate entities.[96]

At the opposite end of the spectrum, an organization that as its primary activity provides valuable and difficult-to-obtain services for its members may then find its political activities relatively unconstrained by the threat of exit. For example, one might feel obliged to belong to a professional organization regardless of its lobbying activities simply in order to obtain professional insurance at a reasonable rate. In that case, exit will not constrain the organization's political activities, particularly if they are small from the perspective of members relative to its primary focus. An outsider, then, should have no *a priori* reason to believe that the organizational view on any given issue reflects the views of the membership—a detailed investigation of the internal representative mechanisms is necessary. In light of the problems of bounded rationality, oligarchy and the like, even apparently representative governance schemes may not be enough to assure that the leadership and the membership remain on common ground.

IV. CORPORATIONS AS GROUP SPEAKERS

A. THE VIEW OF CORPORATIONS AS GROUPS

The classic critique of corporate speech treats corporations as a group like other groups, subject to the failures of representation described above.

On this analysis, corporations are understood as representing their shareholders. Both voice and exit problems have been identified. The exit problems center around materiality and bounded rationality: shareholders "join" a corporation to make money, and provided that corporate lobbying or other political activity does not have a materially negative effect on profits, they are likely simply to ignore it regardless of whether they agree or disagree.

Other scholars have emphasized, in various contexts, that the voice

96. *See* NAACP v. Button, 371 U.S. 415, 430-31 (1963) (reviewing protection of group speech and extending it to litigation); NAACP v. Alabama, 357 U.S. 449 (1958) (allowing NAACP to assert rights of its members); *cf.* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (reasoning as if, counterfactually, PAC's donors were human citizens). In *First National Bank v. Bellotti*, 435 U.S. 765 (1978), the Court assumed that not-for-profits could not be distinguished from business corporations for First Amendment purposes. It should now be clear that different corporate forms must be considered separately, not simply lumped together. While the NAACP fits reasonably well the constitutional category of "Committees of Correspondence"—citizens petitioning for redress of grievances—other corporate entities likely do not.

problems, particularly problems of inconsistency and cycling in aggregating individual shareholder preferences, might lead rational shareholders to give great discretion to managers. Conversely, the great discretion given to managers may place them in a position in which they can abuse their authority to cause the corporation to act in accordance with their own views even when those are clearly in conflict with shareholder views.[97]

While I am not aware of any attempt to discuss boundary problems in the specific context of corporate political activity, the issue has been hotly debated elsewhere in corporate law. One trigger for this discussion has been the state law innovation of "constituency statutes." These statutes create limited circumstances, generally restricted to hostile takeovers and similar transactions, in which corporate boards of directors are authorized to invoke the interests of nonshareholder participants to avoid what would otherwise be clear fiduciary duties to shareholders. While none of the statutes actually creates any enforceable rights for these nonshareholder corporate "stakeholders," the very acknowledgment that the corporation might include disenfranchised groups necessarily gives rise to questions regarding the proper boundaries of the corporation and questions regarding whether subgroups may be "silenced."[98]

The nexus-of-contracts theory of corporate personality, which reduces the corporation not to a group of shareholders but to a moment in the

97. While state law clearly directs corporate decision makers to set aside their own views and interests, it extends a good deal of discretion to corporate directors to decide how to fulfill that duty. This unreviewed discretion, in turn, presents the possibility that corporate decision makers will not, in fact, set aside their views, but will instead use corporate assets to pursue their own agenda. State law takes this risk on the reasonable view that strict judicial enforcement of corporate fiduciary duties is likely to cause more problems than it will solve. Nonetheless, such behavior by corporate fiduciaries is clearly a form of theft—that sort of corporate speech no more deserves First Amendment protection than would a thief's claim that he was constitutionally protected in his effort to spend his ill-gotten gains in lobbying for changes in the law of property. This point has been ably argued by Justice White in *Bellotti*, 435 U.S. at 802 (White, J., dissenting), and by Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235 (1981) (characterizing corporate political speech as managerial speech funded by misappropriation of shareholder funds). This Article, in contrast, focuses on the situation in which corporate managers *do* act as they are supposed to. Even if state law were perfectly enforceable, First Amendment rights for corporations still would produce perverse results.

Of course, profit maximization is not necessarily incompatible with other goals. Corporate managers may be able to persuade themselves (or courts) that other goals are also profitable. *See, e.g.*, Paramount Communications v. Time, 571 A.2d 1140 (Del. 1990) (accepting the board's implausible claim that its goal of "preserving Time Culture" was linked to the interests of shareholders); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (implausibly defending charitable contribution as profit maximizing); discussion *infra* p. 1050. Any significant departure from profit maximizing norms, however, is likely to be severely punished by both the capital and the product market. *See infra* Part IV.D.

98. *See, e.g.*, Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 Geo. Wash. L. Rev. 14 (1992) (examining whether corporate directors may consider nonshareholder interests in corporate decision making); Symposium, *Corporate Malaise—Stakeholder Statues: Cause or Cure*, 21 Stetson L. Rev. 1-279 (1991).

market, has much the same effect.[99] If employees, bondholders, customers, neighbors or other stakeholders are considered part of the corporation, or if the corporation is seen not as the shareholders joined together but as a nexus of contracts in which employees can be thought of as hiring capital just as easily as the other way around, then the boundaries of the corporation are no longer clear. With boundaries that may include nonvoting members, the broader corporation limitation of the franchise to shareholders creates an obvious *prima facie* problem.[100]

In the speech and political activity context, then, the primary boundary problem is this: if a corporation is deemed to include more than merely its shareholders, what mechanisms assure that corporate actions will be representative of those nonshareholder groups?

A second boundary issue has arisen with the increasing awareness that some extremely powerful shareholders pursue interests that appear to be contrary to the interests of the classic fictional shareholder. The much reviled short-term speculators and arbitragers—more properly, all the true portfolio investors—often do not seem to have the interests of the firm at heart and often seem to have the market power to coerce corporations to act according to their views rather than more traditional ones. Indeed, rational portfolio investors acting to maximize the returns to their own fictional shareholders will often act as if they reject the norm of profit maximization at the firm level or even the separateness of different firms: if Bell Atlantic profits at the expense of U.S. West, a diversified shareholder holding both firms loses out to the degree that consumers gain. For the portfolio investor, the only relevant boundary is between publicly traded securities (all of which can be thought of a single firm) and everything else. The obvious conflict between the classic notion of a shareholder as a being with no interests other than its stock in one firm and the market reality of portfolio investors seeking to maximize returns to their own fictional shareholders drives much of modern corporate law. As a boundary issue, it is expressed by questioning whether arbitragers or important portfolio investors ought to be deemed "true" or "real" shareholders.[101]

99. *See generally* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 Cornell L. Rev. 407 (1989).

100. Theorists, of course, have had no trouble generating stories, of varying degrees of persuasiveness, to justify disenfranchisement of nonshareholder constituencies. The most successful of these accounts focus on the comparative risk borne by shareholders and other stakeholders: under some circumstances, including an unrealistically fluid labor market, shareholders are the corporation's residual risk bearer and least able to rely on contract protections. For current purposes, however, the important fact is that a story must be told, not how successful the story is; the issue of why the franchise is restricted to shareholders arises only after theorists or state legislatures have abandoned the notion that a corporation is its shareholders and no more. If the corporation were just its shareholders, the others would be outsiders and there would be no need to explain why they are not entitled to vote.

101. *See infra* Part IV.D.1. and note 128. Portfolio investors differ from the classic fictional shareholder in that they are invested in a diversified portfolio of publicly traded securities rather than solely in the stock of the firm in question. Like classic fictional shareholders, they are indifferent among projects, places, people and the like. *See infra* note 132. They differ

Each of these analyses treats the corporation as essentially similar to other groups and organizations that participate in our political life. Corporations may be well along the spectrum towards the unrepresentative end, due to agency problems or materiality and rational ignorance (although the ease of exit—the ease with which one investment can be replaced with another similar one—might suggest that even small differences may become salient).[102] Corporations may have more features of "exit failure" than many other organizations, due to the importance of the profit motive as the primary reason investors participate (although the emotional ties of most shareholders to their shareholdings are quite minimal and shareholder ease of exit, in terms of collateral consequences, is greater than in almost any other institutionalized group).[103] Business corporations may be better able to overcome free rider problems. They may have more money (although, of course, there are poor corporations as well as rich ones, and rich individuals as well as poor ones).[104]

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however in that they also are indifferent among firms: the diversified portfolio is not made better off if U.S. West improves its situation at the expense of Bell Atlantic, since it owns both. From the perspective of the classic fictional shareholder, specific projects of a corporation appear as no more than entirely fungible projected cash flows; the portfolio investor takes this perspective one step further—each corporation is no more than a fungible moment on the capital investment frontier. Accordingly, the difference is this: a classic fictional shareholder is seen as willing to have the corporation abandon factories, products or employees at any time in a constant chase for the optimum risk-reward ratio, but is presumed to be irrationally committed to its investment in the corporation. In contrast, the portfolio investor is no more committed to a particular stock than the corporation is to a particular investment. It is neither a short term investor nor a long term one but rather time indifferent: it shifts any time a better opportunity appears, and stays as long as the security meets its requirements. For the purposes of this Article, the distinction between the two types of shareholder is rarely important—although they will have different views on some significant political issues (portfolio investors should strongly oppose corporate attempts to use the legal system to bash other publicly traded corporations) both versions will happily externalize costs onto nonsecuritized beings such as the people who hold the shares. However, corporate managements often will have strong preference for the classic model, which views them as important, over the portfolio version, which views management as fungible. For detailed discussion and further citation, see Greenwood, *supra* note 14, at 1056-89; Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 Tex. L. Rev. 1273 (1991).

102. That is, stocks are relatively fungible. An investor who dislikes a corporation's action in one sphere should be able to find another generally similar investment differing only in the offensive characteristic. *See, e.g.*, Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1977) (relying on ease of exit to argue that management and shareholders will be aligned even in relatively immaterial matters). Unfortunately, as I argue below, corporate law mandates that all corporations take systematically similar positions on political issues, so the corporate investor cannot simply chose another stock with different politics.

103. That is, the transaction costs of exit are quite low. To abandon your church, or even the NAACP, may require substantial changes in self-understanding and/or social ties. To abandon a publicly traded corporate investment requires no more than calling your broker and the possibility of paying deferred capital gains tax.

104. First Nat'l Bank v. Bellotti, 435 U.S. 765, 785 n.22, 791 n.30 (1978). Some scholars argue that money distorts the political process; since corporations have more of it, they are

But regardless of whether they attack or defend corporate speech, these critics fundamentally agree that the problems of corporate speech are simply those of politics itself. All political coalitions and attempts to aggregate individual views through politics face these problems—while business corporations may have the problems in greater or lesser degree than some other organizations, the issues that corporations face as political participants are similar to those that any coalition of any variety faces. These views, in short, agree that business corporations properly are classified as intermediate institutions, similar to the other "factions," interest groups, fraternal organizations, and coalitions that make up civil society in a democratic republic.

B. CORPORATIONS REPRESENT ONLY A FICTION, NOT A GROUP

The fictional shareholder view is significantly different. Corporate political participation is different in kind, not simply in degree, from the participation of other groups or individuals. Any coalition of individuals will suffer from the various problems of voice and exit, the problems of boundaries, aggregation, consistency, saliency and so on. Corporations have an additional and significantly different set of problems: they are legally required to represent not a group of people but a legally defined set of interests—the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation.

Corporate positions are not determined by debate and struggle among a group of people to define boundaries and manipulate internal procedures, to persuade each other or outmaneuver each other, in the manner of ordinary politics and ordinary intragroup struggle. Instead, corporate positions are determined by fiduciaries who are obligated both to set aside their own views and to ignore the actual views and interests of the other people involved in the corporation.[105]

Because corporate policies are not determined by politics, the corporation can become a peculiar type of monster or robot: an organization on automatic pilot with no human in a position to call it back from its logic to the road of moderation.[106] Similarly, because corporate

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particularly dangerous distorters. On money as speech generally, see, for example, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 Calif. L. Rev. 1416 (1992); Steven Shiffren, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1281 (1983) (arguing that some commercial speech deserves First Amendment protection); Mark Tushnet, *Corporations and Free Speech*, *in* The Politics of Law 253 (David Kairys ed., 1982); Wright, *supra* note 49 (arguing that campaign finance reform promotes First Amendment values); on specifically corporate money in political campaigns, see Note, *supra* note 19 (arguing that granting corporations free-speech rights does not serve any free-speech interests).

105. There is one significant exception: the portfolio investors. Diversified portfolio investors have a different interest than an undiversified fictional shareholder, and also often have market power sufficient to enforce their views. *See supra* note 101.

106. The reference is to the "utility monster" problem in utilitarian theory. Imagine a

decisions are made by fiduciaries on behalf of fictional shareholders, they reflect only a narrow and one-sided aspect of the human beings who stand behind the shares. Of course, as the group theorists from Michels to Crenshaw point out, any group tends to emphasize one aspect of the personalities of the people who make it up and to suppress other aspects of their multifaceted identities.[107] But a political party or political pressure group also must be responsive to the conversations, struggles and views of its participants/members: otherwise the members will vote out the leadership or just leave and the organization will wither and die. A business corporation, in contrast, exists independent of the particular individuals who stand behind its shares; individual political views will be filtered out long before they can influence the corporate stance.

C. FICTIONAL SHAREHOLDERS

State corporate law requires corporate directors to set aside their own personal interests and views and to manage the company in the interests of "the corporation and its shareholders." It is this requirement that corporations be managed in the interests of their shareholders (leaving aside the interesting issue of what the interests of the corporation itself might be) that lends surface credibility to the idea that corporations should be seen as groups of shareholders.

Corporate law is centrally about agency—but a peculiar agency that looks neither to the views nor the actual interests of the alleged principal. Corporate law excludes the actual shareholders from corporate governance, bars managers from considering actual interests of the shareholders and then considers this situation entirely unproblematic. In this section I explore the paradox of agency law without agency problems: in section D, I explain the implications for corporations as speakers.

1. Excluding Actual Politics

First, the business corporation is extraordinarily centralized. As a rule, shareholders are barred from governing the firm directly; state law requires that the directors, not the shareholders, manage the firm. Indeed, federal law has often (though not always) constrained shareholders from using the proxy machinery to mount even advisory campaigns on matters of ordinary

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person who derives extraordinary pleasure from seeing others made miserable. Under aggregate utility maximizing views, if the sadist's utility is sufficient, we ought to organize society to satisfy him. Egalitarian utilitarian views have a similar problem with a different type of utility monster: the individual who needs enormous resources to derive even a minimal degree of satisfaction, who is likely to be massively miserable without a steady supply of Beluga caviar and Armani suits. If the utilitarian's goal is to equalize utility, this monster can absorb all of the society's resources. The corporation is a monster in a related sense: because it seeks to maximize share value without regard for the costs to any other value, left unrestrained it too will organize all society to serve its own needs.

107. *See supra* Part III.A (discussing the problem of leaders who claim to speak for a group but hide the views of the group's minority members).

business decision making.[108]

Thus, shareholders, who under ordinary principles of democratic theory, agency law, or even "best interests" theory might be viewed as the best source of information about shareholder interests, are systematically excluded from the decision-making process. While this exclusion has sometimes been explained on division of labor grounds, it is important to note how far it goes: even to the core decision that every shareholder must make. Shareholders, if they have no other expertise, must at least be specialists in determining whether to buy, hold or sell shares. Yet, the Delaware courts have clearly and consistently stated that a Board must exercise its own judgment in determining whether to sell the firm—it may not delegate even this most shareholder-of-all-shareholder decisions to the shareholders.[109]

Similarly, directors—unlike politicians, for example—may not fulfill their duty by doing just what they were elected to do. A director elected on a platform promising a particular course with respect to managing the firm must nonetheless continue to exercise independent judgment; a Contract With American Shareholders requiring the director to follow the expressed views of the voters would be void and a breach of the director's duty. A director elected by a specific faction is required, nonetheless, to represent the interests of all shareholders, not merely the electors, even where there are clear distinctions.[110]

In short, then, the law seems to assume that the actual views of the actual individuals who, directly or more often indirectly, stand behind the corporation's shares are legally and practically irrelevant. Shareholders are treated as if they were minor wards of a Dickensian trustee or the proletariat under the guidance of a Leninist vanguard, unable to speak for themselves.

2. Excluding Actual Interests

But that is not all. Not only are the expressed views of the shareholders

108. Securities Exchange Act Rule 14a-8(c)(7), (c)(5), 17 C.F.R. 240.14a-8(c)(7), (c)(5) (1998) (allowing corporations to exclude from proxy statements shareholder proposals "deal[ing] with a matter relating to the company's ordinary business operations" or affecting less than 5% of company's assets, net earnings, and gross sales). Virtually any lobbying directed towards potentially profitable activities of the corporation will fit within this rubric, even if it also implicates significant public policy issues. *See, e.g.*, New York City Employees' Retirement Sys. v. SEC, 843 F. Supp. 858, 863-66 (S.D.N.Y. 1994) (discussing history of SEC action on subject), *rev'd*, 45 F.3d 7 (2d Cir. 1995); Pillsbury v. Honeywell, 191 N.W.2d 406 (Minn. 1971), *criticized in* Credit Bureau v. Credit Bureau, 290 A.2d 691 (Del. 1972), *distinguished in* Conservative Caucus v. Chevron, 525 A.2d 569, 572 (Del. Ch. 1987). The issues remain controversial. See discussion in Greenwood, *supra* note 14, at 1039, and the SEC's latest revisions. SEC Release No. 34-40018, *available in* 1998 SEC LEXIS 1001.

109. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding that board must make reasonable inquiry and recommendation before allowing shareholder vote on proposed merger and may not simply allow shareholders to decide).

110. McQuade v. Stoneham & McGraw, 263 N.Y. 323 (1934). The rule has been relaxed in close corporate contexts where the managers, directors and shareholders are largely the same people, but I am aware of no attempts to modify it in publicly traded firms.

irrelevant, but their actual interests are as well. Shareholdings in American corporations are concentrated, in the sense that a small number of individuals and institutions control the bulk of the publicly traded shares. But they are quite dispersed in a sense more relevant to my discussion: roughly half of all Americans own stock directly and even more do so indirectly. Institutional shareholders, which together hold over half our outstanding stock,[111] for the purposes of this Article should be viewed as themselves corporations (or corporation-like entities) acting on behalf of their own beneficiaries. Those beneficiaries include every American with a pension, a 401(k) plan invested in mutual funds, or an equity mutual fund—a large crowd indeed, and one that is not nearly so dominated by a small segment of the ultrawealthy as is direct stock-holding. Additionally, a significant part of the stock of American corporations is held by foreigners. In short, it is reasonable to assume that both shareholder views and shareholder interests are more or less as diverse as the electorate's (or at least the more affluent half or two thirds of the electorate).

Now, one might say that whatever else shareholders want in the rest of their lives, surely they all want higher share values.[112] But human shareholders who are also neighbors or employees or customers or friends may have other commitments beyond an extra nickel in the quarterly dividend. Even on purely economic issues, since shareholdings in this country are not only wide but shallow, many shareholders will find that their basic interests are aligned more with employees, stability or customers than with the highest possible value for their shareholdings: a decrease in your phone bill is likely to be worth more to you than the commensurate drop in the price of the telephone company shares held by your pension fund. Only foreign shareholders with little connection to the American

111. By 1990, institutions owned 53% of the outstanding corporate equity. Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. Rev. 811, 827 (1992). The percentage has increased since then with the rapid growth of mutual funds.

112. This argument is similar to Hobbes's argument that whatever men want, they all want to live; to Locke's argument that whatever citizens want, they all want the state to protect life, liberty, and property; and to Rawls's argument that whatever else persons want, they are all better off with more "primary goods." Hobbes, *supra* note 82, at 188, 192; Locke, *supra* note 92, at 348-49, 368-69, 371; John Rawls, Theory of Justice 93 (1971)[hereinafter Rawls, Theory]; John Rawls, *Social Unity and Primary Goods*, *in* Utilitarianism and Beyond 159, 163 (Amartya Sen & Bernard Williams eds., 1982) (using index of primary goods as a public basis for interpersonal comparison). The argument is wrong in each case: human ends are too diverse for a universal means. (In Rawls's more recent work, he has emphasized universal agreement not on universal means but rather on a constitutional process. *See* John Rawls, Political Liberalism 127 (1993). Although discussion is beyond the scope of this paper, I suspect that similar problems remain: processes cannot be determined independent of goals any more than other means may be distributed without regard to ends.) For further discussion, see, for example, Charles Taylor, *The Diversity of Goods*, *in* Utilitarianism and Beyond, *supra*, at 129, 142 (discussing multiplicity of moral realm); Bernard Williams, *Conflicts of Values*, *in* Moral Luck (1981) (discussing conflicting moral obligations); Bernard Williams, *Rawls and Pascal's Wager*, *in* Moral Luck, *supra*, at 96 (discussing difficulties of assuming a universally useful set of primary goods).

economy or politics beyond their shareholdings approximate this conventional image of a shareholder always interested in higher stock returns.[113]

Nonetheless, despite the obvious diversity of shareholders, neither corporate management nor courts ever find it necessary to determine who in fact are the actual human beings behind the shares of a corporation prior to discussing the interests of the shareholders. Rather, corporations are managed as if shareholders were all the same.

Clearly, then, corporate law contemplates a very different sort of politics within the corporation than we know outside of it. In ordinary politics, we rarely assume that the (entire) people has a single interest; rather, assertions of such a unity are generally rightly regarded as dangerous precursors to totalitarianism. Only fascists, Leninists, and perhaps some who think they have privileged communication with God believe that there is *an* interest that everyone shares and that the political elite is required to pursue without regard to the actual views of the citizenry. Inside the corporation, in contrast, the Vanguard of the Shareholding Proletariat is not merely entitled but required to act in the class interest, regardless of any false consciousness that might lead the actual voters to other views.[114]

The paradox of this Leninist politics of the corporation is compounded by the very fact that has led most theorists to dismiss it as a problem. In actual votes, most shareholder elections are won by margins found in ordinary politics only in the plebiscites of Napoleonic, fascist, communist and similarly undemocratic regimes. That is, shareholders appear to act as if they really were all the same, with a Rousseauian general will or a Leninist class consciousness. Within the confines of corporate law, then, discouragement of shareholder participation seems entirely appropriate: shareholder votes, which are enormously expensive, are almost invariably predictable without regard to any information about the actual voters. In the absence of an immediate prospect of a cash payment, management wins. With cash, the side that offers the most cash wins by the same overwhelming margin. In short, not only does the law presume that shareholders are monolithic—shareholders act as if they were. But they are us, and we differ on almost everything important; how can this be?

3. The Poverty of Agency-Cost Theory

For over half a century, since Berle and Means, the central theme of academic corporate law has been agency failure (although the jargon is

113. Of course, even foreigners are likely to feel some solidarity with Americans or concern with "spillover" effects beyond American borders that may lead them as well to balance other goals against share-value maximization.

114. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989) (allowing management to act on its understanding of shareholder interest—rejecting an acquisition offer—despite overwhelming evidence that shareholders viewed their interests differently). *Van Gorkom*, 488 A.2d at 873 (barring Board from simply deferring to shareholder views).

newer). But the agency problems with which corporate law scholars have concerned themselves are staggeringly primitive: the concern of corporate law is agents who act in bad faith, who steal from their principals or are simply incompetent.

The problem of corporate speech is a problem of role morality. The actual speakers—the lobbyists, advertising copy writers, lawyers, executives, and publicists who speak on behalf of the corporation—speak as agents, not on their own behalf. That is, their roles demand that they set aside their personal views and act as professionals, seeking the most effective means to promote their clients' views.[115]

Speech by agents is not unusual. Indeed, it is simply a special case of the representation of another's interests, an inherent aspect of professional service. Many areas of law and professional ethics struggle with the problems of understanding and interpreting clients—these have been the central issues, for example, in the fields of medical ethics (determining how best to care for patients when patient and doctor disagree on the best course, or when it is difficult or impossible to determine what the patient wants); family law (especially in the area of representing children who are considered unable to decide for themselves); poverty law (where much ink has been spilled insisting that attorneys not substitute their own judgment for that of their clients), and so on.

In general, the legal and ethical rules follow a consistent pattern: the professional is restricted from making value judgments for the client, but instead is directed to find the best way to pursue the client's goals.[116] Brokers are to take as given a client's risk preferences and financial goals and find the best way to reach them. Lawyers "zealously assert[] the client's position":[117] the objective to be sought is for the client to determine, not the lawyer. The client, not the lawyer, settles a case or takes a plea.[118] Similar distinctions between the goal—which is the client's—and the means—which are for the professional to determine—underlie the informed consent movement in medicine. Judges attempt to interpret statutes, contracts, estate plans and constitutions in accordance with the intent of their authors,

115. *See* Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 Cal. L. Rev. 1229 (1991) [hereinafter Dan Cohen, *Freedoms of Collective Speech*].

116. *See, e.g.*, David Kennedy, *Spring Break*, 63 Tex. L. Rev. 1377, 1378-79, 1382, 1385-89, 1400, 1404-05, 1412-15 (1985) (discussing ambiguities of international human rights lawyer's role in representing client and the "boundary separating our mission from its object").

117. Model Rules of Professional Conduct preamble (1997); *cf. id.* Canons 5, 7; Model Code of Professional Responsibility EC 7-8 (1997) ("[T]he decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client."). Since the corporate agent has no client other than a legal fiction, in the corporation there is no one who can legitimately decide to "forego legally available objectives or methods" of lobbying because of nonprofit maximizing factors.

118. Model Rules of Professional Conduct Rule 1.2 (distinguishing, in general, between the objective (for client) and the means to attain the objective (for attorney) and warning of difficulty in drawing a bright-line distinction).

setting aside the judge's own preferences to the degree possible.

The problems, similarly, follow a consistent pattern; they fall into two categories. The conceptually more difficult problems are the interpretative and communicative ones: how does the professional figure out what the client's goals are, especially when the client may not know or able to communicate them?[119] What does it mean to fulfill contractual intent, when the contracting parties never considered the issue? How do we know what an incompetent person, at the end or beginning of life, would want a doctor to do, if the person were capable of wants at all?[120] Does Congress have a collective intent, and if so, how do we identify it? What can a poverty lawyer (or a doctor) do to ensure that it is the client's goals, not the lawyer's (doctor's) preconceived notions of what those goals are likely to be, that drives the litigation (treatment plan)? These are all issues relating to the problem of determining the goals of clients, who often are inconsistent or inarticulate in setting and communicating them.[121] The issues are, on an individual level, precisely equivalent to the problem of politics on a collective level: creating an agreed-upon set of goals.

The second set of problems are those of administration. Administrative problems, in turn, also subdivide into two basic categories. The first is the problem of technical expertise: given a goal, what is the best way to reach it? The second is the problem of corruption,[122] or in the modern jargon, agency costs: how do we ensure that the professionals in fact are pursuing the goal they are supposed to aim at, rather than, for example, simply lining their own pockets?

The corporate law literature has limited itself to only these administrative parts of the agency problem. Business organizations share all the problems of administration, and the enormous literatures of corporate

119. *See id.* Rules 1.13, 1.14 (respecting difficulties of receiving instructions from collective and disabled clients).

120. *See* Ronald Dworkin, Life's Dominions (1993) (discussing problems of abortion and euthanasia).

121. Philosophers (and economists, medical ethicists, and professionals generally) often assume that people have a consistent set of preferences, goals, or values, which, if only they worked hard enough, they could identify and articulate. *See* Rawls, Theory, *supra* note 112, at 20 (describing process of reaching reflective equilibrium). My own view, however, is that reflective equilibrium is a myth: if we work hard enough, we will discover that we have a number of inconsistent preferences, goals, and values that do not reach equilibrium and cannot be set in a cardinal order but rather fluctuate chaotically, like a lemming population's density. The tragedy—or human reality—of the polynomic community is fractally replicated in each of our own individual sets of values. *See* Greenwood, *Beyond Dworkin's Dominions*, *supra* note 30, at 561-63, 576, 607-30 & nn.15-18, 77; *see also* Cover, *supra* note 81 (describing polynomic community as the source of law); Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974) (discussing inconsistencies in human decisionmaking). *See generally* Isaiah Berlin, *Introduction* to Philosophy in an Age of Pluralism (James Tully ed., 1994) (arguing that incompatibility of values determines the outcome of human behavior).

122. In the classic writings, corruption was often discussed as the problem of "virtue," that is, how to avoid corruption, and in technocratic literature, referred to as "professionalism".

finance, managerial technique and corporate law are devoted to solving them. But the problem that is central to this Article is the one that remains even when administration is perfect: that of politics, of setting the goal, rather than reaching an already determined one.

There is no discussion in corporate law, unlike family law, professional responsibility or medical ethics, of how the agent acting in good faith is supposed to figure out what the client's interests are, or of how to act when the professional's assessment of the client's interest differs from the client's. "Beyond the Best Interests of the Shareholder" has yet to be written; there is no advocate of shareholder autonomy seeking to "return" control of the large corporation to the actual humans behind its shareholders. Indeed, it is difficult to imagine even what such a theory would look like. A publicly traded firm run by the humans behind the shareholders would be neither firm nor corporate, as shareholders of varying abilities or commitments continually shift in and out of ownership positions.

For corporate law and corporate finance, the interests of the shareholder are the subject of expert articles full of mathematical symbols: logical deductions rather than philosophical meditations or attempts to bridge the communication gap between professional and client. Clients in other areas of the law are different and complex, sometimes even conflicted and inconsistent. The shareholder is not. Agency cost theory thus treats the interests of shareholders as deeply unproblematic and deeply antipolitical. In contrast to the goal debates of politics, corporate administration centers on how to get there, not where we are going. Given the diversity of shareholders and given the broad impact of corporations on our civic life, this is again puzzling and implausible. Why are we suddenly all the same in just this one aspect of life?

D. REPLACING POLITICS WITH ADMINISTRATION

I have argued that the fictional shareholder is the resolution to the paradox of the unchanging and monolithic firm fronting for a shifting and amorphous mass of shareholders.[123]

Politics is suppressed in the corporation. The agents of a corporation speak on behalf not of a group of human principals who more or less consistently consider conflicting goals, apply some more or less imperfect decision-making procedure and reach a collective conclusion about which to pursue, but rather on behalf of a legally mandated principle, one-sided and clear voiced. The cacophony and polynomia of politics[124] and individual psychology[125] is silenced, replaced by a single, conflict-free, essentially unified, entirely consistent, and therefore utterly inhuman, goal. The humans who stand behind the shares have various and conflicting goals, as all people do: they want their shares to increase in value, of course, but they

123. Greenwood, *supra* note 14, at 1025.
124. *See generally* Cover, *supra* note 81.
125. *See supra* note 121.

may also want decent jobs for their kids or neighbors, attractive and safe cities, a clean environment, and other things that, from time to time, conflict with the increase in value of their shares. The corporate law system eliminates all these conflicting goals, leaving the agents with a simple and clear directive: maximize shareholder value.[126]

The shareholders on whose behalf the board of directors requires its hired underlings to speak are not human beings in the full multiplicity and variegated splendor of post-identity (or even pre-identity) politics. Indeed, the shareholders whose needs are served by the paid agents of corporate speech are not human at all. Rather, they are legal fictions, created by the law (with the help of the market), whose one-sidedness makes the essentialism of the most essentialist of identity politics look like Foucault in sexy dressed drag. This shareholder, unlike the humans behind it, is an investor, pure and simple: it seeks to maximize the present discounted value of the future returns on its holdings. That is it.

Because the fictional shareholder has only one goal, it need make no value judgments. Politics is simply unnecessary, or, at least, simply a reflection of the problems of imperfect knowledge and limited rationality in the world. Were all (fictional) shareholders fully informed and fully rational, they would all agree—quite unlike ordinary citizens, who would still have to decide what kind of a society they wish to live in even if information were free. When people agree on the goal—as the fictional shareholder does by virtue of its stripped-down essentialism—politics is just administration; just a matter of setting the experts to work and ensuring (as corporate law has tried to do since Berle and Means) that the experts work for the client and not (just) themselves. Where goals are all agreed upon, the only purpose of democracy is to police corruption. Since most agents are not corrupt, most elections will be overwhelming, most clients will defer most of the time to the expert professionals, and corporate law's model makes sense.

The Hobbesian foundation, however, is the underlying agreement that as shareholders, all investors, whatever else they may believe in other areas of their lives, agree that the only important goal is the maximization of the discounted present value of the risk-adjusted cash flows associated with their stock. The law eliminates all other possible purposes. Shareholders, except by unanimous vote, cannot change the goal or values of the corporation. A mere majority of the shareholders simply has no authority under modern corporate law to manage the firm, or, more particularly, to direct the managers to give any significant weight to any value other than shareholder value maximization. This legally imposed unity of purpose is the underpinning for the whole structure.[127]

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126. *See supra* note 101; *infra* note 132.

127. Corporate law is thus structurally parallel to the political philosophy of Hobbes. *Cf. supra* note 82. Because all shareholders (citizens) share a common goal, maximization of value (preservation of life), management (government) may proceed in their interests without consulting them and an outside observer may judge the competence and fidelity of the governors without any input from the governed.

Maximization of shareholder value is (largely) a technical problem of administration, not politics. Accordingly, once this goal is accepted as the decisive directive to which corporate managers must respond, it is entirely appropriate to disempower the actual people behind the fictional shareholder and leave the management to the managers. Technical decisions—unlike value judgments—are best left to the experts.

Corporate law, then, replaces politics with administration. The role of the (real) shareholders is to police the problems of administration: gross incompetence, self-dealing, and the other problems of agency costs.

Because the people behind the shares have no practical authority to vary the single goal on behalf of which corporate managers must act, corporate speakers are agents answerable to a principle, not a principal. The managers' role—like that of any agent—requires them to restrict their attention to means rather than ends. However, unlike other agency relationships, here there is no human principal who can conclude that the time has come to change the balance or modify the goal. Only if corporate agents violate their role obligations will the corporation ever consider any good other than share value maximization.

1. The Inhumanity of the Fictional Shareholder

The fictional shareholder is not completely a modernist fantasy of internal unity. That would be too much to ask even in the political core of the liberal market place. But its variegation is quite limited. For virtually all purposes, there is only one significant variation: sometimes the law (and nearly always the market) views the shareholder as a diversified investor with only a small part of its wealth invested in the securities of the particular firm, but more often the law (and nearly always managers determining their role obligations) views the shareholder as undiversified, all of its wealth (the present discounted value of which it always seeks to maximize) tied up in the security in question.

Sometimes the differences between the diversified and the undiversified shareholder are enormously important—indeed, they drive much of the litigated controversies in corporate law. Diversified and undiversified investors, the theories of corporate finance tell us, have radically different views of risk.[128] Managers seeking to act in the interests of their shareholders will think quite differently about their role obligations depending on which of the two visions of the imaginary shareholder they have in mind. Likewise, the cases offer instances of courts confusedly

128. Portfolio investors are largely indifferent to interfirm competition: by holding securities of both competing firms, they assure that they obtain the same results regardless of which firm wins out. If cable modems win out over telephone ones, the Baby Bells will suffer, but AT&T/TCI will gain. If the reverse is true, the winners will be reversed. But an investor who holds both Bells and AT&T has the same results either way. In effect, portfolio investors treat the entire range of publicly traded firms as if it were a single conglomerate. In contrast, the undiversified investor of conventional corporate law takes the distinction among firms quite seriously.

switching between the two essences, using one to justify one result and the other to justify a different one.[129]

However, for the purposes of this Article, the two versions of the fictional shareholder are more alike than dissimilar, and both are essentially inhuman. Since the fictional shareholder is just an investor, it is immortal and time indifferent—the market allows any investor to transform future income into present income, short term gains into long terms ones, and so on, simply by applying the correct discount rate. It is context indifferent—since money is perfectly fungible, a pure shareholder is indifferent between money earned in Salt Lake City or Cambridge; Flint or Manilla. It has no commitment to particular enterprises: so long as the investment is on the capital frontier, offering the appropriate risk adjusted rate of return, one project is as good as any other. Tin cans and insurance, news magazines and amusement parks—what the company does is a matter of entire indifference.[130] It is universalist in the modernist, not the post-identity, sense: the fictional shareholder recognizes no boundaries, professes no nationality (or, more precisely, will change nationalities at the current or future monetary exchange rate), has no religion, no community, no union, no gender and, oddly enough, no class: the invested funds of the unions are no different from the invested funds of the capitalists against which they struggle. It is, in short, radically uncommitted, cosmopolitan, deracinated, tied to no religion, language, nation or community.[131] Perhaps most important for bargaining purposes, the shareholder is fully mobile—able to leap borders (and professions, commitments and projects) at a single bound.[132]

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129. *See* Greenwood, *supra* note 14.

130. The key difference between the two versions of the fictional shareholder is that the portfolio investor is also indifferent as to *which* publicly traded company does it.

131. Compare the discussion of the situated self in Will Kymlicka, Liberalism, Community, and Culture 166-78 (1989) (discussing importance of participation in a particular cultural community); Michael J. Sandel, Democracy's Discontent 13-17 (1996) (discussing the implausibility of the image of the unencumbered self); Tamir, *supra* note 78, at 32-34, 38-42 (discussing cultural and national affiliation as constitutive of personhood); Charles Taylor, Sources of the Self: The Making of the Modern Identity 504-06 (1989) (criticizing liberal theory for placing individuals outside of context).

132. In a competitive financial market, future income can readily be converted into present income and vice versa. Accordingly, corporate managers should disregard the timing of the income they produce, or, looked at another way, treat their investors as if they were time indifferent or eternal. Similarly, risk levels can easily be adjusted by varying the ratio of equity investments to risk-free Treasury Bills held in a portfolio; accordingly, managers should act as if their investors were risk neutral. Lack of commitment stems directly from the picture of a shareholder as having no other relationship to the company and caring only about returns to share ownership, rather than, for example, the effects on the family lives of employees. For an investor interested only in the returns from a particular security, of course, the project that generates the returns is a matter of importance only insofar as it is more or less likely to generate the promised return: holding the risk-reward ratio constant, the fictional shareholder is entirely indifferent among different projects, factories, employees or products. All those things appear to the fictional shareholder only as the present discounted value of future income streams, and money is entirely fungible. And if the risk-reward ratio is

This shareholder is a fiction—not in the sense that it is not real, but in the sense that it is a unidimensional story that can be told by another. Any competent professional can imagine and represent shareholder interests without worrying about listening to the human beings behind the shareholder speak for themselves. Indeed, given that most of the human beings at issue are not competent professionals, the professionals generally can articulate and pursue (fictional) shareholder interests better than the (human) shareholders themselves. That, after all, is what they are paid, handsomely, to do.

The fictional shareholder is quite real, at least in its portfolio version. It is Fidelity's Magellan Fund, or CalPERS, or, closer to home for most readers, the TIAA-CREF pension funds, required by law and the market to act in the interests of their own fictional shareholders—namely you but not you, a stripped down version of you and others like you reduced to nothing more than the desire to be as rich as possible in your (never quite arriving)[133] retirement. It is on behalf of the interest of this stripped down person that the professionally managed funds, and the professionally managed corporations the shares of which the funds hold, will act. Eternally vigilant, mobile, uncommitted to any investment or relationship, project or community, the professionals search the world over for a higher present discounted value.

But it is a fiction nonetheless, in the classic sense of a legal fiction. When the law demands that corporate directors and managers manage the corporation in the interests of the shareholders and the corporation, it does not mean the interests—let alone the will—of the actual human, multidimensional, conflicted, polymorphic, committed, split-identitied people who are ultimately the legal owners of the shares (or, in our increasingly institutional stock market, the human, multidimensional, conflicted, polymorphic, committed, split-identitied people who are the ultimate beneficiaries of the legal entities that own the stock). The humans are not consulted; they have only primitive, indirect and ineffective means of letting their perceived interests or actual will be known.

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not constant, the fictional shareholder will always prefer the better ratio, with no regrets for factories closed, jobs relocated, or products abandoned. Real people, however, will always have some identification with the human beings affected by corporate decisions, even if attenuated. Fictional shareholders, then, unlike human beings, are fully mobile, entirely uncommitted, and effectively eternal. For further discussion, *see generally* Greenwood, *supra* note 14; Hu, *supra* note 101, at 1277, 1282 n.39, 1285 (describing three different understandings of how to act in shareholder interests); Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. Rev. 277, 295-306, 355-66 (1990) (discussing differing understandings of the maximization of shareholder wealth); Kuttner, *supra* note 3, at 59-64 (contending that markets free-ride on preexisting nonmarket norms of behavior).

133. *Cf.* Lewis Carroll, Alice Through the Looking Glass 86 (1941) ("The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."). A pension fund is always investing for a future that never arrives. *See* Greenwood, *supra* note 14, at 1082-83.

2. Enforcing the Fictional Shareholder's Fictional Will: Law, Stock Listings and Immateriality

Indeed, as a general rule, the law explicitly bars directors from consulting shareholders on issues of business policy: business decisions are to be made by the directors in the interests of the corporation and its shareholders, not by the shareholders or in accordance with the will of the shareholders. Nor, in determining the interests of the shareholders, may the directors play the role of a Platonic philosopher king examining the life situations of the actual people out there and determining that, whether they know it or not, their interests require some action or other. Directors are directed to act in the interests of the fictional shareholder, not the humans behind it.[134]

The law, however, is not the most important enforcer of the fictional shareholder. More important is the market, mediated through the institutional investors and the problems of limited information and bounded rationality. Markets work best and most efficiently for commodities: uniform items that differ only in a few, easily described features. The stock market is a classic market for a commodity: one share is identical to another share of the same company, and, more importantly, for diversified investors following contemporary investment theory, one company's stock is largely fungible with another's, provided that both have similar risk-reward ratios. Financial investors, accordingly, need look only at a few, relatively easily obtained pieces of information in order to make their decisions.

Fully committed and variegated persons have only a limited amount of time and energy to expend in managing their investments—especially when those investments are a relatively small part of their wealth, let alone their personality. If you have a few thousand dollars to invest, you are far better off putting your energies into your job or your family rather than detailed investigations of what is happening to your money.

Accordingly, reasonable people rely heavily on easily monitored proxies when investing. Investment advisors describe companies in a page or two, and corporate financial statements exclude expenditures that are "immaterial" to an investor interested only in the company's financial future. Most small investors invest via an institution that in turn must compete for funds based only on the most simple information about itself.

When investors limit their view in this way, as they must, the market makes fictional shareholders out of real people. Even an expenditure on political speech, lobbying, or law reform that is large enough to have a dramatic effect on the political outcome—the telephone companies' campaign to influence the new telecommunications order; or corporate efforts to retain depletion allowances, affect revisions in the EPA, or limit

134. *Cf.* Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 Vand. L. Rev. 1263, 1301-17 (1992) (arguing that corporate boards should be recast as self-perpetuating mediating groups among the various corporate constituencies).

liability in mass torts—is highly unlikely to be a significant part of the earnings of a large publicly traded corporation. Investors are unlikely even to learn of the expense. Ordinary accounting principles do not require that immaterial expenses—usually defined as five percent of earnings—be disclosed, even if they are quite material from the perspective of the political or regulatory process. Accordingly, the expenses will be invisible to the investment community. Even were they not, information overload would prevent a diversified investor from paying much attention to the expenditures. In any event, most individual indirect investors would find that their interest—filtered through the institutional layers—is far too small to be worth any attempt to make their will known.[135]

Sometimes, of course, corporate political activity is public by its very nature. Lobbying can be done behind the scenes, but law reform often requires persuading the public—think, for example, of the cigarette companies' campaign for "freedom of choice." But even when investors are aware of the company's political activities, as they must be in the cigarette case, they will ignore them.

Consider an investor who, like many Americans, believes that cigarettes are addictive and kill their users, or at least make them reek, and that companies that deliberately attempt to make people into cigarette addicts are immoral, or at least distasteful. Such an investor may well be willing to avoid direct stock holdings of Philip Morris or R.J.R. Nabisco, despite a broker's advice that they have records of outstanding financial performance. But how many such investors would sell each mutual fund that held .5% of its assets in tobacco-related investments? If the investor holds $2000 in the fund, the indirect interest in cigarettes is less than $10, a clearly immaterial amount from the investor's perspective.[136]

At the same time that the investor is concluding that avoiding R.J.R. or Philip Morris is not worth the effort, the other participants in the process will be forced to set aside their own personal beliefs. The managers of pension funds or other institutional investors, for example, have a fiduciary duty to maximize their own beneficiary or shareholder value; they would may well view themselves as obligated to invest in R.J.R. so long as it remains profitable and the stock remains undervalued.[137] Of course, if

135. Indeed, in the case of the largest of the institutional investors—the pension funds—it would be clearly illegal for the fund manager to allow fund beneficiaries to direct that the fund abandon the pursuit of maximum profit (for the fund) even if beneficiaries saw the matter differently. ERISA bars pension funds from, for example, weighing the beneficiaries' interest in a larger retirement against their interests in a present job, even when those interests are in clear conflict and the actual humans involved might have strong views. *See* 29 U.S.C. § 1104(a) (1994) (setting forth the duties of fiduciaries under ERISA). A pension fund, therefore, is required to support profit-maximizing layoffs, even if the layoffs cause financial or emotional ruin to its beneficiaries. *See* Greenwood, *supra* note 14, at 1068-69.

136. This overstates the investor's involvement and thus understates the materiality problem: not all of an investment in R.J.R. Nabisco, for example, is attributable to the cigarette business.

137. *See, e.g.*, Steve Hemmerick, *Anti-Tobacco Campaign Hits a Snag*, 19 Pensions &

individual investors avoid the stock to a significant degree, that act in itself may drive down the stock price, thus forcing institutional investors to purchase it (and counteracting any influence the individual shareholders may have had on the management of the company).[138]

Even if the fund managers do not view themselves as morally or legally constrained to set aside their personal views regarding cigarettes, they may well be constrained by the market to do so: funds that avoid profitable investments are highly unlikely to show up well on the simple statistical trackings that are used by investors to track their fund managers. In any event, fund managers have far too much information that they are required to assess to spend much time analyzing corporate lobbying activities that do not affect the value of the investment.

The same story that is true of the fund manager is true of R.J.R. Nabisco's executives. They should view their own beliefs about cigarettes as basically irrelevant to the job they have to do, which is to make money for

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Investments, Mar. 4, 1991, at 3 (reporting that CalPERS Board views divestiture as a breach of its duty to maximize returns for future pensioners—presumably including future smokers).

As one might imagine, given the nature of the market they supply, tobacco companies have long been extremely profitable and their stocks are often cited as having been among the best choices a profit-maximizing investor could make. (This latter fact might suggest that tobacco boycotters have actually had an effect, driving the stock price below where it would be on a purely profit-seeking rational analysis. Given the pressures on institutional investors to ignore moral or political considerations, I think it more likely that the market has both consistently underestimated either the industry's ability to extract more value from its basic franchise—perhaps because of the persuasiveness of tobacco industry arguments that smoking is not addictive—or that it has consistently overestimated the ability of the political system to restrain the future pursuit of profit through nicotine—perhaps because of too unquestioning an acceptance of the marketplace of ideas picture of political debate. *See, e.g.*, NatWest Securities, Tobacco Industries Report, Feb. 24, 1998 (noting that addictiveness of cigarettes assures customer loyalty, ability to pass on fines, and profitability, but expressing concern that lawsuits will bankrupt firms).

138. If "socially conscious" investors avoid a stock in sufficient numbers to effect its price, pure profit maximizers will recognize an arbitrage opportunity: a stock priced below the expected value of its future financial returns offers an above-market return. These professionals will purchase it until its price is bid back up to the financially "correct" price. The "socially conscious" investor, then, will have suffered a personal loss, but will have sent no message to management and had no effect on the company, which will continue to see its stock trade based on market estimates of future returns. The only significant difference will be that the new shareholder base will be more supportive of management's profit pursuing goals.

In contrast, a firm that deliberately departs from profit maximization will be punished brutally. In any reasonably competitive product market, it will be at a disadvantage because it will be, by hypothesis, a high-cost producer. In the financial market, the same institutional investors will have a fiduciary (and market driven) responsibility to sell the firm's stock because more profitable opportunities are available. This will not only reduce share value (and increase the cost of capital, thus further lessening competitiveness) but also expose it to hostile takeover, since its stock value can be increased easily by returning it to profit-maximizing norms.

The combination of these effects should assure that few publicly traded firms will deliberately abandon profit maximization as a goal, regardless of the personal preferences of managers or individual shareholders, so long as a significant part of the investing market (the portfolio investors) sees itself as bound to profit maximize.

their shareholders. Accordingly, they may view themselves as obligated to stay in the cigarette business so long as it remains legal and profitable. Those who do not see themselves so obligated likely will quit and be replaced by some who do.[139]

Indeed, even if R.J.R. Nabisco were to withdraw from the cigarette industry, the likely result would be that the reduction in competition would make the industry more profitable and attract another, less fastidious, enterprise, with no ultimate change in the availability of the product. Since withdrawal is pointless, even those executives (or entire companies of executives) with qualms are likely to conclude there is not much point in acting upon them. Just as at the investor level, then, the market allows no mechanism for those with moral qualms to affect the actual behavior of the corporation: so long as cigarette smoking remains profitable and legal, the market assures that cigarettes will be produced.

In short, the personal views of all the corporate participants drop out. Most individual shareholders will find it impractical to monitor their investments for political positions they disagree with. Most institutional investors will be barred by law from doing so, or if they are not, they will be bound by market pressures (created by individuals who cannot monitor for political positions) to set aside politics. Most managers will perceive their duty to be to maximize shareholder profits without regard for other values; even those who do not will find that market pressures (created by the institutional investors) will force them to do so. So long as a significant supply of managers is available who are willing to do what we tell them they are supposed to do, and so long as a significant number of investors apply some standard of materiality in policing their portfolios, the individual views and politics of individual investors will disappear, leaving only the unidimensional, monolithic fictional shareholder.[140]

D. THE FICTIONAL SHAREHOLDER TALKS

Corporate lobbying is a product just like cigarettes: so long as it remains profitable and legal, the market and the fiduciary duties of corporate directors and managers will assure that it is produced. Regardless of the political beliefs of the corporate participants, corporations will advocate any political position that maximizes shareholder value, even if the human beings behind the shareholders disagree, and even if they will be injured in the simplest economic sense.

If corporate managers are acting as the law and ordinary role morality expect of them, they will set aside their personal politics and cause the

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139. Alternatively they may be fired or branded as traitors for placing social interests above the company's.

140. *See* Greenwood, *supra* note 14, at 1090-93 (using Bell v. Maryland, 378 U.S. 226 (1964), to illustrate how a company managed by nonracists, owned entirely by desegregationists, could end up enforcing Jim Crow simply by each participant doing what they are supposed to do).

company to enter the political fray only in pursuit of profit. The decision to lobby, that is, should be made in just the same way as the decision to build a new factory—by evaluating the risk-adjusted present value of the expected net returns and comparing it to available alternatives. If it is more profitable to convince the legislature or the regulatory apparatus to remove a regulation than to pay the fine, or comply with the law, then the firm should lobby, regardless of the managers' private views about whether the legal change is a good one for the country as a whole. Managers who view their fiduciary responsibility to their shareholders as requiring them to profit maximize to the extent permitted by law will also view themselves as obligated, regardless of personal beliefs, to profit maximize by attempting to change the law.

Institutional money managers should view the issue of corporate lobbying in precisely the same way: they are required to maximize the value of their fund. If the underlying firm's lobbying activities are cost effective, they should support it, regardless of any personal views to the contrary.

Corporations are managed on behalf of the fictional shareholder with no interests other than its investments—not on behalf of real people. When the corporation enters into politics, it does so in the same way—on behalf of an imaginary investor with no other interests. This is not the result of our corporations being run by greedy, selfish semifelons;[141] it is the result of ordinary people doing their job precisely as they are supposed to. It is not the result of agency failure but rather of agency success.

But the effect is that corporations cannot speak on behalf of the people behind their fictional shareholders.

V. THE VALUES OF FICTIONAL SHAREHOLDER SPEECH

Corporations are strange and unfortunate participants in our politics not because they take the wrong positions (although they often will), but because they must think about their positions in the wrong way. While real people must balance competing values, compare their own needs and those of others important to them, and make difficult choices between various aspects of our too-finite lives, corporations (or the role-constrained managers who decide for them) just maximize shareholder value.

No doubt profit-maximizing is often in the interests of most of the real people behind the shareholders. Often a majority of them would also agree. After all, despite the teachings of some religious leaders, most of us prefer to be richer rather than poorer, and often an indirect shareholder's only, or primary, relationship with a corporation is as shareholder. Not all shareholders live within breathing distance of the polluting smokestack, and some of the distant ones will not care about pollution that does not affect them directly.[142]

141. *See* Allan Sloan, *Corporate Killers*, Newsweek, Feb. 26, 1996, at cover page (showing "mug shots" of major corporate CEOs responsible for mass layoffs).

142. Many human investors, of course, do care about pollution even when it does not

Indeed, even where there is a clear conflict between shareholder interests and other interests of the person who owns the shares, the shareholder interest often will be the more important: many of us are willing to make quite major sacrifices in other areas of our lives for an incremental bit of individual wealth or collective economic growth. So my complaint is not that business corporations are more likely to end up on the substantively "wrong" side of a dispute than other political participants.

Rather, the issue is that the corporation is barred from making the trade-off at all. Fiduciaries for a fictional shareholder are told that they must not think about the tradeoffs; they must profit maximize without regard for the costs in change, overwork, family stresses, (legal) pollution, and so on (except, of course, to the extent that those factors will have a result on profits).[143]

As a rule, this one-sidedness is a good thing—the singular focus of the corporate structure allows corporations to do a singularly good job of the job they do. One of the reasons why business corporations are generally better at producing innovative and inexpensive consumer goods than are government agencies, despite the extra expense of paying the shareholders, is that the business corporation can focus on production as its sole job. It does not also have to act as a social welfare agency, making jobs for depressed areas or in depressed times or for people with depressed credentials, as the government agency often does. It need not comply with political values of equal access or civil service norms of routinized regularity. It is not answerable to an amorphous political process making numerous and inconsistent demands and providing excessive or insufficient resources for the tasks it is urged to perform. The IRS is told simultaneously to collect taxes and to not try too hard to do so; the Pentagon is given money to spend that it does not ask for and directed to keep open bases that it does not need; every government agency is required to follow elaborate procedures to assure that orders, and jobs, are distributed according to politically determined norms of fairness or spoils. The business corporation does none of this, and so can get the other job done. I see no reason to give up these enormous advantages.

But the same one-sidedness that makes the business corporation so useful in the economic sphere is the reason it should be excluded from the political sphere.[144] It is a political, not an economic, decision whether we should promote economic growth when it conflicts with multigenerational families, unattractive snails, magnificent redwoods, the inherent stodginess

affect them directly, or so one might infer from the heavy support for the environmental protection laws found by the pollsters. That concern, however, will be washed out and will not affect the fictional shareholder or its agents.

143. *See* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 583 (N.J. 1953) (allowing firm to make charitable contribution because it allegedly was profitable to do so).

144. *See* Walzer, *supra* note 4, at 95-103, 282-84, 291-303 (arguing that money should not be allowed to influence government action); *supra* note 66 (discussing the exclusion of corporate money from political campaigns in other countries).

of some middle-aged employees, or any other of the value-laden conflicts that arise all around us.

Business corporations are directed by the law to disregard all values other than those captured in shareholder value maximization; if they are then allowed to influence the law, they must, by law, seek to change the law to allow them to disregard all values other than shareholder value maximization. They must lobby to impose externalities—economic or otherwise—on anyone they can; to exploit market imperfections wherever they are available; to disregard the needs of customers, neighbors, employees and even investors, whenever they conflict with the imagined goals of the fictional shareholder or its personification in the institutional investor. The fictional shareholder cares only about its portfolio; we, however, are not securities and therefore do not appear there.

Another way to look at the same issue is this: corporate law succeeds because it disregards issues of regulating corporate behavior. Tort law, not corporate law, regulates the choices that corporations make between low-cost products and safety, by forcing corporations to internalize the cost of the accidents caused by their products. Environmental regulation, not corporate law, regulates the choices that corporations make between low-cost products and environmental damage. Labor and contract law, not corporate law, regulate the choices that corporations make between low-cost products and providing decent working conditions and pay to employees. And so on. Corporate law simply directs the corporation to profit maximize within the constraints provided by those other areas of the law.

But if corporations are *permitted* to profit maximize by lobbying to change the regulations under which they function, corporate law *requires* them to do so—and thus threatens the integrity of the entire system.

The position I have taken here is based on the uncontroversial view that corporations are legally obliged and forced by the market to profit-maximize. It follows that they will intervene in the political process in order to profit maximize. Paradoxically, corporate profit maximization is not necessarily in the interest of the human beings who stand behind the corporation's shareholders: many if not all of them will have other relationships to the corporation, as consumers, employees, neighbors, citizens of a particular town, state or country, inhabitants of an ecosphere, and so on, that may be more important than their role as shareholder. The odd result is that corporations may pursue "shareholder" interests even when those interests are contrary to the views and interests of the people who ultimately own the shares: corporations are managed in the interests of fictional shareholders, not real people.

A. The Effects of One-Sidedness: Speaking on Behalf of Uninomic Fictions

Corporations, then, are one-sided participants in the political debate. They are required to use the money available to them to promote share values, even when the interests of society, or the owners of the shares, are to the contrary, and there is no internal corporate mechanism to rein in their lobbying efforts when they become detrimental.

And these lobbying efforts often will become detrimental. First, share value is maximized by organizing society to fulfill the needs of capital. Financial capital is mobile, diversified and time-indifferent. As virtually every economist would agree, capital reproduces most successfully when it is allowed to freely move from place to place and project to project in a never-ending search for maximum (risk adjusted) return. But while humans clearly have an interest in the multiplication of capital, they have other interests as well. In particular, humans—unlike capital—reproduce best with minimal mobility, are never diversified, often are deeply committed to particular places, people or projects, and are highly time dependent. There is no market that allows a parent to convert present reading-time with small children into future reading-time or vice versa, the best efforts of the "quality time" movement notwithstanding.

Second, share values often can be increased by influencing the legal system to allow (or subsidize) corporate attempts to externalize the costs of doing business. If a legal rule will increase the part of the costs of pollution, or safety, or competition that must be borne by neighbors, or customers, or competitors, the share of corporate profits going to the stock will increase—and corporate agents will view themselves as required to support the rule.

Critically, the corporation must continue to lobby for the right to externalize its costs, even if we are all made worse off as a result and, indeed, even if the humans who own the shares bear the burden of the externalization. Nor is this conflict between the values of the fiction and the real people likely to be an odd or unusual occurrence: for most purposes, shareholders are us. Necessarily, then, shareholders must be bearing the burden of externalizations. Nonetheless, corporate agents acting within their roles will, indeed must, simply ignore all costs that do not affect stock value. Corporations must act as if they were lobbyists on behalf of self-interested foreigners with no connection to the United States other than extracting the maximum profit from it—as sort of a self-imposed imperialism.

The result is that corporations entering the political sphere cannot be conceptualized as groups of citizens. Unlike groups of citizens, who must always debate the proper and shifting balance of conflicting values, corporations will pursue a single value to the detriment of all others. Unlike groups of citizens, no one in the corporation—not the directors, not the managers, not the rank and file employees, not the shareholders and not the customers—is in a position to influence the corporation's choice of ultimate goal. The goal—increasing the value of the shares—is set and debate is restricted only to the technical issue of the best means to reach this destination, even when the end has long since ceased to justify the means.

Furthermore, the internal mechanisms of the corporation, like the external forces of the law and the market, encourage its decision makers to set aside their own social, political and moral commitments in order to pursue the corporation's goals. As a result, people who in their private lives might disapprove of encouraging nonsmokers to adopt a dangerous and vile habit, extracting rents via distortion of the legal system, externalizing costs of business onto outsiders, and so on, are again invited and commanded to set those qualms aside. The professional's duty is to pursue the interests of the client vigorously within the bounds of the law; so long as the law allows unsafe or polluting (but profitable) products, or business hours that are incompatible with raising a family (but are profitable), a professional will cause the corporation to seek such things.

The analysis is not dependent on a claim that all professionals behave in this way. Some people, of course, will find the conflict unbearable and will not resolve it by modifying their personal morality. The usual response in this case is to quit. But while that may ease the conflict in the individual's life, it should have little effect on the institution: he or she will be replaced by someone who is more comfortable with the role. Similarly, some professionals will be tempted to discard the rule that a professional must put aside his or her own views and act on behalf of the client. While there clearly is significant room for discretion in corporate management, managers who do not profit maximize are highly likely to see increases in production costs with associated decreases in competitiveness and drops in share price, endangering both their job security and stock option values and making the firm a target for takeover. Whether in defense against such a prospect or as a result of takeover, the alternative values are likely to quickly take a distant second seat to the market's primary demand for share return maximization.

The final step of the analysis is that the internal mechanisms of the corporation do not differentiate between making money by creating a good product or lobbying the law to avoid the costs of a bad one. A corporation driven by the profit motive is morally indifferent: it will lobby to repeal the eight hour day or the EPA, or, alternatively, invest in additional automation or pollution control devices indifferently, based only on a cost benefit analysis of which option is likely to cost the shares less. It will compete with a competitor, or lobby to create a legally regulated monopoly, indifferent except as to the relative risk-adjusted projected net present values of the alternatives. It will adapt to a world of long-term employment and family wages, or advocate one of employee mobility, over-work for some and under-employment for the rest, entirely indifferent to effects on children or civil society because those effects are not reflected in the returns to the shares.

In each case the corporation's calculation of relative costs is skewed, for costs borne by citizens as a whole, or even the human beings who work for the corporation, buy its products and own its shares, are not considered in the professional's calculations—they do not affect the discounted future returns of the stock. Unlike real citizens, fictional shareholders give no weight to values of community, to moral commitments to employees or neighbors, to working hours that allow parents to see their children, or, indeed, to any cost that is borne by unsecuritized human beings.

Rather than a group of citizens, a corporation must be understood as a pot of money driven to grow, by good means or bad. Now this is not an unusual claim, and the standard corporate law response is clear and correct: the great success of corporations is their one-sidedness. Because business corporations have only one goal, they need only be administered. Recreating corporations into political entities in order to make them legitimate participants in the political debate would destroy their real value for a very questionable benefit. Far better to let business do what it is good at, and regulate it through a political system freed of the distorting effects of corporate speech. But the one-sidedness of the business corporation does not mean that wealth maximization is our only value—only that there is a time and a place for everything. The proper place for the value debates is in substantive regulatory law and the politics of ordinary government.

When the pot of money enters the political system, it distorts the very regulatory pattern that ensures its own utility. When the pot of money is allowed to influence the rules by which it grows, it will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for all of us (to extract rents, in the economists' jargon). If permitted, then, the profit motive will drive the corporation to lobby to destroy the very regulations necessary to make it a source of human freedom instead of slavery.

Corporations, then, are properly barred from making political calculations. Having been freed from politics, such an entity can only pervert the political process.

When groups of citizens band together to amplify their voices—to petition for redress of grievances, as our founding document puts it—they must compromise, discuss, coalesce and somehow determine the goal or goals they will pursue. As those goals change, or those compromises waver, different people will join or leave, and the organization will shift, strengthen or weaken. That is the essence of democracy.

When a corporation lobbies, however, its goal is set by law and market: it lobbies on behalf of the principle of the fictional shareholder, to maximize the returns to an imaginary being with no interests other than its shares in the corporation. No internal debate, coalition building or political process sets the corporate goal; the views of the various human participants in the firm are largely irrelevant. Unlike the group of citizens, then, corporation speaks in a unified voice on behalf of a single principle rather than an ever-recreated compromise.

The shareholders of a typical publicly traded corporation shift on an hourly basis—but it makes no difference. Regardless of the particular individuals who work for or own the securities of the corporation, the corporation (if its managers are fulfilling their role obligations) will enter the political process only in the pursuit of profit. Politics, for the publicly traded firm, is not war by another means, but business by another means. This is not democracy at all, but an entrenchment of a particular ideology in a position of enormous power: Mr. Herbert Spencer's Social Statics enacted into law.

Corporate free speech, in short, is not free but compelled. It serves not the purpose of increasing the citizenry's ability to self-govern, but the opposite. Allowing corporations to influence the legal environment in which they operate creates a bureaucratic monster that determines its own feeding schedule. Our servant becomes our master—the institutions that we have created to help us get rich instead spend our resources to distort our judgments about what to do with our wealth, what kind of society we want to be, and, indeed, why we even value this servant. Accordingly, corporate participation in the political debate must be understood as in derogation of a democratic system, not in fulfillment of it.

Corporate speech, then, should be viewed with extreme suspicion. Corporate interference in the political sphere raises an omnipresent specter of impropriety, of a valuable institution stepping out of its proper sphere, of a tool of the people becoming its ruler. This is not to say, of course, that corporations have nothing to contribute to the political debate or that they should be entirely barred from it. Nor, given the enormous influence that corporations currently have on the legislative branches, is there much realistic possibility of significant regulation of corporation speech. But it does, at a minimum, suggest that current First Amendment doctrine is entirely backward: corporate speech is entitled to no additional constitutional protection from governmental regulation beyond the already excessive influence it has in any event.

B. AUTONOMY, POLITICAL INTEGRITY, AND LISTENER'S RIGHTS: PLACING CORPORATE SPEECH IN CONTEXT

The question remains how this picture of a corporation's political speech fits into conventional First Amendment analysis.

1. Autonomy of the Speaker

One value often said to be promoted by the First Amendment is that of protecting the autonomy of speakers.[145] American political theory depends heavily on a fear of unified majorities. "We" the people are always persons, an amalgamated mass of individuals disagreeing on many issues, and rarely a "people" in the singular national sense, with one essentialized view that is entitled to suppress all dissenters and disagreement.[146]

This sense of the majoritarian difficulty, the Federalist Papers' faction of the majority—that there are limits beyond which a majority has no right

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145. For examples of essays basing First Amendment analysis on this value, see C. Edwin Baker, Human Liberty and Freedom of Speech (1989); Thomas I. Emerson, The System of Freedom of Expression (1970).

146. For contrasting views, see sources cited *supra* note 80.

to decide important issues over the objections of the minority—is an important force behind our First Amendment. Minority religions, minority tastes in art or literature, minority views in matters of dispute are protected not only to preserve the integrity of the political process by preserving the possibility of continuing debate,[147] but also to preserve a sphere of individuality free from all collective intervention. This individualist First Amendment value is simply inapplicable to corporate speech on behalf of the interests of the corporation itself or of its fictional shareholders: no individual's sphere of action is protected when corporate management is directed to spend corporate funds on behalf of a singular corporate goal that ignores all competing considerations.

A corporation speaks by hiring someone to create speech or to write for it. The human being whose speech is involved, accordingly, is not acting as an autonomous self-directed principal but rather as an agent. In this role, he or she is likely to feel constrained—by job and role obligations—to speak on behalf not of him or herself but on behalf of the corporation that employs him or her and, ultimately, on behalf of the fictional shareholder.[148] The agent's job is to do his or her job, to follow orders, to consider the best means to an end set by the principal, to perfect tactics rather than goals.

Now, it is clearly established as a matter of First Amendment law that agents may speak on behalf of their principals, and that it is the principals' rights, rather the agents', that are vindicated on an autonomy view.[149] This, I take it, is implicit in the now fundamental First Amendment principle that spending money is equivalent to speaking: the principal, by spending money, purchases the services of the actual speaker, who, in turn, is understood to be speaking on behalf of the principal rather than him or herself.

In the corporate context, it should be uncontroversial that ordinarily corporate spokespeople speak on behalf of the corporation, rather than themselves, and accordingly that the autonomy at issue is the corporation's, not their own. But here, unlike many other areas of purchased or proxy speech, there is no "there" there. The principal is simply the legal fiction of the unidimensional, time-indifferent, uncommitted shareholder. The principal is merely a principle, an abstraction, not a human being. Principles, unlike principals, do not have any autonomy rights to be respected.

Were one tempted to change the standard view and look to the rights

147. *See* Noam J. Zohar, *Midrash: Amendment through the Molding of Meaning*, *in* Responding to Imperfection: The Theory & Practice of Constitutional Amendment 307-18 (Sanford Levinson ed., 1995) (discussing claim that dissents are preserved in order to encourage further debate); Greenwood, *Akhnai*, *supra* note 30, at 327-33 (arguing that the legal system can stay the same only by changing).

148. *See* Meir Dan-Cohen, Rights, Persons, and Organzations: A Legal Theory for Bureaucratic Society (1986); Dan-Cohen, *Freedoms of Collective Speech*, *supra* note 115.

149. I discuss separately the rights of the listener. *See infra* Part V.B.4.

of the agent, the temptation would be best resisted. There is nothing wrong with people doing their jobs in the manner in which we expect them to. But, as Eichmann has taught us, people who are just following orders are neither full moral subjects nor appropriate participants in the difficult debates of the political forum.[150] The role of technician or advisor is quite different from the role of citizen; we should not confuse the two. In a democratic society, agents who accept their principal's message as their own may speak in their own right, with the full protection of the First Amendment. They do not need, and should not receive, additional protection for speaking on behalf of someone else.[151]

2. The Publisher's Exception

Sometimes, however, the agency relationship appears to be reversed, in realistic if not technical doctrinal terms. If Mobil Oil's editorial advertisements on the *New York Times* op-ed page clearly seem to be products of the corporation, the articles next to them seem equally clearly to be the products of the by-line author or editor, even if those authors are employees of the *New York Times*. Thus, sometimes corporations do not speak as fiduciaries but as vehicles for individuals or groups speaking on behalf of themselves. When the *Times* publishes an op-ed editorial, the writer is not speaking as a voice for a fictional client, but as a political participant in the author's own right. When Random House publishes an author, it is the author speaking, not a fiduciary.

In general, the authors of articles in newspapers, Hollywood movies, works of fiction, and the like, are often employees or agents of corporate entities that own the rights to the works in question and plan to promote those works in order to maximize profits for their fictional shareholders. Nonetheless, it seems clearly incorrect to claim that these works were written by agents of the fictional shareholders on behalf of the fictional

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150. *See* Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 21-22, 24-26 (1976) (stating that Eichmann believed himself not guilty in the sense of the indictment because he had no base motives and was a law-abiding citizen executing legal orders to the best of his ability; in Arendt's view, he was perfectly normal); *cf.* Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Hum. Rel. 55 (1965) (stating that experimental subjects were willing to administer apparently painful and near-fatal electrical shocks when told to do so by an authority figure). *But see* Arendt, *supra*, at 231-33 (observing that some people were able to act decently even in the midst of total evil).

151. In the corporate-law context, granting rights to agents independent of the principal is simply a fancy way of saying that top corporate management will be granted a license to use corporate funds to promote their own views. Corporate-law theorists and courts have debated the proper ownership of corporate funds, some contending that those funds can be viewed in a simple way as belonging to shareholders, and others contending that other participants in the "nexus of contracts" may have an equally strong claim. *See, e.g.*, Greenwood, *supra* note 14, at 1023-25 n.6, 1034-35 n.24 (comparing the two sides of the debate). However, virtually everyone agrees that directors and top management have no right to use corporate property for their own personal purposes. Accordingly, it should be uncontroversial that managerial use of corporate funds to promote *managerial* political views is both a violation of corporate-law norms and unprotected by the First Amendment. *See supra* note 97.

shareholders. Rather, they were written by their human authors, for the human authors' own purposes.

This distinction between corporate speech by fiduciaries on behalf of imaginary principals, as opposed to citizens promoting their own principles (or principal) using corporate vehicles for funding, publicity, organization or production, will not be difficult to maintain. The corporate lawyers for Exxon may be proud of the quality of their work, but they are quite clear that it is done on behalf of their client; the Hollywood director may be slathering at the mouth at the thought of the profits his next movie will bring in, but he knows that the message of the movie is his, not determined by the interests of his corporate sponsor's shareholders.

In principle, then, the distinction I seek to draw is between agents who have suspended their own judgment as to the ends which they seek to promote, adopting instead the professional's creed of seeking to advance another's goals as well as possible, and authors who speak or write on their own behalf—regardless of their personal motivations, and regardless of whether they are independent contractors or employees. When agents speak on behalf of a principal that is a principle, that is, a one-sided legal fiction, an ideal type lacking in the conflicts and multifaceted commitments that all real people have, the agent, like this sentence, becomes a run-away train, a continuing advocate with no stopping point (except for the agents' willingness to break role-morality, to violate the terms of their contract or to quit). Agents of the fictional shareholder raise the problem of the banality of, if not evil, at least of excess: ordinary people acting as corporate agents, seeking to do their jobs in good faith, will continue their advocacy of the interests of the fictional, immortal, uncommitted, placeless and faceless shareholder, long after the people behind the shareholder—or the agents themselves, acting in the role of citizens—would have decided that another value is more important.

Now this is not an entirely clean or simple distinction. First, it is not based on profit motive: authors speaking in their own voice may well believe, with Samuel Johnson, that "[n]o man but a blockhead ever wrote except for money."[152] Many authors write or speak in order to make a profit, and I see no reason why that should diminish the First Amendment protection to which their works are entitled. The problem with the corporation working on behalf of its fictional shareholder is not its pursuit of profit, but rather its one-sided, relentless pursuit of profit without any other countervailing value that could even potentially point it in a different direction: no human pursues profit in that way. Autonomous authors balance their desire for profit with their other values—for fidelity, justice, excellence, tradition or whatever—in a way that corporate fiduciaries are directed to avoid. In contrast, when lobbyists are paid by the corporation on behalf of its fictional shareholders, there need be no human being at all

152. 3 Boswell's Life of Johnson 19 (L. Powell ed., 1934) (1791). Law professors, of course, are not paid, at least directly, for writing law review articles.

who on considered judgment would support the political activity, and it will continue nonetheless, so long as it appears to be effective in persuading people to act in a way that maximizes profit for the firm.

Second, the distinction is not one of individual versus collective speech. When two or even seventy human beings sit down to create a collective product that reflects their needs or being in some partial way, the product obviously will be different from the product of an individual working alone. But it is not less worthy for that reason. The classic movies of the Hollywood studios often do not seem to have an individual author in the usual sense; nonetheless *The Wizard of Oz* is a great movie and there seems no clear reason why its collective origins should deny it protection.[153] In any event, if individual authorship were a requirement for constitutional protection, the First Amendment status of, say, the *Book of Genesis*, would be dependent on the courts' view of the relative authority of the claims of believers and modern Biblical scholarship. It seems clear, then, that individual authorship cannot be a requirement for constitutional protection.[154] Rather, the distinction must be between groups that write or speak on their own behalf (or on behalf of other humans) and those that speak only on behalf of a legal fiction, and, as a result, are incapable of balancing conflicting interests while maintaining institutional integrity.

Third, in many instances spokespeople for the fictional shareholder can be expected to internalize the fiction's one-sided, uncommitted values, if only to reduce the cognitive dissonance that would otherwise result from a professional role of saying things one does not believe. Even when spokespeople believe what they are saying, however, the speech remains the principal's, not the spokespeople's, and constitutional protection should be based on the rights of the principal alone. Agents should not be given constitutional protection for using their principal's property to promote their own agendas—that would turn the First Amendment into a license to steal.[155]

Fourth, agents often take great pride and professional satisfaction in their work. The distinction I am making is not one between alienated and unalienated labor. Lawyers writing a brief for a client intend to promote the client's goals, but the expression is the lawyers'; the same can be said of advertising copywriters, publicists, and corporate executives generally. And of course many such agents presumably seek to advance their own goals—professional success and perhaps personal political or cultural agendas—through their promotion of their principals' goals. I mean to keep all such writers on the unprotected side of the line: so long as they speak on behalf

153. *See* Salman Rushdie, The Wizard of Oz 14-16 (1992) (stating that *The Wizard of Oz* had multiple writers and directors, making it "that will-o-the-wisp of modern critical theory: the authorless text" and that it is unclear who is responsible for the famous phrase, "There's no place like home.").

154. *But see* Randall Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735 (1995) (arguing that institutional speech is "speakerless" and less deserving of constitutional protection).

155. This argument was eloquently made by Brudney, *supra* note 97.

of their principal, it is the principal's speech autonomy, not their own, that is vindicated by protection; accordingly, where the principal is fictional, no protection is warranted.[156] The reasoning is simple: even if the principal's speech coincides with speech the agent would like to make, the principal—not the agent—remains in control.[157] Were one of the individual human authors to decide that he or she had had enough, that the salary was not enough to warrant the positions one was forced to take, the corporation would simply hire a different agent to say the same things. So long as the principal is the fictional shareholder, it is driven by an inhuman one-sidedness that prevents any of the human actors from balancing or considering other relevant values and considerations.

Conversely, many an individual author views some of his or her work product as a "pot-boiler": a market-driven, role-bound product that is not a reflection of the author's personality. But I do not mean to withdraw protection for this work: the author remains in control, even if he or she has decided to follow the lead of the market. When this author decides that family, or religion, or justice, or indolence is more important than the market, the production ceases with no violation of role morality, job obligations, or institutional integrity. It is not so with the fungible services of the corporate spokesperson.

In short, the distinction between agents controlled by another and autonomous individuals under their own control is not entirely clear. Nonetheless, generally it will be obvious when Random House, or Dow Jones & Company, is speaking on behalf of its shareholders and when it is acting as a vehicle to allow authors to speak on behalf of themselves—even if the interests and intentions of the two often coincide. The distinction turns on whether the speakers are using the corporation as a medium to disseminate their product or whether, in contrast, the corporation is using the speakers as a medium to disseminate its own message, and, fundamentally, on whether the speaker is or is not speaking as an agent of fictional shareholders to promote the political interests of an imaginary being interested solely in maximizing its return from this investment.

Furthermore, in practice, a simple test solves most hard cases. My concern is that speech by the corporation on behalf of its fictional shareholders is not subject to the ordinary restraints of market, law, or popular opinion. Rather, it is the market and law itself attempting to mold that opinion and those restraints. I propose, then, the following criterion to distinguish between protected and unprotected speech involving business organizations: when a corporation sells a speech product, it is presumptively the work of human authors using the corporation for their own (inevitably polymorphic) ends. That speech remains subject to the test

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156. The agents' autonomy, in contrast, would be the key issue if the question were not the agents' speech rights but rather the agents' right to sell their work product or labor power. That analysis, however, comes under not the First Amendment but rather *Lochner*.

157. Of course, the very same work product, produced on the author's behalf, would be entirely protected.

of the market and public opinion: if no human wants to pay to hear it, it will not exist.

In contrast, when the corporation pays to have its speech disseminated to the public (or to a government agency), presumptively the corporation is lobbying on behalf of its fictional shareholders. Here, no human being or collection of human beings is in a position to stop the speech so long as it provides a cheaper alternative road to profit than producing something people want to buy under the current legal regime.

I would thus protect the editorial columns of the *Wall Street Journal* or *Forbes*, even if they seem to have been written by a devotee of the crudest form of Marxist class consciousness, and even if one were to conclude that the positions taken are entirely profit motivated. So long as the journal allows for editorial autonomy, it is not placing the writer in a position in which he or she is required to set aside personal views; so long as the journal charges for its views, it is entering into the market place and subject to at least some control by customers. Similarly, my analysis would not extend to a full length movie based on the adventures of an action hero, even if one way to read the work is as a lengthy commercial for the related toy. Regardless of whether the work is better understood as a promotion for a commercial product, created in order to enrich the shareholders and driven by the pursuit of profit, or whether it has some claim to being an artistic product, commercialized in order to assure its wider dissemination (or its authors' enrichment), it is not within the scope of the fictional shareholder exception to the First Amendment. Whether one concludes that the movie-producing corporation is using the authors or that the authors are using the corporation is likely, I suspect, to be a matter of taste rather than Langdellian logic in this case, but in either event, the corporation is selling its product to the public, and that probably takes it out of the category of lobbying on behalf of the fictional shareholder.

The distinction is not between commercial and noncommercial speech, but between political lobbying on behalf of the fictional shareholder, on the one hand, and both political group speech and other forms of commercial speech on the other. When a corporation sells its speech product to the public, however puerile, commercial, or full of political undertones the speech may be, it is not likely that is it properly viewed as lobbying. It is when the corporation, on behalf of the fictional shareholder, pays to persuade the public to change its beliefs in order to satisfy the needs of the fiction that we ought to be concerned. The speaker, not the speech, must be the focus: economics-based or profit-motivated speech made by a citizen should be protected—even though clearly commercial—while the most explicitly political speech by a business corporation should not.[158]

3. The Integrity of the Political Process

Alexander Meiklejohn famously grounded the First Amendment in

158. *See supra* p. 1001.

pure necessity: a democratic government cannot long claim to be governed by the people if the government can control the flow of information or commentary.[159] When a government can censor or lobby it is in a position to maintain itself artificially.

An argument from democratic necessity—that a free flow of information and debate, and an active opposition are vital components to democracy—is of no avail to the fictional shareholder. Were the government to suppress the speech of the fictional shareholder, democratic values would be vindicated, not reduced. This is because the fictional shareholder is not a citizen but rather a creation of the legal system itself. Permitting the fiction to manipulate the legal system reduces the likelihood that the citizenry will be able to self-govern.

The argument from democracy contends that a government that is allowed to suppress dissenters' speech will be able to entrench itself in office, by cutting off the factual information and debate over values necessary to mobilize public opinion against it. In contrast, neither selective nor general suppression of the speech of business corporations implicate this important concern: all the legitimate participants in the political debate remain able to speak freely.

Indeed, the argument for *limiting* the political speech of business corporations is almost identical to the classic argument against censorship. Corporations that are permitted to lobby create precisely the same entrenchment as governments that are permitted to censor, for the same reason: they distort the debate that is necessary to regulate them properly. Just as governmental agencies are not entitled to First Amendment protection when they seek to use taxpayer money to convince the citizenry to allow them to continue to exist or expand, so too business corporations should not be permitted to use this legally created pot of money to expand the organizations' privileges or rights against the citizenry that created them and compose them. Allowing them freedom to lobby distorts the political process by creating a self-reinforcing cycle: the more a corporation is permitted to modify the law to allow it to profit-maximize at the expense of others, the more money it will have with which to pursue more such modifications.

In short, corporate lobbying for corporate privileges—particularly in the areas closest to corporate profit making—ought to be viewed with an extremely jaundiced eye. While we ought to encourage citizens to band together in groups to present their political views, a corporation is not a banding together of citizens but rather best understood as a pot of money subject to legal regulation and market restrictions forcing it to be used to pursue a particular, one-sided and partial idea. The business corporation is an institution we have created to serve us in a particular area and for a

159. Alexander Meiklejohn, *supra* note 12, at 24-27 (explaining that the First Amendment protects against the mutilation of thoughts so that "when men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger").

particular purpose—when we allow it to influence the rules we use to keep it in its own useful place, we are allowing our creature to govern us rather than the other way around. On the great liberal divide between public and private, the corporation belongs on the governmental side.

All this is, of course, the precise opposite of the legal status quo, which protects corporate speech related to corporate interests more highly than other corporate political activity, and, except for certain campaign contributions, draws no distinctions between the lobbying of business corporations and the ordinary self-governance of the citizenry.

American political theory relies heavily on a distinction between state and society. The state is the other, governing us but not us, an institution that "we the people" have created but from which we always are somewhat alienated. "We have met the enemy and he is us" does not apply in our ordinary political theory when the enemy is the state. Our Bill of Rights, in this understanding, offers us rights against our own creation, the government, precisely because we are afraid that our creature may win some independence from us. In this great dichotomy between us and our institutions, between society and state, publicly traded corporations clearly belong on the side of the state, not (as our courts have usually said) with society. Corporations—like the state—are useful and dangerous institutions ordained and established by the People to establish Justice, promote the general Welfare, and secure the Blessings of Liberty to ourselves. They are not—as citizens are—creatures endowed by their Creator with certain inalienable rights. Just as the First Amendment protects us against our governments, and does not give our governments rights to speak regardless of the will of the governed or their representatives, so too the First Amendment should protect us against our other governing creatures, the corporations, and not give them rights to distort our political processes.[160]

160. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (arguing that the primary function of judicial constitutional decision making should be to protect integrity of democratic political process).

Much legal theory since the Legal Realists has concentrated on breaking down the state/society distinction, principally by arguing that the "background" of civil society cannot be understood independently of the legal regime that creates and channels it. In the First Amendment area, this project has only just begun. *See, e.g.*, Owen Fiss, The Irony of Free Speech 2-4 (1996); Cass Sunstein, Democracy and the Problem of Free Speech 16 (1995); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 379-87; Fred Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. Colo. L. Rev. 935, 949-51 (1993) (taking seriously the metaphor of a free market of ideas and arguing that, as in New Deal economics, regulation rather than abstract rights may be necessary to promote liberty against the threats of legally sanctioned private power). *But see* Kathleen Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. Rev. 949, 955 (1995) (reviewing debate and rejecting metaphor of market for speech on autonomy grounds). This Article contends that granting abstract free speech rights to corporations does not promote the liberty of the real individuals involved and that corporations must be understood as part of the state (legal) system that creates them rather than somehow existing "before" it. Doctrinally, however, the Article stands or falls independently of the larger Realist critique of First Amendment jurisprudence: one need not reject the notion of a private sphere to consider whether

Political speech designed to increase shareholder returns by imposing externalities on nonsecuritized participants in, or neighbors of, the firm will be supported by both the capital markets and the product market.[161] The question is why a free people would want to allow an institution to enter its politics when it will do so almost solely in order to increase its ability to impose externalities on others. I can see no justification for this.

4. The Rights of the Listeners

The burden of this Article has been that it matters who the speakers are in our political discourse. One form of First Amendment argument would render my argument irrelevant: the claim that in the free market of ideas, more speech is always better, and money is irrelevant. As I argued above, and others have argued before me, this idea is based on an inherently implausible belief that only information, not rhetoric, matters, and on dismissal of modern rational cascade theory.[162] Money may not always be determinative in our politics, but to argue that it has no effect is, in my view, silly.

Perhaps more importantly, cultural and political debate are not a market heading towards a single equilibrium "truth" (indeed, even real markets often do not head towards a single equilibrium), but rather an ongoing debate among members of a common community over how to live together.[163] In this vision, it cannot be the case that socially mandated financing for advertising and other advocacy of one side of a series of controversial issues is an unmitigated good, i.e., that "more information is always better." The point is not information but creating a common

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corporate speech properly is considered part of it. Nor do I see any need for present purposes to enter into the debate regarding the continued usefulness of the Footnote Four categories, *see, e.g.*, Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985) (arguing that the *Carolene* formula of "discrete and insular minorities" must be reappraised). Similarly, I seek to evade the ongoing debate between libertarian and egalitarian concepts of the First Amendment, *see, e.g.*, Fiss, *supra*, at 15 (describing the conflict between liberty and equality); Fred Schauer, *Judicial Review of the Devices of Democracy*, 94 Colum. L. Rev. 1326, 1341 (1994) (describing the egalitarian and libertarian conceptions of democracy). The issue I raise is not one of liberating or equalizing the participants in political debate but rather one of determining the legitimate participants in the debate. I contend that because corporations are compelled by law to act in the interests of fictional beings who are, in effect, foreigners, corporations are not legitimate proxies for citizens and should not be constitutionally entitled to participate in our political debate.

161. It may be worth noting, in this connection, that corporate speech not in the pursuit of profit is anomalous as a matter of corporate law and market theory. When corporations act as semi-eleemosynary institutions, their managers are (by definition) imposing avoidable costs on the firm and will be punished by any reasonably competitive product or capital market. In a competitive market, firms that waste money on activities that are not designed to increase profit will have higher costs than other firms and, accordingly, will be driven out of business. *Cf.* Dodge v. Ford, 170 N.W. 668, 684 (Mich. 1919) (condemning such activity as a legal matter as well).

162. *See supra* note 68.

163. *See supra* note 121.

ground—and when people are struggling to find a way to live with each other, relative volume is extraordinarily important, since it limits or determines the available consensus points.

I will not, therefore, argue against the strong form of the "free market of ideas" claim except to point out that were it true, corporate lobbying would be properly classified as corporate waste. If the lobbying expenses were ineffective, they could not be profit maximizing, and therefore, as a matter of corporate law, ought not to be encouraged. Even if corporate law has good reasons for leaving the determination of waste to directors rather than to courts, there still would be no reason for a court, as a matter of constitutional law, to require states to allow corporate managers to waste corporate money on an ineffectual attempt to influence public opinion or governmental action.

I assume, then, that money does have an effect and thus that corporate expenditures are not waste. On this view, the rights of the listeners to hear should not be imputed to the business corporation, because it makes no sense to say that listeners have a right to have their views distorted by their own creatures.

One answer to the problem of the rights of listeners is to point to the underlying reason why listening is important: listening is an essential part of the ongoing process of creating a community and a politics. Corporations are not a legitimate part of that process—a political decision reached without consideration of the views or needs of corporations is perfectly legitimate, not subject to the problems of the majoritarian difficulty.[164] Corporations are not entitled, that is, to the respect due our fellow citizens, and thus we have no particular need to listen to them. Furthermore, listening to them may often distort our ability to hear each other, and it is that latter task to which we should be directing our attentions.[165]

A second answer is that the listener gives up nothing by losing the "right" to be lobbied by corporations. To the extent that the corporation is promoting ideas held by anyone, those ideas are fully protected when they emerge from protected speakers. There is no reason to think that they will not so emerge. After all, many human beings will often place profit maximization and similar values high—if not alone—on their list of

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164. *See* Greenwood, *Akhnai*, *supra* note 30, at 339-42 (discussing majoritarian difficulty). Jim Crow or the Nuremberg Laws would have remained just as evil even if they had been adopted in free and democratic elections in which their victims had been allowed to vote; no one, so far as I know, has tried to distinguish the American version of apartheid from the South African version on the ground that the former, but not the latter, involved a majority oppressing a minority. Majority oppression, in short, is still oppression.

165. This explanation also serves to distinguish the foreign speaker cases. While Mandel was not a fellow citizen, Kliendienst v. Mandel, 408 U.S. 753 (1972), he is nonetheless a fellow human being and in some sense entitled to be at least to some degree considered a member of our larger community with whom we should remain in dialogue. More importantly, Mandel can be understood to be speaking as the agent of the citizens who invited him to speak; as we have seen, the corporation speaks as an agent of legal fictions, not human citizens.

political goals. The effect of removing corporate speech from First Amendment protection is not to suppress the ideas corporations seek to promote but to eliminate the legal requirement that corporate directors and corporate employees spend corporate money to promote those ideas and political programs, thereby distorting the democratic process.

VI. CONCLUSION

Corporations present several related problems as participants in politics.

First is the issue of political idolatry, the tool becoming a master. Created to pursue wealth without internal limit, corporations on entering the political forum both distort that forum and corrupt the very bases of their legitimacy in their own sphere.[166] For the very success of corporate law is that it eliminates all difficult value choices, leaving corporate managers easily able to pursue wholeheartedly a single goal. That single-minded justification, however, can only work if other institutions, principally the substantive regulation promulgated by the political system, are capable of making the value choices that corporations cannot. When corporations pursue their share price maximization mandate by influencing the regulatory process, a negative feedback cycle is created. Instead of a robust political debate leading to a political decision regarding the extent to which corporations should be regulated by market or political processes, corporations use the political process to further the very agenda the political process gave them—with no countervailing force to limit the pursuit of wealth from exceeding its proper bounds. For much the same reason that state agencies are not protected by the First Amendment, corporations should not be: as instruments of our attempts at self-government, they should not be protected in attempts to free themselves from our control.

First, corporations cannot be understood as representing a class or group of citizens— corporate speech is different from class-based politics. It might be claimed that corporations represent a group of investors, in the sense that all shareholders, however else they may differ, would agree on the goal of maximizing share value. But this is wrong. While *ceteris paribus* higher share value obviously is better for the owners of the shares than lower share value, in the real world *ceteris* is rarely *paribus*. Real investors are human beings with life cycles, multiple commitments to particular people, places and projects, economic interests other (and often more important) than their share holdings, and values, ideals and interests that are not economic at all.[167]

166. *See* Walzer, *supra* note 4, at 96-103 (describing what money cannot, or should not be able to, buy).

167. Because share holdings are a very small part of most citizens' personal wealth, even on purely economic issues, real investors will often find themselves better off with lower stock prices. *See* discussion *supra* pp. 1035-37.

Second, even within the realm of narrowly conceived wealth maximization, shares are systematically different from citizens. Share values are maximized by following the dictates of corporate finance, which direct corporate managers to strive to shift capital to projects with the best available risk-reward ratio and highest risk adjusted present discounted value without regard for any other values. Corporations seeking to maximize share value, then, can be thought of as acting in the interests of a fictional owner of a share with no interests other than the share itself—one who, following the teachings of corporate finance, is time indifferent, risk neutral, uncommitted to any project, place or person, and immortal.[168] In short, this shareholder is not merely not situated but utterly inhuman. Predictably, this fictional shareholder will often have different interests and views than the real ones; real people can never be indifferent between income now or later or jobs here or elsewhere.

Indeed, the closest human real world approximation to a person with the interests imputed to shareholders is a foreigner with no other significant connection to American society: someone utterly uncommitted and indifferent to all but share value maximization. In other words, one might view our corporate law as encouraging corporate managers to act as if they were managing for foreigners, not members of our political community, and, correspondingly, the *Bellotti* doctrine can be understood as a constitutional destruction of the boundaries of citizenship or a guarantee of the rights of nonmembers of the community to influence its politics using funds aggregated for an entirely different purpose.

Third, corporations are barred from the type of deliberation and balancing of competing goals that is the essence of political life. Corporate managers are directed by state law (and the finance and product markets) to cause the corporation to act in the interests of an essentialized shareholder who has no values, interests or community other than an investment in this particular company or, sometimes, in a portfolio of companies. So, corporate speakers permitted by federal law to speak will feel compelled by state law and their fiduciary duties to speak. But they do so in order to defend a single position that they are directed by state law to defend, not a position that they, or anyone else, choose.

As a result, corporations differ from citizens (among other ways) in that when their decision makers are acting in good faith, they are incapable of Aristotelian practical reason: a corporation is directed not to balance conflicting political and moral goals but rather to pursue one end—profit maximization—without considering alternative or competing goals. While

168. More complicated views recognize that the share may be a part of a diversified portfolio. *See supra* note 101 and accompanying text (discussing portfolio investors). Whether the shareholder is thought of as undiversified or as a portfolio of shares affects its imputed interests on a number of important issues, as discussed below. However, both the diversified and the undiversified shareholder share the characteristics stated in the text, and, in particular, neither has any interest in values that are reflected only in non-publicly traded citizens, such as child rearing or civic virtue.

citizens acting in the political sphere are expected to bring all their values to bear and must confront in some fashion their inevitable conflicts, citizens functioning as corporate decision makers are expected to set aside their politics (in the largest sense of the word, including all their views of the good life) and instead to work for a simple set of goals set by state law and the (legally structured) financial marketplace.

Under these circumstances, granting corporations a right to free speech does not increase the freedom of any human being. First Amendment rights for corporations do not promote individual freedom to participate in an ongoing process of debate over our collective and individual futures or a dynamic process of self-government. Instead, they create a bureaucratic automaton, demanding, as a corporation is required to do, more privileges for itself and using the resources of the human beings affiliated with it—both those employees doing the actual speaking or directing and those stakeholders who might otherwise have received the money spent on lobbying and other political activity[169]—to promote a monolithic, narrow, essentialized understanding of one goal among the many that full human beings have. Corporate speech is an expression of the autonomy neither of the actual speaker (the corporate agent) nor of the imaginary principal on whose behalf it is made.

Similarly, only a strange and disembodied understanding of "listeners' rights"—in which listeners have a "right" to have the legal system force them to subsidize attempts to influence their views—can justify the current legal regime. Corporate speech is simply an instance of a legal creation intervening to free itself from the constraints that are necessary to make it a servant rather than a master of the citizens for whose benefit it was created. Corporate political speech is antithetical to the basic principles of democratic self-government. It should be entirely outside First Amendment protection.

The claim is not that profit maximization is an undesirable goal or that it is a goal not shared by many, perhaps most, of the humans who might have a claim on corporate assets. Rather the problem is that human beings always have various and often conflicting political goals—and corporate law directs corporate decision makers to intervene in our political disputes over resolving those conflicts while deliberately ignoring all but one side of each multisided issue.

No doubt most of us would like to get rich. But we also likely wish to go fishing, spend time with our children, or develop our skills as critical critics. We may wish to live in a society in which grandparents pass on their wisdom or idiosyncracies to their grandchildren, pollution is restricted, art is supported for its own sake, public spaces are beautiful, resources are

169. There is no reason to believe that lobbying is paid for by shareholders. At equilibrium in fully competitive markets, lobbying (like other forms of advertising and regulatory compliance) is a cost of production borne by consumers. In less perfect markets, the cost may be borne by consumers, equity or bond holders, suppliers, or employees, depending on the relative competitiveness of product, capital, supply, and labor markets.

distributed according to the dictates of justice, or entertainment is tasteful. We may value local communities for more than their efficiency in the current marketplace, and be willing to sacrifice some economic growth in order to protect particular aspects of our homes even if they run counter to the needs of a unified common market. Some may even believe that wealth is incompatible with more important goals—that "[i]t is easier for a camel to pass through the eye of a needle than for a rich man to enter the kingdom of God."[170] Our goals conflict, and much of contemporary—or any—politics is devoted to mediating incompatibles.

The problem with corporate speech goes beyond the issues that have been identified in the cases and the commentaries: the issue is not only that corporate managers may be able to spend corporate money in improper ways, or that corporations accumulate wealth as a result of state granted privileges of limited liability, eternal life and reduced taxation,[171] or that corporations, as a formal matter, are not citizen members of the political body. The problem is that corporations have a distinctive viewpoint, created by the law of fiduciary duties to fictional shareholders and enforced by market and legal pressures, that need not reflect the view of any human being at all, and that differs dramatically from human views even when it reaches the same conclusion.[172] For when a human being puts wealth generation above all other values, he or she does so as a result of conscious or unconscious deliberation and rejection of competing values; when a corporation does so, it simply fulfills its legal mandate.

Corporate participation in the political process distorts that process in a way that is quite different from the background distortions caused by our general failure to separate the spheres of money and debate. If one were to

170. Matthew 19:24.

171. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (restricting corporate campaign contributions in part on theory that corporate wealth results from state protection).

172. Many commentators have assumed that if corporations have a distinctive voice, as I am arguing they do, that is a reason to protect their speech. *See Bellotti*, 435 U.S. at 782 n.18 (stating that voters might be "interested in hearing [corporations'] views," apparently assuming that a corporation has a view separate from the protected views of its human constituents); *cf. id.* at 770 n.4 (imputing "belie[f]" to anthropomorphized corporation); *id.* at 769 (imputing "want[s]" and "views" to anthropomorphized corporation). *See generally* Dan-Cohen, A Legal Theory (arguing for distinctiveness of corporation as an organizational entity different from the individuals who make it up, due in part to role requirements, but conceding (at p. 110) that corporation has no right to be heard); Dan-Cohen, *Freedoms of Collective Speech*, *supra* note 115; Martin Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. Pa. L. Rev. 678 (1982) (emphasizing importance of listeners' rights and assuming that corporations add a distinctive voice to the mix of information); Shelledy, *supra* note 19, at 568-69.

But this can be true only if corporations might have an original position that no human could have thought of—a manifest impossibility—or if they are a legitimate interest group entitled to representation separate and apart from the human beings who compose them (each of whom, of course, retains full First Amendment rights to promote his or her own views using his or her own assets).

reject the Court's conclusion in *Buckley v. Valeo*[173] that money used to buy speech is indistinguishable from speech itself, one would necessarily deny corporations any First Amendment protection, since a corporation as a legal entity must always buy its speech. But the reverse is not true: even accepting that core free speech values require protecting the right to purchase speakers and publishers, corporate money is fundamentally different from human money. Ford, the man, must decide whether to pursue his class interests, narrowly defined, or to pursue the public interest as he or others see it; Ford, the corporation, is directed by law and market not to make that choice or consider the consequences of that decision.[174]

Ordinary politics requires discourse. A democratic people will remain one people only so long as its members are prepared to speak to each other and listen to each other; mutual respect and a willingness to compromise underlie the success of a democratic process. Majoritarianism, indeed, would be morally repulsive (and politically unacceptable to the minority) if it did not include this element of common enterprise. The communication protected by the First Amendment is a core method of preventing that oppression: it is far harder to oppress someone who is telling you to stop than one who has been silenced and dehumanized. And it is impossible to create the gives and takes of political compromise that lead people to feel that they are not oppressed even though they have lost an important political battle, unless they are part of the political debate.

This is the core of the First Amendment. It has nothing to do with the lobbying activities of business corporations. We are not in a common enterprise with business corporations—they are institutions we created and we should control, faithful (we hope) servants rather than fellow citizens whom we must respect and treat as equals. We give them control of vast amounts of money for good and sufficient reasons—but not to distort the debate among us. If corporate positions are in fact in the interests of the citizenry, as they often will be, then citizens will take up the banner, using their own resources. We need not fear that there will be no one to plead the cause of profit, growth and the creation of wealth, for those are good things and good people will support them. But we also need not dedicate the largest concentrations of our social wealth to pleading that cause without limit.

173. 424 U.S. 1 (1976).

174. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (holding that majority shareholder and board could not run corporation as a semi-eleemosynary institution). For a more careful discussion of the choices open to conscientious corporate managers, see Greenwood, *supra* note 14. Ford the Foundation requires a different analysis. *See infra* p. 1027 (discussing speech by private foundations).