

## A CONTRACTARIAN CRITIQUE OF *CITIZENS UNITED*

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“[P]olitical speech does not lose First Amendment protection ‘simply because its source is a corporation.’”

- Justice Kennedy, for the 5-4 majority in *Citizens United*<sup>1</sup>

“[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”

- Justice Stevens, dissenting in *Citizens United*<sup>2</sup>

### ABSTRACT

*This Article advances a new framework for analyzing whether and when regulation of corporations is warranted. This new framework springs from a contractarian perspective. Using that perspective, ordinarily the constituents of a corporation should be allowed the autonomy to structure their bargains involving the corporation in whatever way they see fit, absent government regulation. However, where the resulting bargains involved are plagued by some defects, either procedural or substantive, then ex ante regulation is not only constitutional but is also prudent. This Article uses a critique of the now famous Citizens United case to illustrate and develop this framework. The justification for regulation is even more compelling where the absence of regulation creates some systemic risk to our economy or democracy that would not easily be cured by ex post judicial involvement.*

*In Citizens United v. Federal Election Commission, a 5-4 majority overturned a congressional enactment limiting corporate electioneering. Decided in 2010, the Citizens United opinion has been harshly criticized by a broad spectrum of people, ranging from President Obama to Ben & Jerry. A group of senators has even called for a constitutional amendment to undo the results of that decision. In this Article, I criticize the majority opinion in Citizens United for ignoring the prevailing contractarian view of a corporation. In so doing, the majority arrived at the false conclusion that corporations should be entitled to the constitutional protections of*

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1 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 900 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)).

2 *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part).

*individual citizens.*

*Under the contractarian paradigm, corporations are understood as a nexus of contracts among the corporation's constituents. Contractarians typically draw the normative conclusion that since parties freely enter into those contracts, parties should be at liberty to set whatever terms they like, without government regulation.*

*My Article argues for the opposite normative conclusion, that because the contracts at stake in fact are often not bargained for freely or fairly, as the theoreticians argue, there is need for government regulation to ensure the contracting process and the resulting bargains are fair. This need for regulation is all the more compelling in a case like Citizens United where the very nature of our democratic process is at stake.*

*This reconceived contractarian paradigm should empower both judicial and legislative bodies to appropriately regulate and even limit the activities of corporations. It is my hope that this Article might encourage jurists and legislators to do just that.*

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INTRODUCTION

As the quotes above illustrate, a battle is raging in the Supreme Court. At its core, this battle is about the proper role of corporations in our economy and in our democracy.<sup>3</sup> This Article will present a new analytical framework that suggests that, where the bargains involving the constituents of a corporation are not fairly or freely entered into, ex ante regulation is not only constitutional, it is also prudent.

The most recent catalyst that renewed this battle over whether and when to regulate corporations was *Citizens United v. Federal Election Commission*, decided in January 2010.<sup>4</sup> That case has quickly become a landmark case on an issue that is at the crossroads of three distinct doctrinal areas of law: contract, corporate, and constitutional law.

In *Citizens United*, a 5-4 majority overturned a congressional enactment that placed specific limits on a corporation’s ability to use corporate money to advocate for or against politicians during election seasons.<sup>5</sup> According to the *Citizens United* majority, the political campaign context is an area where corporations are entitled to the same First Amendment protection as natural persons.<sup>6</sup> Thus, the majority struck down what it deemed an unconstitutional restraint on corporate First Amendment free speech rights.<sup>7</sup>

In this Article, I criticize the majority opinion in *Citizens United* for ignoring the prevailing contractarian view of a corporation.<sup>8</sup> As a result of

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3 In his dissent, Justice Stevens described the majority opinion as threatening “to undermine the integrity of elected institutions across the Nation.” *Id.* at 931.  
 4 *Id.* at 876 (majority opinion).  
 5 *Id.* at 917.  
 6 *Id.* at 904–08 (proclaiming that a corporation’s and an individual’s political speech are equally “indispensable” to democratic principles).  
 7 *Id.* at 903, 907.  
 8 Professor Stefan Padfield disagrees with the view that the Justices ignored the contractarian paradigm. Instead, he has reasoned that even though the *Citizens United* majority did not acknowledge corporate law scholarship in its opinion, it seemed to have impliedly adopted a view of the corporation as an aggregate of its constituent citizens. Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 224 (2011) [hereinafter Padfield, *The Dodd-Frank Corporation*] (“The [*Citizens*

the Court's approach, the majority arrived at the false conclusion that corporations should be entitled to the constitutional protections of individual citizens. This Article presents a new way of using the contractarian paradigm as a defense of corporation regulation.

Under the contractarian paradigm, corporations are understood as a nexus of contracts among the corporation's constituents. Contractarians typically draw the normative conclusion that since parties freely enter into those contracts, parties should be at liberty to set whatever terms they like, without government regulation.

My Article argues the opposite normative conclusion: that where the resulting bargains involved are plagued by some defects, either procedural or substantive, then *ex ante* regulation is not only constitutional, but is also prudent. The justification for regulation is even more compelling in cases like *Citizens United* where the absence of regulation creates some systemic risk to our economy or democracy that would not easily be cured by *ex post* judicial involvement.

As a nexus of contracts, corporations are entirely distinct from individuals. Thus, granting them the protections an individual receives under the Constitution is mistaken.

Part One of this Article will discuss the *Citizens United* decision itself. This Part will highlight the majority's defense of raising a corporation up as an equal to an individual for free speech purposes (at least in the election law context). It will also outline the dissent's arguments that the majority has turned the Constitution on its head by taking on a constitutional issue not presented by the parties and establishing new precedent that further frees corporations from government regulation.

Part Two of this Article will discuss two of the dominant paradigms for understanding a corporation discussed in corporate law scholarship. However, this Part will focus on the prevailing economic perspective to

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*United*] majority viewed the corporation as fundamentally little more than an association of citizens.”). Professor Padfield equates this “association of citizens” view of a corporation with the contractarian nexus of contracts paradigm, and he explains that an explicit adoption of the nexus of contracts paradigm would have allowed the majority to “conclude that there was nothing about the corporation qua corporation that justified restricting corporate political speech solely on the basis of corporate identity.” Stefan J. Padfield, *Citizens United and the Nexus-of-Contracts Presumption*, 1 HARV. BUS. L. REV. ONLINE 25, 26 (2011), available at [http://www.hblr.org/wp-content/uploads/2011/01/Padfield\\_Online\\_Article.pdf](http://www.hblr.org/wp-content/uploads/2011/01/Padfield_Online_Article.pdf) [hereinafter Padfield, *Citizens United and the Nexus-of-Contracts Presumption*]; see also Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 222 & n.7, 265 (concluding that the *Citizens United* majority's treatment of corporations is an implicit adoption of “real entity” theory, which “posits that the corporation, as an entity, is entitled to constitutional protection independent of its shareholders,” and arguing that such a theory does not accord with the original intentions of the drafters of the Constitution).

further develop my contractarian's defense of corporation regulation. In this Part, I will explain why the contractarian paradigm of the corporation as a nexus of contracts is the most helpful paradigm available and why, in accord with that theory, corporations should still be subject to regulation. This theoretical discussion will develop this contractarian paradigm as an analytical tool for assessing whether and when regulation of corporations is both constitutional and prudential. It will also apply that analytical framework to the *Citizens United* case itself.

Part Three will discuss some of the responses that have been proposed to remediate the *Citizens United* decision. It will assess those responses using the contractarian framework developed in Part Two. It will ultimately recommend further advocacy of a corporation's appropriately regulated place in both our economy and our democracy.

## I. PART ONE: THE *CITIZENS UNITED* DECISION

The catalyst for the battle over a corporation's appropriate role in our nation's political system was the *Citizens United* decision. Much has been written about *Citizens United*,<sup>9</sup> and the opinion itself spans more than one hundred pages, including the concurrences and dissents.<sup>10</sup> This Article will present a thorough analysis of this case from the perspective of how the Supreme Court views a corporation, with a specific focus on whether and when a corporation should be subject to regulation.

This Part will (A) put that decision into its political context, before (B) briefly presenting an overview of the facts of the case. This Part will then examine (C) why the Court insisted on deciding whether the statute in question was constitutional even though the litigants did not ask the Court to do so; and (D) the central substantive issue of whether the fiction of corporate personhood should have been extended to empower corporations with the same free speech rights as individual persons.

### A. *The Political Context*

The venue for the battle over a corporation's appropriate role in our nation's political system is not limited to the Supreme Court. Indeed, each of our three branches of government has spoken on the issue of what role

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<sup>9</sup> See, e.g., Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999 (2010); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. MIAMI L. REV. 1 (2010); Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161 (2010).

<sup>10</sup> *Citizens United*, 130 S. Ct. at 876.

corporations should play in politics and, at least at the moment, the Court is at odds both with the other two branches, and with itself.

Congress, our legislative branch, was the first to speak on the issue.<sup>11</sup> Relying on decades of similar legislation and precedent that reacted to that legislation, Congress carefully crafted and enacted the restricting regulation: the Bipartisan Campaign Reform Act of 2002 (“BCRA”).<sup>12</sup> The impetus for the enactment was Congress’s finding that corporations can create a distorting effect in the political process due to their ability to accumulate massive amounts of wealth and their duty to zealously advocate single-mindedly for the wealth maximization of their shareholders.<sup>13</sup>

And Congress has been no stranger to corporate regulation action over the years. Historically, the most massive corporate regulatory effort was the overarching statutory framework established by the Securities and Exchange Act of 1933<sup>14</sup> and the Exchange Act of 1934.<sup>15</sup> Both of those acts implicate the First Amendment because they involve forced speech in the form of disclosure requirements for corporations.<sup>16</sup> The most recent congressional

11 Congress has wrestled for centuries with the question of how to eliminate corruption, including the appearance of corruption, in elections. The fear is that supporters of candidates are later rewarded with special access to the politician, jobs, contracts, or other favors. See, e.g., Louis Lawrence Boyle, *Reforming Civil Service Reform: Should the Federal Government Continue to Regulate State and Local Government Employees?*, 7 J.L. & POL. 243, 246–54 (1991) (summarizing congressional efforts beginning in 1791 to reform participation by civil servants in electoral politics, as a result of concern about perceived corruption in the political system). Congress has regularly spoken on these matters. See, e.g., *infra* notes 145–49.

12 Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431 (2006).

13 There was some debate over whether the law would effectively eliminate all corporate “soft money” influence on elections, but generally corporate campaign finance was understood to be a problem. Cf. H.R. REP. NO. 107-131, pt. 1, at 48 (2001) (“There simply is too much special-interest money from too few sources flowing into party committees in the form of soft money, and onto the airwaves in the form of thinly disguised political advertisements paid for with unrestricted dollars from entities that are permitted, under today’s broken campaign finance regime, to disclose as much or as little about their operations as they choose. Many of these entities are barred by the Federal Election Campaign Act (FECA) from raising and spending any money to influence federal campaigns. Increased reliance on soft money shows no signs of abating, and is of particular concern.”); see also Trevor Potter, *McConnell v. FEC: Jurisprudence and Its Future Impact on Campaign Finance*, 60 U. MIAMI L. REV. 185, 185–86 (2006) (explaining that the BCRA was intended primarily to both eliminate soft money donations, “i.e. donations not in compliance with amount limits, source prohibitions, and reporting requirements,” and also to prohibit corporations from financing electioneering communications from corporate treasury funds).

14 The Securities Act of 1933, 15 U.S.C. § 77 (2006).

15 The Securities Exchange Act of 1934, 15 U.S.C. § 78 (2006).

16 See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 641–45 (2006) (observing that “[t]he securities regulation regime currently inhabits an island of immunity from the First Amendment”).

attempts to regulate modern abuses of the corporate form are the Sarbanes-Oxley Act in 2002,<sup>17</sup> and the Dodd-Frank Act in 2010.<sup>18</sup>

The Supreme Court responded to Congress in its majority opinion in the *Citizens United* case.<sup>19</sup> The majority struck down the campaign finance regulation on the basis that corporations are people and should receive the same First Amendment protections on their freedom of speech as natural people.<sup>20</sup> The Court spoke aggressively about speech being an “essential

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- 17 Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 and 18 U.S.C.). For a comprehensive early analysis of the Sarbanes-Oxley Act and the opportunities missed by that legislation, see Joseph F. Morrissey, *Catching the Culprits: Is Sarbanes-Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801 (2003) (assessing the likely impact of the Sarbanes-Oxley Act on the anti-fraud rules of the U.S. securities market shortly after it was signed into law and proposing ways the judiciary and legislature could improve and/or correct the Act’s deficiencies); see also Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1602 (2005) (examining the corporate governance mandates of the Sarbanes-Oxley Act and concluding the Act was “seriously misconceived”); Sanjai Bhagat, Brian Bolton & Roberta Romano, *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803, 1862 (2008) (analyzing corporate governance indices and finding that a flexible regulatory regime is more desirable than the Sarbanes-Oxley Act’s “one-size-fits-all” approach).
- 18 12 U.S.C. § 5301 (Supp. 2012). For an assessment of proposed regulatory solutions to recent corporate misconduct, see Daniel J. Morrissey, *After the Meltdown*, 45 TULSA L. REV. 393 (2010) (discussing the insufficiencies of the regulatory reforms proposed in the wake of the recent financial crisis, and offering suggestions for how they may be strengthened); Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1866 (2011) (“Regulatory responses to the bailout have fallen back on familiar tools like shareholder empowerment, disclosure, and independence, with no acknowledgement that the investing landscape has changed in ways that make traditional regulatory approaches unlikely to advance underlying regulatory aims.”); Nicola Faith Sharpe, *The Cosmetic Independence of Corporate Boards*, 34 SEATTLE U. L. REV. 1435 (2011) (arguing that the regulatory reforms aimed at improving the monitoring of corporate boards amount to nothing more than “cosmetic independence”); see also Padfield, *The Dodd-Frank Corporation*, *supra* note 8 (arguing that Dodd-Frank creates problems for adherents of contractarianism both from a positive perspective, because it is a reminder that the state retains the power to dictate terms vis-à-vis the corporation regardless of how much the state may have chosen to advance freedom of contract previously, and from a normative perspective, because it officially announces the arrival of the too-big-to-fail corporation, which at least some contractarians would previously have argued should not arise in de-regulated competitive markets).
- 19 Interestingly, some state regulatory initiatives have been upheld by federal courts after *Citizens United*. See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1084–89 (2011) (describing state campaign disclosure laws that have been upheld by courts in the wake of *Citizens United*).
- 20 *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 904–08 (2010) (rejecting the antidistortion rationale that was developed by the Court in *Austin*, and holding instead that Congress is prohibited by the First Amendment from limiting the political speech of associations of people that happen to “ha[ve] taken on the corporate form” (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. at 913)).

mechanism of democracy.”<sup>21</sup> It facilitates citizens’ paramount right “to inquire, to hear, to speak, and to use information.”<sup>22</sup> The Court was clear that those rights extend not only to natural citizens, but also to corporations, entities whose speech is “a precondition to enlightened self-government.”<sup>23</sup> But even the *Citizens United* Court was split, with five Justices in the majority and four Justices proffering a scathing dissent.<sup>24</sup>

After Congress and the Supreme Court spoke to the issue, the President of the United States added his voice. In a press release issued by the White House on the day the decision was released, the President stated,

With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that . . . drown out the voices of everyday Americans.<sup>25</sup>

Perhaps speaking from his background as a constitutional law professor at the University of Chicago, President Obama went on in his State of the Union address that followed the release of that opinion to criticize the Court’s decision as unjustifiably reversing one hundred years of established

21 *Id.* at 898 (“Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”).

22 *Id.* (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition of enlightened self-government and a necessary means to protect it.”).

23 *Id.* (“[The BCRA’s] prohibition on corporate independent expenditures is thus a ban on speech. . . . [This] is a precondition to enlightened self-government, and a necessary means to protect it.”).

24 As has all too often been the case in recent years, the First Amendment aspects of the Court’s opinion were split along partisan lines: conservative Justices were in the majority (Justices Alito, Kennedy, Roberts, Scalia, and Thomas) leaving the liberal Justices outnumbered (Justices Breyer, Ginsburg, Sotomayor, and Stevens). Dean Erwin Chemerinsky has recently written an article discussing this troubling trend of partisan Supreme Court decisions. See Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMM. L.J. 579, 581–82 (2011) (“[Y]ou can understand the Roberts Court better by reading the 2008 Republican platform than by reading the *Federalist Papers*, and . . . that is certainly true with regard to freedom of speech.”); see also Gene Nichol, *Citizens United and the Roberts Court’s War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1009 (2011) (criticizing the Roberts Court’s judicial activism—including its practices of bringing up matters or scheduling re-argument on its own, as well as overruling significant precedents—with a particular aim at Chief Justice Roberts because of the “grotesque hypocrisy” of the promise he made during his confirmation hearing to “just call balls and strikes” (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John Roberts, nominee, C.J. of the U.S. Supreme Court))).

25 Press Release, White House Office of the Press Sec’y, Statement from the President on Today’s Supreme Court Decision (Jan. 21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0>.



precedent regulating corporate involvement in campaign finance and “open[ing] the floodgates for special interests.”<sup>26</sup>

And the Supreme Court—at least one member—seemed to speak out again. As one of six Supreme Court Justices sitting in the House of Representatives listening to President Obama’s State of the Union chastisement, Justice Alito was visibly shaking his head in disagreement with the President’s *Citizens United* assessment.<sup>27</sup> Justice Alito went so far as to mouth the words, “not true.”<sup>28</sup> Justice Alito was, of course, part of the majority.

But perhaps more important than what any particular branch of the government says, the people who are responsible for electing our government representatives have spoken on the issue. First, as seen with the Tea Party’s unexpected rise during the 2010 midterm elections,<sup>29</sup> the people began demanding more accountability and transparency; not just from government, but also from the corporations and banks bailed out by the government.<sup>30</sup> The Occupy Wall Street movement stands apart from the Tea Party Movement, and it has swept through cities around the country.<sup>31</sup>

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26 Barack H. Obama, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (Jan. 27, 2010), at 8 (“With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”).

27 *See Alito Reacts to Obama Remarks*, ABC NEWS VIDEO (Jan. 27, 2010), <http://abcnews.go.com/video/playerIndex?id=9682842> (“Justice Alito shakes his head when Obama hits campaign finance decision.”).

28 *Id.*

29 There is some debate over the significance of the Tea Party in the 2010 mid-term elections; it had more success in the House elections than the Senate elections. *See generally Tea Party Movement*, *Times Topics*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea\\_party\\_movement/index.html?8qa](http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea_party_movement/index.html?8qa) (last updated Oct. 4, 2012) (“The Tea Party became a pivotal player in the Republicans’ successful bid to take control of the House of Representatives in the 2010 midterm elections. . . . [However,] the numbers of Tea Party-affiliated winners in the November 2010 elections was [sic] relatively small . . .”).

30 *See generally Credit Crisis—Bailout Plan (TARP)*, *Times Topics*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit\\_crisis/bailout\\_plan/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/bailout_plan/index.html) (last updated Dec. 7, 2010) (“The Troubled Asset Relief Program, known as TARP and more familiarly as ‘the bank bailout’ was hastily put in place in September 2008 as stock markets plunged, credit markets around the globe seized up and the world seemed on the verge of a cataclysmic financial meltdown. Congress authorized the Treasury Department to use up to \$700 billion to stabilize financial markets through the program—a step that inspired widespread public outrage, helping to fuel what became the Tea Party Movement, and, in the mind of most economists, one that played a crucial role in pulling the global economy back from the brink.”).

31 Many commentators question the ultimate message and motives of the Occupy Wall Street movement, pointing out its lack of demands and leaders. These questions have not been completely settled. *See, e.g.*, Arthur S. Brisbane, *Who Is Occupy Wall Street?*, N.Y.

While there are no particular individuals leading the Occupy Wall Street movement,<sup>32</sup> the movement's central message is clear. Among other issues, that message condemns corporate domination of elections and the manipulation of the political and economic system by the economic elite in the United States.<sup>33</sup>

And Congress seems to be listening to the masses, as some members have responded directly to the Supreme Court's decision in *Citizens United*. On November 1, 2011, Senator Tom Udall, together with a group of seven United States Senators, introduced a proposed constitutional amendment to effectively reverse *Citizens United*.<sup>34</sup> That proposed amendment would clarify that Congress and state legislatures are empowered to regulate campaign finance. In Senator Udall's words, "*Citizens United* has unleashed a flood of special interest money . . . . [T]he Courts have taken this [campaign finance area] over, we [in Congress] have to take it back."<sup>35</sup>

### B. The Factual Context

The regulation at stake in *Citizens United* is the Bipartisan Campaign Reform Act of 2002 ("BCRA").<sup>36</sup> That Act amended previous election finance regulations to prohibit corporations from spending any of their

TIMES, Nov. 13, 2011, at 12, available at <http://www.nytimes.com/2011/11/13/opinion/sunday/who-is-occupy-wall-street.html> (grappling with the difficulty of reporting on "a movement that pointedly eschews leadership and formal demands," and hypothesizing that a "push to establish origins and leadership would help surface the demands, or at least the most important underlying issues" of the Occupy Wall Street movement).

<sup>32</sup> *Id.* ("[S]ome members say the [Occupy Wall Street] groups are 'leaderless.'" (quoting Jerry Ceppos, journalism dean at Louisiana State University)).

<sup>33</sup> See Edith Honan & Edward McAllister, *Thousands protest banks, corporate greed in U.S. marches*, REUTERS (Oct. 15, 2011, 7:51 PM), available at <http://www.reuters.com/article/2011/10/15/us-usa-wallstreet-protests-idUSTRE79A41E20111015> (describing the protesters' anger that U.S. banks are "enjoying booming profits after getting bailouts in 2008, while many people are struggling in a difficult economy"); see also *Occupy Movement (Occupy Wall Street)*, *Times Topics*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy\\_wall\\_street/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/o/occupy_wall_street/index.html) (last updated Sept. 17, 2012) (describing the original impetus for the Occupy Wall Street as making "a stand against corporate greed, social inequality and the corrosive power of major banks and multinational corporations over the democratic process").

<sup>34</sup> See *The Dylan Ratigan Show* (MSNBC television broadcast Nov. 3, 2011), available at <http://video.msnbc.msn.com/dylan-ratigan-show/45155424#45155424> (interviewing Senator Udall, who asserted that "we need a constitutional amendment so that Congress can take back the authority to legislate on campaign finance reform" and need to recreate a "marketplace of ideas").

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

<sup>36</sup> Specifically, the section of the BCRA at issue in *Citizens United* was § 203, which amended § 441b of Title 2 United States Code. Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b (2006), *invalidated* by *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913, 917 (2010).

treasury funds on electioneering communications, and also to impose certain disclosure and reporting requirements for permitted electioneering communications.<sup>37</sup> The term “electioneering communications” is defined by federal statute and regulation as: “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal Office and is made within 30 days of a primary or 60 days of a general election” and that is “publicly distributed.”<sup>38</sup>

In December 2007, Citizens United, a nonprofit corporation, sought to distribute a documentary film entitled *Hillary: The Movie*, assessing the candidacy of then-presidential candidate Hillary Clinton.<sup>39</sup> The distribution would have occurred within thirty days of the 2008 primary elections for President and was thus arguably precluded by the BCRA.<sup>40</sup> Citizens United brought suit against the Federal Election Commission (“FEC”) in an attempt to get declaratory and injunctive relief, claiming that the BCRA’s application to *Hillary: The Movie* was unconstitutional.<sup>41</sup>

Citizens United claimed that the movie was just a documentary and therefore should not be deemed electioneering in any way.<sup>42</sup> The courts disagreed and cited several passages from the movie: the narrator begins the movie asking, “could [Hillary Clinton] become the first female president in the history of the United States?”;<sup>43</sup> the movie goes on to describe her as “Machiavellian”;<sup>44</sup> and it closes by warning the audience about what is at stake in the next election for President and that the decision should not be taken lightly.<sup>45</sup>

The District Court ruled in favor of the FEC, finding that the statute clearly applied to the movie and thus precluded Citizens United from airing

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37 See 2 U.S.C. § 441b(b)(2), (c)(1)–(5) (2006), *invalidated by* Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 913, 917 (2010).

38 *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006); 11 C.F.R. § 100.29(a)(2) (2009)) (internal quotation marks omitted).

39 *Citizens United*, 130 S. Ct. at 887.

40 *Id.*

41 *Id.* at 888.

42 Specifically, Citizens United had proffered the ironic argument that *Hillary: The Movie* did not express advocacy for or against a specific candidate. *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 278–79 (D.D.C. 2008).

43 *Citizens United*, 130 S. Ct. at 890.

44 *Id.*

45 *Id.* (“Finally, before America decides on our next president, voters should need no reminders of . . . what’s at stake . . . .” (alteration in original)).

the movie within the prescribed period.<sup>46</sup> The Supreme Court took the case on appeal.<sup>47</sup>

The Supreme Court did not just rule that the statute was unconstitutional as applied to *Hillary: The Movie*; it went further by also ruling that the statute was unconstitutional altogether.<sup>48</sup> According to the majority opinion, the statute placed unique limits on a corporation's ability to use corporate money to advocate for or against politicians during election seasons.<sup>49</sup> Thus, the Court held, the enactment placed an unconstitutional restraint on the corporation's First Amendment right to free speech.<sup>50</sup> Under this reasoning, corporations are entitled to the same First Amendment protection in this area as are natural persons.

### C. *The Need to Address Broad Constitutional Issues*

The first issue discussed by the majority was whether it even needed to evaluate a facial challenge to the constitutionality of the statute.<sup>51</sup> In his dissent, Justice Stevens could not have exhibited more anger about the majority taking on that question. Justice Stevens pointed out that Citizens United itself had dropped its facial challenge to the constitutionality of the statute and had pressed only an "as-applied" challenge.<sup>52</sup> The litigating party sought only a limited ruling that the statute did not apply to it, so that it

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46 See *Citizens United*, 530 F. Supp. 2d at 281–82 (holding that plaintiff Citizens United had not established the required probability of prevailing on the merits of its claims in order to warrant injunctive or declaratory relief).

47 *Citizens United*, 130 S. Ct. at 887; see also *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 594 (2008) (noting probable jurisdiction over the *Citizens United* appeal).

48 *Citizens United*, 130 S. Ct. at 913 (holding that the provisions of the BCRA barring independent corporate expenditures for electioneering communications violated the First Amendment).

49 See *id.* at 898 (explaining that, by restricting the amount of money a corporation can spend on political communication during a campaign, the BCRA reduces the quantity and depth of corporate expression, as well as reducing the size of the audience reached).

50 See *id.* at 898–99 (holding that the BCRA's "prohibition on corporate independent expenditures is thus a ban on speech," and that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers," i.e. corporations).

51 See *id.* at 892, 892–96 (determining that "the Court cannot resolve this case on a narrower ground without chilling political speech" and defending this determination by explaining that "it is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications").

52 *Id.* at 931–32 (Stevens, J., concurring in part and dissenting in part) (arguing that the question of whether the BCRA was facially unconstitutional "was not properly brought before [the Court]" because the appellant Citizens United "never sought a declaration that [BCRA] § 203 was facially unconstitutional as to all corporations and unions"); see also *id.* at 892 (majority opinion) ("Citizens United stipulated to dismissing count 5 of its complaint, which raised a facial challenge to [2 U.S.C.] § 441b . . .").

could distribute its film.<sup>53</sup> Justice Stevens emphasized that it was extraordinary for the Supreme Court to take on questions that are not brought by the litigants themselves.<sup>54</sup>

Moreover, “facial challenges are disfavored”<sup>55</sup> in order to preserve as much of the legislature’s work as possible.<sup>56</sup> In Justice Stevens’s words, “[e]ssentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”<sup>57</sup> This statement stands in stark contradistinction to the majority’s invocation of Chief Justice John Marshall’s instructions that it is the Court’s duty “to say what the law is,” but not to create it.<sup>58</sup> In his dissent, Justice Stevens cited another cardinal principle of the judicial process: “[i]f it is not necessary to decide more, it is necessary not to decide more.”<sup>59</sup> In other words, the Supreme Court should not extend the reach of its opinions beyond what is absolutely necessary.

Further, Justice Stevens argued that the majority’s approach flouted the maxim of judicial restraint, the notion that the judiciary should attempt to construe a statute as consonant with the Constitution to the extent possible and reach a facial constitutional challenge only when it absolutely must.<sup>60</sup>

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53 *Id.* at 931–32 (characterizing appellant Citizens United’s claim as only that its film should not be subject to the BCRA “because [appellant’s speech] was ‘funded overwhelmingly by individuals’” (quoting Brief for Appellant at 29, *Citizens United*, 130 S. Ct. 876 (Jan. 8, 2008) (No. 08-205))).

54 *Id.* at 932 (“It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.” (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976)) (internal quotation marks omitted)); *see also id.* at 931 (“In declaring § 203 of BCRA facially unconstitutional . . . the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court’s invitation. This procedure is unusual and inadvisable for a court.”).

55 *Id.* at 932 (“This Court has repeatedly emphasized in recent years that ‘[f]acial challenges are disfavored.’” (alteration in original) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008))).

56 *Id.* at 932 (articulating the “normal rule” as favoring partial invalidation rather than facial invalidation, so that a statute is declared invalid only “to the extent that it reaches too far, but [is] otherwise left intact” (internal quotation marks omitted) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985))).

57 *Id.*

58 *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Oddly, the *Citizens United* majority cited this same passage from *Marbury* to justify departing from precedent. *Citizens United*, 130 S. Ct. at 913 (2010) (majority opinion) (arguing that legislatures cannot prevent the Court from overruling its own precedents, because such an ability would allow Congress to interfere with the Court’s duty to “say what the law is”). Justice Stevens described the majority’s *Marbury* citation as “perplexing.” *Id.* at 934 (Stevens, J., concurring in part and dissenting in part); *see also infra* notes 69 and 82.

59 *Id.* at 937 (Stevens, J., concurring in part and dissenting in part) (citing *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004)).

60 *See id.* at 933 (“[C]ourts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader

“The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics.”<sup>61</sup>

The majority took Justice Stevens’s criticism to heart and addressed it directly. After rejecting possible arguments that the BCRA would not apply to Citizens United’s film, the Court decided that it must reach the larger constitutional question.<sup>62</sup> If the Court did not, the resulting prohibition of films such as *Hillary: The Movie* would untenably chill political speech. Justice Kennedy, writing for the majority, stated: “It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications.”<sup>63</sup>

Moreover, Justice Kennedy explained that even though Citizens United had dropped its facial challenge to the constitutionality of the BCRA, the challenge had been raised—and rejected—at the federal district court level and therefore could be reconsidered on appeal.<sup>64</sup> Additionally, the Court explained that since the appellant Citizens United was making a First Amendment argument, any theories to support that argument could be entertained.<sup>65</sup> The Court emphasized that attempting to deal with only the as-applied question would require future courts to determine standards for the BCRA’s application that would be both difficult and uncertain.<sup>66</sup> Finally, the Court stressed that the speech interest at stake was so crucial to the democratic process that a full review of the regulation was warranted and indeed necessary.<sup>67</sup>

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than is required by the precise facts to which it is to be applied.” (internal quotation marks omitted) (quoting *Wash. State Grange*, 552 U.S. at 450)).

61 *Id.*

62 *See id.* at 892 (majority opinion) (asserting that resolving the case on a “narrower ground” would chill political speech).

63 *Id.*

64 *Id.* at 892–93 (explaining that “even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from . . . addressing the facial validity [of the statute at issue],” as long as the issue was not presented below because the lower court passed on that issue, and concluding that the ruling by the District Court in *Citizens United* presented such a case).

65 *Id.* at 893 (noting that “throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech” and that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below” (alteration in original) (quoting *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995))).

66 *Id.* at 894–95 (describing the “uncertainty caused by the litigating position of the Government” and concluding that because “the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the question of statutory validity”).

67 *Id.* at 895–96 (highlighting the “primary importance of speech itself to the integrity of the election process” as a reason that the “ongoing chill upon speech that is beyond all doubt

The majority of the Court went so far as to invoke *Marbury v. Madison* and echo the famous words penned there: that it is the Court's duty "to say what the law is."<sup>68</sup> Justice Stevens, in his dissent, retorted that the Court does not normally flout what its predecessors have said the law is, nor does it "typically say what the law *is not* as a hedge against future judicial error" (referring to the Court's decision to rule the statute unconstitutional only in order to avoid the difficulty that future courts might have in applying the statute).<sup>69</sup>

Thus, despite the strenuous objections of Justice Stevens on behalf of four of the Justices and the canons of constitutional interpretation mentioned above, including the maxim of judicial restraint, the majority went to great lengths to make sure it took on the larger facial question of the constitutionality of the statute. The majority seems to have been intent on taking this opportunity to further empower corporations.

#### D. *Whether Corporations Have the Free Speech Rights of Individuals*

In light of the facial challenge to the constitutionality of the BCRA, the core issue of the *Citizens United* opinion became whether corporations have the same free speech rights as individuals, specifically in the context of electioneering.<sup>70</sup> If so, the BCRA could not withstand constitutional scrutiny under the First Amendment.<sup>71</sup> The Justices on both sides of the answer to this question used a wide range of constitutional interpretive tools to justify their conclusions. Embedded in their discussions were implicit notions about the very nature of a corporation.<sup>72</sup> Chief among the interpretive tools employed in the debate between the majority and dissenting opinions are: (i) original intent; (ii) respect for the principle of stare decisis; and (iii) the balancing of interests.

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protected" in the case at hand requires a return "to the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated").

<sup>68</sup> *Id.* at 913 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

<sup>69</sup> *Id.* at 934 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 895–96 (majority opinion).

<sup>70</sup> *Id.* (providing context by describing the strong protection of free speech in general, and then enumerating the variety and breadth of corporate speech prohibited by the BCRA in the electioneering context).

<sup>71</sup> *Id.* at 898 ("If [2 U.S.C.] § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.").

<sup>72</sup> This is abundantly clear from some of the attacks on Justice Stevens's dissent. *See, e.g., id.* at 925 (Scalia, J., concurring) ("Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them?").

1. *With No Evidence, the Majority Finds Original Intent Was to Empower Corporations*

Justice Kennedy wrote the opinion of the majority, and began his opinion by saying that providing corporations with free speech rights simply reflects “ancient First Amendment principles.”<sup>73</sup> Justice Kennedy went on to describe the BCRA as an outright ban on corporate political speech, a classic example of censorship, which does indeed violate the First Amendment.<sup>74</sup>

Justice Kennedy, speaking for the Court, made many impassioned statements about the necessity of political speech to a free society: “[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>75</sup> However, the Court did acknowledge that laws that burden political speech are permissible if they pass a strict scrutiny test, i.e. if the government can prove that the regulation “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>76</sup> Of course, as is further developed in Part I.D.3 below, the majority never did find such a compelling interest.<sup>77</sup>

Justice Stevens, writing on behalf of the dissenting Justices, was outraged by this glib invocation of our Founding Fathers and resulting manipulation of First Amendment jurisprudence.<sup>78</sup> Justice Stevens discussed at great length his view that the Founding Fathers never would have extended individual rights to a corporation.<sup>79</sup> Justice Stevens also noted that the entire

73 *Id.* at 886 (majority opinion) (distinguishing the majority’s handling of the BCRA’s limitations on corporate speech from the treatment in *Austin*, which the majority described as “a significant departure from ancient First Amendment principles” (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (Scalia, J., concurring) [hereinafter *WRTL*]) (internal quotation marks omitted)); *see also id.* at 906 (arguing that, although the Framers “may not have anticipated modern business and media corporations,” there is nevertheless “no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations”).

74 *Id.* at 888–89 (considering whether the case could be resolved on narrower, as-applied, grounds, and concluding that, in light of the severity of 2 U.S.C. § 441b’s limitations on political speech, the challenge to the statute must be evaluated on a facial constitutionality basis).

75 *Id.* at 898.

76 *Id.* (quoting *WRTL*, 551 U.S. at 464) (internal quotation marks omitted).

77 *Id.* at 903–13 (rejecting a series of rationales proffered as compelling interests, concluding that none of these were sufficient to pass strict scrutiny).

78 *Id.* at 948–51 (Stevens, J., concurring in part and dissenting in part) (“The Court invokes ‘ancient First Amendment principles’ and original understandings to defend today’s ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment.” (internal citations omitted)).

79 *Id.* at 949–51 (“Unlike our colleagues, [the Framers] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free



Bill of Rights was designed to protect individual rights (the rights of natural people). In his words, there is not a “scintilla of evidence to support the notion that anyone believed” corporations should be given the free speech rights of individuals.<sup>80</sup>

Justice Stevens discussed what the Founding Fathers would have understood about corporations:<sup>81</sup> at the end of the eighteenth century there were only a few hundred corporations in the entire country, and each needed to specifically petition its local state governments for a charter that would entitle it to do anything at all.<sup>82</sup> Since these corporations were very much at the mercy of the state for all of their rights, the notion today that corporations should not be subject to congressional regulation would be absurd to men like Thomas Jefferson.<sup>83</sup> In Justice Stevens’s words, this notion is not merely a misinterpretation of the Constitution in a close case, but is absolutely “implausible.”<sup>84</sup>

Here and throughout the dissent, the dissenting Justices’ ire is apparent. There is no hint of a healthy and respectful debate on close issues of constitutional interpretation. Justice Stevens clearly seemed to believe the majority was manipulating the case instrumentally to achieve the partisan de-regulatory results desired.

Justice Stevens went on to explain that, in fact, corporations were feared in the early days of our nation.<sup>85</sup> Justice Stevens cited scholars from the era of our Constitution’s founding, writing repeatedly that corporations were “soulless” and could “concentrate the worst urges of whole groups of men.”<sup>86</sup> In an early case from 1819, then Chief Justice Marshall (ironically cited by the majority for his *Marbury* opinion)<sup>87</sup> wrote that, “[a] corporation is an

speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”).

80 *Id.* at 948 (arguing that there is no support for the claim that the same First Amendment protections afforded to individuals would also insulate corporations from laws enacting regulatory distinctions based solely on the corporate form).

81 *Id.* at 948–51 (citing numerous secondary sources describing the treatment and understanding of corporations in the time of the Founders).

82 *Id.* at 949, 949 & n.53.

83 *See id.* at 949 n.54 (quoting one of Thomas Jefferson’s letters, which describes his apprehensions about the ultimate consequences of the rise of corporations).

84 *Id.* at 950.

85 *Id.* at 949 (noting that “widespread acceptance of business corporations as socially useful actors” was not the case in the Founding era, and instead “did not emerge until the 1800’s [sic]” (citing Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001))).

86 *Id.* at 949 (“The word ‘soulless’ constantly recurs in [Founding-era] debates over corporations . . . Corporations, it was feared, could concentrate the worst urges of whole groups of men.” (alteration in original) (internal quotation marks omitted) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 194 (2d ed. 1985))).

87 *Id.* at 913 (majority opinion) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”<sup>88</sup>

Scholarship and jurisprudence up to this day evidence the historic distrust of corporations described by Justice Stevens in his dissent.<sup>89</sup> As will be developed further in Part II of this Article, Justice Stevens was describing the Founding Fathers’ understanding of the corporation, which today is known as the state entity theory.<sup>90</sup> In accord with that theory, a corporation is not entitled to any constitutional protections; it is granted rights and privileges by the state that created and empowered it.<sup>91</sup> Accordingly, it can also be regulated and limited by the state.

Modern corporate scholars continue to emphasize this view of the corporation.<sup>92</sup> In a recent article, Professor Hillary Sale argues that it is essential to conceive of a corporation as a public entity, as distinct from a private entity, or, for that matter, a private individual.<sup>93</sup>

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88 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

89 See, e.g., Marcantel, *supra* note 8, at 229, 265 (reasoning that the majority in *Citizens United* must have viewed a corporation in accordance with a “real entity” theory that views a corporation as a natural person, and going on to argue that the drafters of the Constitution did not share this corporate theory, and that they would not have intended to “protect[] juridicial beings as real constitutional entities”).

90 Hale v. Henkel, 201 U.S. 43, 76 (1906) (“A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.”); see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987) (describing corporations as “entities whose very existence and attributes are a product of state law”).

91 See Avi-Yonah, *supra* note 9, at 1019–22, 1036–39 (describing the “ultra vires” or “artificial entity” doctrine, which “held that a [corporation] could not act contrary to the powers conferred on it by the state,” and going on to describe examples of that doctrine in Supreme Court opinions); Morton J. Horwitz, Santa Clara Revisited: *The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985) (contrasting corporate theories arguing that business associations have “an organic unity” wherein “the group was greater than the mere sum of its parts,” with artificial entity theory, which postulates that corporations are “simply artificial aggregations of individuals”). For discussion of theories rebuking the notion of a corporation as a democracy that can be policed by its shareholders, see *infra* notes 246–59.

92 See Padfield, *The Dodd-Frank Corporation*, *supra* note 8, at 229 (arguing that the adoption of the Dodd-Frank Act underscores the regulatory power of the state with respect to the corporation and is evidence supporting the state entity theory); see also Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 860–61, 864–69 (1997) (book review) (discussing the role of government-imposed mandatory rules or default rules in competing corporate theories).

93 Hillary A. Sale, *The New “Public” Corporation*, 74 LAW & CONTEMP. PROBS. 137, 137–38 (2011) (reviewing the Model Business Corporation Act as a starting point for a broader discussion of the definition of “public corporation,” and arguing that corporate directors’ failure to appreciate that “the government and the media have increasing influence over public corporations and their governance” leads to a variety of negative consequences).

The ever-Machiavellian Justice Scalia, writing in a concurrence with the majority, took on Justice Stevens's conception of what the Founding Fathers would have thought about extending First Amendment protections to corporations.<sup>94</sup> Justice Scalia attempted to use a textual analysis of the Constitution to support the notion that the Founding Fathers did indeed intend to empower corporations with First Amendment rights.<sup>95</sup>

In his concurrence, Justice Scalia claimed that if the Founding Fathers had wanted to exclude corporations from free speech rights, the First Amendment would have specifically said so.<sup>96</sup> Since the First Amendment talks generally about Congress not abridging rights to free speech, corporations must be included, Scalia argued.<sup>97</sup>

Of course, where the Constitution discusses political leaders being elected by "the People," it likewise did not specifically exclude corporations.<sup>98</sup> Similarly, when it discusses the qualifications a "Person" needs to have for certain offices, it also did not exclude corporations (though perhaps the requirements of attaining a certain age might suggest a natural person, despite a corporation being able to exist and "age" for an indefinite number of years).<sup>99</sup> None of that troubled Justice Scalia. He was,

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94 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 926 (2010) (Scalia, J., concurring) ("Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion [from the First Amendment].").

95 *Id.* at 926–29 (arguing that the First Amendment's "lack of a textual exception" for corporations is meaningful, and that the reference to "the freedom of . . . the press" demonstrates that the First Amendment reaches entities other than individual Americans (alteration in original) (quoting U.S. CONST. amend. I) (internal quotation marks omitted)).

96 *Id.* (reasoning that the drafters of the First Amendment were aware that corporations both existed and exercised forms of speech, and that accordingly, the "lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist [in the founding era] or did not speak").

97 *Id.* at 929 ("The Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion.").

98 U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .").

99 U.S. CONST., art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); U.S. CONST., art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

of course, like the majority, solely focused here on “ancient First Amendment principles.”<sup>100</sup>

Justice Stevens responded to Justice Scalia directly, retorting that the very idea of giving individual rights to a corporation was so inconceivable to the Founding Fathers that it would never have crossed their minds to specifically write into the Constitution that corporations were not entitled to individual rights.<sup>101</sup>

Like Justice Stevens, scholars have also criticized the majority’s invocation of originalism in support of their *Citizens United* decision. One such commentator states that the opinion “fails to persuade” that the Framers actually wanted to empower corporations with First Amendment rights.<sup>102</sup> And that, instead, the opinion “takes us on a long journey” and nowhere arrives at evidence of original intent.<sup>103</sup>

Throughout their discussion of original intent, the majority and both concurring opinions seemed to manipulate any true or even remotely accurate reading of the historical moment when the Constitution and the Bill of Rights were drafted. Their rhetorical description of their faithfulness to original noble principles is inspiring, but indeed, as Justice Stevens himself pointed out, appears to be completely disingenuous.<sup>104</sup> Instead, original intent seemed to be used by the majority as nothing more than a forceful rhetorical tool put into the service of an end result: empowering the corporation.

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100 *Id.* at 948 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted).

101 *Id.* at 951–52 (“If no prominent Framers bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if not also the very notion of ‘corporate speech’—was inconceivable.” (footnote omitted)).

102 Amanda D. Johnson, Comment, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187, 188 (2010) (advocating for deference to modern principles in cases where original intent is unclear, and concluding that *Citizens United* is such a case, wherein the majority “fails to persuade us that the Framers specifically intended to supply corporations with First Amendment rights to free speech”).

103 *Id.* (concluding that, instead of offering persuasive evidence that the Framers’ intent was to extend free speech rights to corporate associations, the *Citizens United* majority “takes us on a long journey, providing a historical recitation of legislative and judicial opinion about corporate free speech,” and “at no time are we offered information on the Framers’ intent”).

104 *Citizens United*, 130 S. Ct. at 952 (Stevens, J., concurring in part and dissenting in part) (“The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.”).

## 2. *The Majority, Citing Respect for Stare Decisis, in Fact Runs Over Precedent*

In addition to original intent, the majority and dissent both focused on another crucial aspect of constitutional interpretation: following relevant precedent and respecting the principle of stare decisis.<sup>105</sup> Citing precedent, the majority specifically rejected the argument that corporations could or should be treated differently than natural people with respect to campaign finance restrictions.<sup>106</sup> “Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>107</sup> In addition, the majority cautioned that the very act of favoring certain speakers and disadvantaging others might be unconstitutional.<sup>108</sup> The majority conceded that some regulations that do discriminate based on the speaker have been upheld in past cases as constitutional.<sup>109</sup> However, it surveyed those cases and found that those restrictions were all crucial to the effective functioning of government, an interest that, in the majority’s opinion, was not served by the BCRA’s general ban on corporate electioneering.<sup>110</sup>

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<sup>105</sup> *Id.* at 886, 911–12 (majority opinion) (detailing the Court’s factors for determining whether to apply or reject the principle of stare decisis in a specific decision); *id.* at 920–21 (Roberts, C.J., concurring) (arguing that stare decisis should not be applied mechanically, particularly in constitutional cases); *id.* at 938–42 (Stevens, J., concurring in part and dissenting in part) (rejecting the majority’s rationales for departing from stare decisis in *Citizens United*); see also Reza Dibadj, *Citizens United as Corporate Law Narrative*, 16 NEXUS: CHAP. J.L. & POL’Y 39, 39 (2010-2011) (arguing that the *Citizens United* majority opinion is remarkable because it pays “precious little attention to *stare decisis*”).

<sup>106</sup> *Citizens United*, 130 S. Ct. at 899–900 (listing precedential cases in which the Court “has recognized that First Amendment protection extends to corporations,” including in the specific context of political speech, and concluding that the Court “has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons’” (quoting *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765, 776 (1978))).

<sup>107</sup> *Citizens United*, 130 S. Ct. at 899.

<sup>108</sup> *Id.* (“Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”).

<sup>109</sup> *Id.* (citing cases where the Court upheld speech restrictions “based on [a compelling] interest in allowing governmental entities to perform their functions” in the context of public schools, the corrections system, the military, and federal service).

<sup>110</sup> *Id.* (“The corporate independent expenditures at issue in this case [under the BCRA], however, would not interfere with governmental functions, so these cases [approving of restrictions of speech when a compelling interest in preserving governmental functions is present] are inapposite.”). Despite the Court’s dismissal of this rationale as applied to the constitutionality of the BCRA, an argument could easily be made that the distorting effects of corporate electioneers directly interfere with the effective functioning of elections and, by extension, whether the government represents the people it governs. See generally James A. Gardner, *Anti-regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673 (2011) (exploring

The majority placed primary reliance on *First National Bank of Boston v. Bellotti* to find that “corporations or other associations should [not] be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”<sup>111</sup> Decided by the Supreme Court in 1978, *Bellotti* involved a state statute that restricted corporate expenditures related to certain referendum items.<sup>112</sup> It is important to emphasize that the *Bellotti* case dealt not with restrictions relating to the election of politicians, but with general referendum items,<sup>113</sup> issues not as likely to incite corruption as support for, or opposition to, specific candidates. The *Bellotti* Court found that corporations are entitled to certain First Amendment protections and that the corporation did not lose the protection of that amendment simply because it was a corporation and not a natural person.<sup>114</sup>

The majority used the *Bellotti* opinion to support the idea that no distinctions could ever be made between corporations and individuals with respect to free speech rights.<sup>115</sup> The majority did not seem troubled by the fact that the issue in *Bellotti* and the issue in *Citizens United* had a crucial distinction. Indeed, cases like *Austin v. Michigan Chamber of Commerce*<sup>116</sup> (decided after *Bellotti*) confronted the exact issue before the Court in *Citizens United* and upheld the relevant statute.<sup>117</sup> Those cases distinguished *Bellotti*

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the conceivable dangers to democratic self-rule and popular sovereignty that might result from the failure to impose campaign speech and spending regulation).

111 *Citizens United*, 130 S. Ct. at 900 (quoting *Bellotti*, 435 U.S. at 776).

112 *Bellotti*, 435 U.S. at 767–68 (“The statute at issue [. . .] prohibits [. . .] corporations[] from making contributions or expenditures for the purpose of [. . .] influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.” (footnote omitted) (internal quotation marks omitted)).

113 *Id.* at 767 (describing the Massachusetts statute at issue as “a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals”).

114 *Id.* at 784 (“We thus find no support in the First . . . Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . .”)

115 *Citizens United*, 130 S. Ct. at 904 (employing the *Bellotti* Court’s premise that the First Amendment’s protection of political speech “does not depend on the identity of its source, whether corporation, association, union, or individual” (quoting *Bellotti*, 435 U.S. at 777) (internal quotation marks omitted)).

116 494 U.S. 652 (1990) (upholding the constitutionality of a Michigan statute that, like the BCRA, prohibited corporations from spending corporate treasury funds on electioneering communications), *overruled by Citizens United*, 130 S. Ct. at 913.

117 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990) (holding that the statute at issue passed strict scrutiny, because it was “narrowly tailored to serve a compelling state interest,” and describing the effect of the statute as “prohibit[ing] corporations from making contributions and independent expenditures in connection with state candidate elections”); *see also* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

because the restriction in *Bellotti* related to referendum items, items not likely to incite corruption, and not individual politicians seeking office.<sup>118</sup>

The *Citizens United* majority also relied on *Buckley v. Valeo*.<sup>119</sup> In *Buckley*—which was decided in 1976, just two years before *Bellotti*—the Court confronted a limit on independent expenditures from individuals as well as corporations and unions.<sup>120</sup> The *Buckley* Court found that regulation to be an unconstitutional burden on free speech since the Court reasoned that the regulation did not serve any compelling purpose in combating quid pro quo corruption.<sup>121</sup>

However, the *Buckley* Court did not confront the separate question of whether restrictions on independent expenditures coming only from corporations or unions would be unconstitutional.<sup>122</sup> Nonetheless, the *Citizens United* majority cited to *Buckley* for the proposition that if such a restriction were to be challenged (as it was in *Citizens United*), the reasoning in *Buckley* could not support it.<sup>123</sup> In other words, *Buckley* did not confront

118 *Austin*, 494 U.S. at 659 (citing *Bellotti*, 435 U.S. at 788 n.26, for the proposition that the Court has “recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections,” as opposed to the less serious referendum context at issue in *Bellotti*). In fact, the *Bellotti* opinion “squarely disavowed the proposition for which the majority cites it” in *Citizens United*, i.e. that corporations and unions could not be treated differently from individuals for purposes of campaign regulation. *Citizens United*, 130 S. Ct. at 958 (Stevens, J., concurring in part and dissenting in part).

119 424 U.S. 1 (1976).

120 *Id.* at 7 (“The statutes at issue summarized in broad terms, contain the following provisions: (a) individual political contributions are limited to \$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor; independent expenditures by individuals and groups ‘relative to a clearly identified candidate’ are limited to \$1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission is established to administer and enforce the legislation.”).

121 *Id.* at 45 (finding that even “assuming, arguendo, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, [the statute in question] does not provide an answer that sufficiently relates to the elimination of those dangers,” because it did not establish a total ban on large expenditures and so did not sufficiently eliminate the potential danger of undue influence, because an enterprising person could devise independent expenditures that circumvent the regulation’s restrictions).

122 *Id.* at 29 n.31 (“The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union.”).

123 *Citizens United*, 130 S. Ct. at 902 (“*Buckley* did not consider [FECA] § 610’s separate ban on corporate and union independent expenditures . . . Had [FECA] § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent.”).

the same question that the *Citizens United* Court was confronting, but the majority relied on *Buckley* nonetheless, because the reasoning alone in that case suggested to them that the BCRA should be ruled unconstitutional.<sup>124</sup>

As mentioned above, two cases decided after *Bellotti* and *Buckley* actually did take up questions that were essentially identical to the issue presented in *Citizens United*. The majority cited and discussed those subsequent cases, *Austin*<sup>125</sup> and *McConnell v. FEC*.<sup>126</sup> The majority found that those cases were simply not in accord with the First Amendment jurisprudence of *Bellotti* and *Buckley*, despite the fact that the Courts in those cases had found their resolution of the cases to be entirely consonant with *Bellotti* and *Buckley*.<sup>127</sup> But the majority in *Citizens United* simply disagreed, and thus the relevant parts of those cases (*Austin* completely and *McConnell* in part) were overruled as aberrations.<sup>128</sup>

In *Austin*, decided approximately twenty years before *Citizens United*, the Court confronted a Michigan state statute restricting independent expenditures by corporations supporting or opposing political candidates.<sup>129</sup> *Austin* upheld the restriction on corporations, reasoning that corporate electioneering could have a corrupting and distorting effect on elections.<sup>130</sup> Thus, the regulations in question were justified and passed constitutional

124 *Id.* at 908 (citing *Buckley*'s proposition that the governmental interest in preventing corruption or the appearance of corruption is insufficient as applied to independent expenditures because of its chilling effect on speech and the lessened potential for corruption involved in independent expenditures).

125 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. at 913; *see also supra* text accompanying notes 116–18.

126 *Austin v. Mich. Chamber of Commerce*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. at 913.

127 *Citizens United*, 130 S. Ct. at 912–15 (rejecting *Austin* as “contraven[ing] this Court’s earlier precedents in *Buckley* and *Bellotti*” and accordingly overruling “the part of *McConnell* that upheld BCRA § 203’s extension of [2 U.S.C.] § 441b’s restrictions on corporate independent expenditures”); *McConnell*, 540 U.S. at 122 (distinguishing *Buckley* because that case “addressed issues that primarily related to contributions and expenditures by individuals, since none of the parties challenged the prohibition on contributions by corporations and labor unions”); *Austin*, 494 U.S. at 659 (identifying support in *Buckley* and *Bellotti* for the propositions that, although the Court “has distinguished [independent] expenditures from direct [campaign] contributions, [ . . . ] it has also recognized that a legislature might demonstrate a danger of real or apparent corruption” from corporate independent expenditures) (citing *Bellotti*, 435 U.S. at 788 n.26; *Buckley*, 424 U.S. at 47).

128 *Citizens United*, 130 S. Ct. at 913.

129 *Austin*, 494 U.S. at 655–56.

130 *Id.* at 661 (“Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies [the statute’s] general applicability to all corporations.”).



scrutiny.<sup>131</sup> *McConnell*, decided seven years before *Citizens United*, scrutinized the very same statute under consideration in *Citizens United*: the BCRA.<sup>132</sup> The *McConnell* Court relied on *Austin* to uphold restrictions on corporate electioneering based in part on the potential for such electioneering to corrupt and distort elections.<sup>133</sup>

One of the primary criticisms leveled by Justice Stevens's *Citizens United* dissent (and by President Obama)<sup>134</sup> was that the majority of the Court overturned a century of precedent allowing for regulations of corporations in the area of corporate finance.<sup>135</sup> Well-known constitutional law scholar Laurence Tribe has written that the *Citizens United* opinion shows that the Roberts Court has no "genuine concern with adherence to precedent."<sup>136</sup>

In his dissent, Justice Stevens stated that "[t]he final principle of judicial process that the majority violates is the most transparent: *stare decisis*."<sup>137</sup> Indeed, as just discussed, the majority specifically overturned *Austin* and that portion of *McConnell* that upheld the BCRA's regulation of corporate electioneering.<sup>138</sup> However, the *Citizens United* majority was also clear that *Austin* and part of *McConnell* were the only cases that needed to be overturned.<sup>139</sup> As both cases were decided within the past twenty years, in

131 *Id.* at 666 ("[W]e hold that [the Michigan statute] does not violate the First Amendment . . .").

132 *McConnell*, 540 U.S. at 114 ("In this opinion we discuss Titles I and II of BCRA.").

133 *Id.* at 205 ("We have repeatedly sustained legislation aimed at the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." (quoting *Austin*, 494 U.S. at 660) (internal quotation marks omitted)).

134 See Obama, *supra* note 26, at 8 ("[T]he Supreme Court reversed a century of law [in *Citizens United*] . . .").

135 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 940 (2010) (Stevens, J., concurring in part and dissenting in part) ("Although the majority opinion spends several pages making these surprising arguments [in favor of overruling precedent in *Citizens United*], it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about *McConnell*, even though the *McConnell* Court's decision to uphold BCRA § 203 relied not only on the antidistortion logic of *Austin* but also on the statute's historical pedigree . . .").

136 Laurence H. Tribe, *What Should Congress Do About Citizens United?*, SCOTUSBLOG, (Jan. 24, 2010, 10:30 PM), <http://www.scotusblog.com/?p=15469> ("There is no doubt that *Citizens United v. Federal Election Commission* . . . signals the end of whatever legitimate claim could otherwise have been made by the Roberts Court to . . . a genuine concern with adherence to precedent.").

137 *Citizens United*, 130 S. Ct. at 938 (Stevens, J., concurring in part and dissenting in part).

138 See *supra* note 128.

139 Cf. *Citizens United*, 130 S. Ct. at 913 (majority opinion) (overruling *Austin* and overruling *McConnell* in part, and then concluding that the BCRA could then be considered unconstitutional).

the majority's view, its action was not a denouncement of a century of regulation but rather a correction of relatively recent case law that was an aberration.<sup>140</sup>

With expressed deference to precedent, the *Citizens United* majority reiterated its previous position that “[s]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.”<sup>141</sup> The Court made clear that it would respect precedent unless respecting precedent put it “on a course that is sure error.”<sup>142</sup> Again stressing the importance of free political speech and the right of all people to speak and also to hear every political message that they choose to, the Court found *Austin* and *McConnell* to represent unsustainable infringements on First Amendment rights, despite its proclaimed respect for precedent.<sup>143</sup>

Justice Stevens lambasted the majority, explaining in clear and harsh terms why stare decisis is so crucial, and then arguing that the majority violated the principle by ignoring a century of precedent in order to reach the result it desired in this case.<sup>144</sup> Justice Stevens cited laws and cases that were more than one hundred years old to support the notion that corporations could be treated differently than individuals for free speech purposes in the context of elections.<sup>145</sup> He cited the Tillman Act of 1907 as banning all corporate contributions to candidates.<sup>146</sup> The debate revolving around the passage of that Act more than one hundred years ago discussed the enormous power of corporations and both the actual and perceived corrupting effects corporations have on elections.<sup>147</sup> The Taft-Hartley Act of

140 *Id.* at 903 (identifying two “conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them”).

141 *Id.* at 912 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)) (internal quotation marks omitted).

142 *Id.* at 911–12 (“Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it put us on a course that is sure error.”).

143 *Id.* at 912–13.

144 *Id.* at 938–42 (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for its failure to adequately justify its departure from precedent).

145 *Id.* at 952–54 (identifying an “express distinction between corporate and individual political spending on elections” that “stretches back to 1907, when Congress passed the Tillman Act,” and also referring to the Taft-Hartley Act of 1947 and the Federal Election Campaign Act of 1971).

146 *Id.* at 952–53.

147 *See* Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)) (prohibiting campaign contributions by corporations); *see also* *Citizens United*, 130 S. Ct. at 952–53 (Stevens, J., concurring in part and dissenting in part) (“[T]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.” (quoting S. REP. NO. 3056, 59th Cong., 1st Sess., 2 (1906)) (internal quotation marks omitted)).

1947 enacted restrictions on indirect corporate expenditures on elections.<sup>148</sup> Congress passed the Federal Election Campaign Act of 1971 to restrict the general use of corporate money for contributions and expenditures, again out of a fear of the corrupting influence corporations can have on elections.<sup>149</sup>

In addition to those legislative acts, Justice Stevens of course discussed *Austin* and *McConnell*, the cases the majority deemed to have been resolved incorrectly.<sup>150</sup> Suddenly, argued Justice Stevens, the majority had decided that corporations should not be regulated differently than individuals in this context of campaign finance.<sup>151</sup> According to Justice Stevens, the majority's decision lie in stark contrast to more than one hundred years of precedent and practice<sup>152</sup> and the rhetoric that somehow the BCRA diminished the constitutional right to free speech was simply that—rhetoric. The majority's decision to fly in the face of stare decisis and established precedent “comes down to nothing more than its disagreement with [the law and those cases].”<sup>153</sup>

Justice Stevens discussed the reliance aspects of stare decisis. He explained that individuals and politicians all rely on stare decisis to shape their behavior.<sup>154</sup> Individuals behave in accord with the new case law.<sup>155</sup>

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148 The primary focus being unions. See Labor Management Relations Act of 1947 (“Taft-Hartley Act”), Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60 (1947) (banning political contributions, including independent expenditures, by labor organizations); Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 448, 456–63 (2008) (examining the development and effect of the Taft-Hartley Act, with a particular focus on the expenditure ban in § 304, and characterizing the Act as “anti-union legislation”); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1130 & n.108 (2002) (noting that the Taft-Hartley Act was amended to apply to unions).

149 See generally The Federal Election Campaign Act of 1971 (“FECA”), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (2006)); FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); see also H.R. REP. NO. 93-1239, at 120, 131 (1974) (relying on the Watergate Scandal to justify greater congressional involvement to prevent campaign finance corruption).

150 See generally *Citizens United*, 130 S. Ct. at 938–79 (Stevens, J., concurring in part and dissenting in part) (discussing both cases extensively).

151 *Id.* at 960–61 (“Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.”).

152 *Id.* (identifying a line of campaign finance precedent upholding corporate regulation that has existed “[c]ontinuously for over 100 years”).

153 *Id.* at 941–42 (“[T]he Court’s rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results.”).

154 *Id.* at 940 (“We have recognized that [*s*]tare decisis has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative

Lawmakers fashion subsequent regulations within the parameters of prior decisions.<sup>156</sup> In this specific case, Justice Stevens pointed out that Congress had developed a record 100,000 pages long when it debated the BCRA and that all of those discussions, compromises, and solutions were in reliance on the settled precedent of *Austin*.<sup>157</sup> The dialogue between the branches of government is not to be taken lightly.<sup>158</sup> Justice Stevens described the overruling of *Austin* and the relevant part of *McConnell* as “[p]ulling out the rug beneath Congress.”<sup>159</sup> Justice Stevens went on to describe the majority’s behavior as “procedural dereliction.”<sup>160</sup>

In its opinion, the majority appealed to one of the primary tools of constitutional interpretation, looking to precedent and respecting the principle of stare decisis.<sup>161</sup> It paid deference to those principles, but, of course, in this case found an exception and overruled the well-established precedent cases *Austin* and *McConnell*.<sup>162</sup> It ignored legislation regulating corporations that has been passed periodically for over a hundred years.<sup>163</sup> It relied on strained interpretations of cases from the 1970s, *Bellotti* and *Buckley*, to support its decision, despite the fact that those cases did not confront the same question as the one presented in *Citizens United*.<sup>164</sup> *Austin*

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response.” (alteration in original) (quoting *Hubbard v. United States*, 514 U.S. 695, 714 (1995)) (internal quotation marks omitted).

155 *Id.* (“*Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion.”).

156 *Id.* (“State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin*, for more than a century.” (footnote omitted)).

157 *Id.* (“The Federal Congress has relied on this authority [to regulate corporate electioneering under Supreme Court precedent prior to *Citizens United*] for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. The total record it compiled was 100,000 pages long.” (footnote omitted)).

158 *Cf. id.* (“Pulling out the rug beneath Congress after affirming the constitutionality of [BCRA] § 203 six years ago shows great disrespect for a coequal branch.”).

159 *Id.*

160 *Id.* at 942 (“The novelty of the Court’s procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits.”).

161 *See id.* at 911–12 (majority opinion) (noting the importance of stare decisis and describing the various considerations that inform the decision whether or not to deviate from stare decisis in a specific case).

162 *Id.* at 913.

163 *See id.* at 960 (Stevens, J., concurring in part and dissenting in part) (noting that laws regulating corporate participation in candidate elections have been enacted “[c]ontinuously for over 100 years,” in response to “documented threats to electoral integrity” (quoting *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 522 (2007) (Souter, J., dissenting))).

164 *See id.* at 958–61 (distinguishing *Buckley* from *Citizens United* by explaining that *Buckley* “focused on a very different statutory provision” that does not map onto the independent expenditure ban at hand in *Citizens United*, and distinguishing *Bellotti* as adjudicating the

and *McConnell*, the cases the majority overruled, did confront the same question.<sup>165</sup> The majority went out of its way to overturn those cases and the principle of stare decisis in order to empower the corporation.

### 3. *The Majority Finds No Interest Sufficient to Limit a Corporation's Free Speech*

Of course, as mentioned briefly above, the *Citizens United* majority did acknowledge that some restrictions on First Amendment freedom of speech are permissible.<sup>166</sup> The jurisprudential test that has evolved to balance the constitutional interest against the interest promoted by the regulation is the strict scrutiny test.<sup>167</sup> Under that test, the government must prove that the regulation “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>168</sup>

The FEC's defense of the BCRA built on the *Austin* case, which acknowledged that three interests were sufficient to support regulating corporations in the campaign finance area.<sup>169</sup> Those interests are anticorruption, antidistortion, and, perhaps most importantly for our inquiry into the nature of a corporation, shareholder protection.<sup>170</sup> The majority of the *Citizens United* Court considered those rationales and rejected all three of them in concert with the overturning of *Austin* and part of *McConnell*.<sup>171</sup> With no compelling interest left to support the BCRA, the Court reasoned that the regulation did not pass strict scrutiny.<sup>172</sup>

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validity of “a state statute that barred business corporations' expenditures on some referenda but not others”).

165 *See id.* at 960 (noting that *Austin* and *McConnell* hold that a compelling state interest exists in regulating corporate expenditures to political activity).

166 *Id.* at 899 (majority opinion) (“The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.”).

167 *See id.* at 898 (“Laws that burden political speech are ‘subject to strict scrutiny[.]’ . . .” (quoting *WRTL*, 551 U.S. at 464)).

168 *Id.* (quoting *WRTL*, 551 U.S. at 464) (internal quotation marks omitted).

169 *Id.* at 903 (acknowledging the Government's reliance on the antidistortion rationale from *Austin*, as well as the anticorruption interest and shareholder-protection interests in its argument supporting corporate-speech restrictions).

170 *Id.*

171 *See id.* at 904–11 (rejecting the antidistortion rationale from *Austin*, the anticorruption rationale from *Buckley*, and the shareholder-protection rationale, with the result of overturning *Austin* and a portion of *McConnell*).

172 *See id.* at 913 (overruling *Austin* and the part of *McConnell* that had upheld BCRA § 203).

*a. Anticorruption*

The majority discussed these three rationales relatively briefly, considering the expanse of its opinion. With respect to corruption, the majority reviewed relevant cases that discussed corruption and determined that those cases essentially acknowledged that safeguarding against quid pro quo corruption was a sufficient purpose to allow for some limitations on free speech.<sup>173</sup> The majority specifically relied on *Buckley* in this regard.<sup>174</sup> The *Buckley* Court upheld limitations on direct contributions to candidates, reasoning that there the possibility of quid pro quo corruption was sufficient to justify the limitations.<sup>175</sup> However, the *Buckley* Court struck down limits on electioneering that applied to corporations, unions, and individuals alike.<sup>176</sup> With respect to those electioneering limitations, the *Buckley* Court found that there was no reason to assume that quid pro quo corruption was at risk with electioneering since there is no arrangement with a candidate in advance.<sup>177</sup> Thus, the *Buckley* Court struck down that limitation on free speech as not being justified by the anticorruption rationale.<sup>178</sup> It bears repeating, however, that the electioneering restriction struck down in *Buckley* applied not only to entities like corporations and unions, but also to individuals. Thus, the *Buckley* case is distinguishable from the *Citizens United* case, where no individual's right to free speech was at stake at all. *Austin* and *McConnell* both recognized this distinction and were able to uphold restrictions on corporations, consonant with *Buckley*.<sup>179</sup>

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173 *Id.* at 908 (pointing to the Court's finding in *Buckley* that the anticorruption interest was "sufficiently important" to allow limits on contributions. . . ." (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976))).

174 *See, e.g., id.* at 901–02, 908–10 (citing *Buckley*, 424 U.S. at 1).

175 *Buckley*, 424 U.S. at 26–27 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation. . . . To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.").

176 *Id.* at 45 ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [FECA] § 608(e)(1)'s ceiling on independent expenditures. . . . [Even] assuming, *arguendo*, that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of these dangers.").

177 *Id.* at 47 ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

178 *Id.* at 45 ("[T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures.").

179 *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 122 (2003) ("Our opinion in *Buckley* addressed issues that primarily related to contributions and expenditures by individuals,

The *Citizens United* majority also relied on *Bellotti* as standing for the idea that speech should not be restricted based on the identity of the speaker, regardless of the specter of corruption.<sup>180</sup> Once again, though, the *Citizens United* majority glossed over the fact that the restriction on electioneering in the *Bellotti* case related only to referendum items, arguably issues where corruption would be less likely than electioneering related directly to a political candidate.<sup>181</sup> The *Citizens United* majority did acknowledge that a footnote in the *Bellotti* case left open the possibility that corporate electioneering could, in fact, lead to corruption.<sup>182</sup> However, the *Citizens United* majority quickly dismissed the significance of that footnote and returned to its reliance on *Buckley*.<sup>183</sup> The Court overlooked once again the distinction that the regulation at stake in the *Buckley* case also was regulating independent expenditures by individuals.<sup>184</sup>

The majority then went on to reason that there is simply no evidence that general independent expenditures could lead to corruption or its

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since none of the parties challenged the prohibition on contributions by corporations and labor unions.” (citing *Buckley*, 424 U.S. at 28 n.31)); *McConnell*, 540 U.S. at 138 (“Like the contribution limits we upheld in *Buckley*, [the restrictions in the statute at issue] have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective political speech.”); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (“Although this Court has distinguished [independent] expenditures from direct contributions in the context of federal laws regulating individual donors, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections . . . .” (citing *Buckley*, 424 U.S. at 47)), *overruled by Citizens United*, 130 S. Ct. 913; *see also Citizens United*, 130 S. Ct. at 957–60 (Stevens, J., concurring in part and dissenting in part) (arguing that the Court’s decisions in *Buckley* and *Bellotti* are consistent with *Austin* and *McConnell*).

180 *Citizens United*, 130 S. Ct. at 902 (majority opinion) (“*Bellotti* reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker’s corporate identity.” (citation omitted)).

181 *See id.* at 958–59 (Stevens, J., concurring in part and dissenting in part) (“The anticorruption interests that animate regulations of corporate participation in candidate elections . . . do not apply equally to regulations of corporate participation in referenda.”).

182 *Id.* at 909 (majority opinion) (acknowledging that a “footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption” (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978))).

183 *Id.* (dismissing the importance of *Bellotti* by arguing that the *Bellotti* footnote is “dictum” that “is thus supported only by a law review student comment, which misinterpreted *Buckley*”) (citation omitted).

184 *See id.* at 958 (Stevens, J., concurring in part and dissenting in part) (describing *Buckley*’s holding as “evaluating ‘the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections’” and explaining that, despite the majority’s reliance on *Buckley*, “[i]t is not apparent why this is relevant to the case before us” (quoting *Buckley*, 424 U.S. at 48)); *see also McConnell*, 540 U.S. at 122 (“Our opinion in *Buckley* addressed issues that primarily related to contributions and expenditures by individuals . . .”).

appearance.<sup>185</sup> The majority surmised that there was no valid interest in eliminating corruption that could justify the supposedly drastic limitation on the corporation's constitutional right to free speech.<sup>186</sup>

In his dissent, Justice Stevens lambasted the majority's "crabbed view of corruption."<sup>187</sup> Justice Stevens wrote sarcastically to say that the rhetoric of the majority's opinion had some appeal, but that it did not even begin to approach the reality of the political arena.<sup>188</sup> The majority argued the simple platitude that more free speech is always better and that our citizenry and our democracy depend on the ability to both deliver and to hear political messages.<sup>189</sup> The majority confined corruption to clear examples of quid pro quo corruption and submitted that only such clear examples of corruption should be allowed to interfere with the right to free speech.<sup>190</sup>

Justice Stevens accused the majority's approach to corruption of lacking of any serious analysis.<sup>191</sup> Justice Stevens cited to the district court's opinion in *McConnell*, written by Judge Kollar-Kotelly.<sup>192</sup> That opinion discussed the subtleties of corruption and the evidence that electioneering involves

185 See *Citizens United*, 130 S. Ct. at 910 (majority opinion) (claiming that "there is only scant evidence that independent expenditures even ingratiate").

186 See *id.* at 911 ("When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.").

187 *Id.* at 961 (Stevens, J., concurring in part and dissenting in part) (quoting *McConnell*, 540 U.S. at 152) (internal quotation marks omitted).

188 *Id.* at 979 (Stevens, J., concurring in part and dissenting in part) ("Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.").

189 *Id.* at 911 (majority opinion) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."); see also *id.* at 904 ("Political speech is indispensable to decisionmaking in a democracy . . . ." (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978))) (internal quotation marks omitted).

190 See *id.* at 901–09, (identifying the original support for the anticorruption interest as "concern that large contributions could be given to secure a political *quid pro quo*," and arguing that independent expenditures do not create sufficient risk of *quid pro quo* corruption to justify a limitation on political speech (quoting *Buckley v. Valeo*, 435 U.S. 1, 26 (1976))) (internal quotation marks omitted).

191 *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) ("Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis.").

192 *Id.* at 961–62, 966 (citing *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 555–60, 622–25 (D.D.C. 2003)).



indirect forms of influence peddling.<sup>193</sup> Judge Kollar-Kotelly had found that politicians routinely request corporations to make electioneering communications so that the politicians themselves do not have to engage in disseminating certain messages.<sup>194</sup> She also discovered that politicians routinely communicate with corporations to thank them for distributing those messages.<sup>195</sup> In addition, she found that a vast portion of the American public—80%—believe that corporations get paybacks for engaging in political electioneering.<sup>196</sup> One lobbyist had even testified that indirect expenditures generate more influence with politicians than direct contributions.<sup>197</sup> That testimony went uncontroverted.<sup>198</sup>

In addition to citing Judge Kollar-Kotelly's findings, Justice Stevens also cited to the voluminous legislative record—more than 100,000 pages—supporting the electioneering restriction that was under consideration.<sup>199</sup>

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193 *McConnell*, 251 F. Supp. 2d at 623–24 (“The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the members’ elections. The record also indicates that Members express appreciation to the organizations for airing these election-related advertisements.” (citation omitted)); *Citizens United*, 130 S. Ct. at 961–63, 966 (Stevens, J., concurring in part and dissenting in part) (“In a careful analysis, Judge Kollar-Kotelly made numerous findings about the corrupting consequences of corporate and union independent expenditures in the years preceding BCRA’s passage.” (citing *McConnell*, 251 F. Supp. 2d at 555–60)).

194 *McConnell*, 251 F. Supp. 2d at 623 (“Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as ‘above the fray.’ . . . The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf.”); *see also Citizens United*, 130 S. Ct. at 962 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 251 F. Supp. 2d at 623–24).

195 *McConnell*, 251 F. Supp. 2d at 623 (noting that Members of Congress “express appreciation to organizations for the airing of” electioneering communications); *see also Citizens United*, 130 S. Ct. at 961–62 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 251 F. Supp. 2d at 623–24).

196 *McConnell*, 251 F. Supp. 2d at 623–24 (“Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from these officials when matters arise that affect those corporations and organizations.”); *Citizens United*, 130 S. Ct. at 962 (Stevens, J., concurring in part and dissenting in part) (citing *McConnell*, 251 F. Supp. 2d at 623–24).

197 *McConnell*, 251 F. Supp. 2d at 556 (“[U]nregulated expenditures—whether soft money donations to the parties or issue ad campaigns—can sometimes generate far more influence than direct campaign contributions.” (internal citations omitted)); *see also Citizens United*, 130 S. Ct. at 966 (Stevens, J., concurring in part and dissenting in part) (quoting *McConnell*, 251 F. Supp. 2d at 556).

198 *McConnell*, 251 F. Supp. 2d at 556 (“Plaintiffs have put forth no contrary evidence to rebut the testimony of these consultants and lobbyist.”); *see also Citizens United*, 130 S. Ct. at 966 (Stevens, J., concurring in part and dissenting in part) (quoting *McConnell*, 251 F. Supp. 2d at 556).

199 *Id.* at 940 (citing David B. Magleby, *The Importance of the Record in McConnell v. FEC*, 3 ELECTION L.J. 285 (2004)).

Congress had studied the issue and concluded that corporations involved in electioneering were routinely granted more access to politicians, and gained favor with them.<sup>200</sup> Somehow, those findings of Judge Kollar-Kotelly and of Congress were not sufficient for the majority.

*b. Antidistortion*

The *Citizens United* majority confronted the antidistortion rationale.<sup>201</sup> That rationale was developed clearly in the *Austin* case.<sup>202</sup> As mentioned above, in *Austin* a Michigan statute forbade corporate electioneering designed to support or denounce any particular political candidate.<sup>203</sup> The *Austin* Court ruled that the massive accumulation of wealth in a corporation can have a distorting effect on elections.<sup>204</sup> Preventing that distortion was sufficient justification to support the statute, despite its limitation on corporate free speech.<sup>205</sup>

The *Citizens United* majority considered this antidistortion rationale and rejected it.<sup>206</sup> The majority stressed the importance of a democratic right to free speech and reasoned that simply because people came together to form an association in the form of a corporation, those people should not have their fundamental rights to free speech trampled.<sup>207</sup>

The majority also addressed the notion that the corporation uses funds accumulated for other purposes and may not accurately reflect the views of

200 *Id.* at 961, 966 (noting that “the record Congress developed in passing BCRA” is “a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs”).

201 *Id.* at 904–08 (majority opinion) (rejecting the proposition that the government can legitimately restrict speech in order to equalize the influence of individuals and groups over elections).

202 *Id.* at 904 (describing that interest as “*Austin*’s antidistortion rationale”); *see also* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (“We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views.”), *overruled by Citizens United*, 130 S. Ct. at 913.

203 *Austin*, 494 U.S. at 655–56.

204 *Id.* at 668–69 (“[T]he Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections.”).

205 *Id.* at 659–60 (upholding the constitutionality of the Michigan Campaign Finance Act).

206 *Citizens United*, 130 S. Ct. at 904–08 (evaluating and eventually rejecting the antidistortion rationale as an insufficient interest to support the BCRA under strict scrutiny).

207 *Id.* at 904 (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”).

its shareholders.<sup>208</sup> Instead, corporate electioneering is likely to distort or even controvert the views of its shareholders.<sup>209</sup> The majority found this idea to be without merit, arguing that all political speakers fund their speech through some market mechanism.<sup>210</sup> It is simply unacceptable to use that argument to restrict free speech, or all free speech could be so regulated.<sup>211</sup>

The majority also argued that the antidistortion rationale could enable possible restrictions on media corporations, which obviously have a potential to distort public opinion.<sup>212</sup> Such restrictions on the media would simply also be unacceptable in our democracy.<sup>213</sup> It is interesting to note, however, that restrictions on media corporations were specifically carved out of the regulation under consideration in *Citizens United*.<sup>214</sup> Thus, again, the majority was taking up a concern that was not presented by the case at hand.

In his dissent, Justice Stevens was again adamant that the majority approach had ignored reality, experience, and the empirical research upon which Congress based its decision to pass the BCRA.<sup>215</sup> Here Justice Stevens actually did consider the nature of a corporation and its difference from natural people.<sup>216</sup> He was again sarcastic with the majority, claiming that it seemed not to notice that difference at all.<sup>217</sup> He stated that “corporations

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208 *Id.* at 911 (rejecting these notions and asserting that there is “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy’” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978))).

209 *See id.* at 953, 977 (Stevens, J., concurring in part and dissenting in part) (“When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions.”).

210 *Id.* at 884 (majority opinion) (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.”).

211 *Id.* at 905–06 (describing the logical ramifications of accepting the antidistortion principle, and concluding that, if accepted, that principle would allow widespread suppression of political speech).

212 *Id.* (“*Austin’s* antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations.”).

213 *Id.* at 886, 906–08 (“Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment’s original meaning would permit suppressing media corporations’ political speech.”).

214 *Id.* at 943–44 (Stevens, J., concurring in part and dissenting in part) (“Like numerous statutes, [the BCRA] exempts media companies’ news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.” (footnote omitted)).

215 *Id.* at 971–75 (defending the antidistortion rationale as support for the BCRA).

216 *Id.* at 971–72 (listing a series of characteristics that distinguish individual people from corporations).

217 *Id.* at 975 n.74, 976 (“The majority seems oblivious to the simple truth . . .”).

have no consciences, no beliefs, no feelings, no thoughts, no desires.”<sup>218</sup> He argued that corporations “are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”<sup>219</sup> Further, corporations are able to amass large amounts of resources in their treasury “war chests,” but a corporation’s accumulation of capital has very little, if anything, to do with the political proclivities of its constituents—including investors and customers.<sup>220</sup> Moreover, because a corporation’s mission is centered on making profits, any electoral message that might advance that mission may indeed be antithetical to the political proclivities of the corporation’s constituents.<sup>221</sup>

Because of the power and influence of corporations in our marketplace, corporations could come to dominate our elections and indeed our democracy.<sup>222</sup> This domination might diminish the inclination of citizens to feel vested in the political process at all.<sup>223</sup> It may, in fact, leave citizens (rightly or wrongly) feeling completely disenfranchised and incapable of meaningfully disciplining elected officials.<sup>224</sup> Justice Stevens was again caustic with the majority and described the majority’s approach to this antidistortion rational as “facile” and one that simply “assumes away all of these complexities.”<sup>225</sup>

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218 *Id.* at 972.

219 *Id.*

220 *Id.* at 971 (“The resources in the treasury of a business corporation, furthermore, are not an indication of popular support for the corporation’s political ideas.” (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990), *overruled by Citizens United*, 130 S. Ct., at 913 (internal quotation marks omitted))).

221 *Id.* at 974, 977 (Stevens, J., concurring in part and dissenting in part) (“The structure of a business corporation, furthermore, draws a line between the corporation’s economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim ‘to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.’” (citations omitted) (quoting Brief of Amicus Curiae American Independent Business Alliance in Support of Appellee on Supplemental Question, at 11, *Citizens United*, 130 S. Ct. 876 (Jul. 31, 2009) (No. 08-205))).

222 *Id.* at 974 (“Corporate domination of electioneering can generate the impression that corporations dominate our democracy.” (citation omitted) (quoting *Austin*, 494 U.S. at 659) (internal quotation marks omitted)).

223 *Id.* (“The predictable result is cynicism and disenchantment: an increased perception that large spenders ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic governance.’” (quoting *McConnell v. Fed. Election Comm’n*, 530 U.S. 93, 144 (2003))).

224 *Id.* at 974–75 (“[U]nregulated corporate electioneering might diminish the ability of citizens to ‘hold officials accountable to the people.’” (citing *id.* at 898 (majority opinion))).

225 *Id.* at 975.

*c. Shareholder Protection*

The *Citizens United* majority also considered a shareholder protection rationale as being insufficient to support the regulation on corporate speech.<sup>226</sup> The shareholder protection rationale was partly described above in Justice Stevens's reaction to the majority's antidistortion arguments.<sup>227</sup> Shareholders do not typically invest in corporations to make political statements.<sup>228</sup> When a corporation then takes general corporate funds to advance a particular political issue, it is not speaking for its shareholders but for the officers or directors who made the decision to engage in the political speech.<sup>229</sup> Thus, restrictions on that type of electioneering in fact protect shareholders from funding the political interests of their corporation's managers.<sup>230</sup> Even assuming that corporate managers are solely acting to advance the interests of the corporation, the political message still would not reflect the political beliefs of each of the corporation's shareholders.<sup>231</sup>

The majority dismissed this shareholder protection rationale out of hand, explaining that such a rationale could again lead to restrictions on the free speech of media corporations (despite the fact that once again such restrictions were not at stake in this case).<sup>232</sup> Thus, the Court said, this slippery slope of permitting such regulations is simply an unacceptable limitation on the free speech enshrined by the First Amendment.<sup>233</sup>

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226 *Id.* at 911 (majority opinion) (finding "sufficient" reasons "to reject this shareholder-protection interest").

227 *Id.* at 971, 977 (Stevens, J., concurring in part and dissenting in part) (explaining the corporate motivation and obligation to enhance profits).

228 *Id.* at 977–78 (noting that there is a governmental interest in safeguarding "individuals who have paid money into a corporation or union for purposes other than the support of candidates" (quoting *Fed. Election Comm'n v. Nat'l. Right to Work Comm.*, 459 U.S. 197, 207–09 (1982))).

229 *Cf. id.* at 972 ("Perhaps the officers or directors of the corporation have the best claim to be the ones speaking . . .").

230 *Id.* at 977 ("Interwoven with *Austin's* concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not reflect their support." (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660–61 (1990), *overruled by Citizens United*, 130 S. Ct. at 913) (internal quotation marks omitted)).

231 *Cf. id.* (noting that the political speech initiated by corporate directors is likely to be misaligned with the political preferences of at least some shareholders).

232 *Id.* at 911 (majority opinion) ("The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin's* antidistortion rationale, would allow the Government to ban the political speech even of media corporations.").

233 *Cf. id.* at 905–08 (arguing that a statute that potentially restricts media corporation speech is unacceptable under the First Amendment).

The majority continued its argument, saying that the BCRA was both too broad and too narrow to withstand strict scrutiny.<sup>234</sup> The BCRA is too broad because there are narrower measures the government could have enacted to protect shareholders from indirectly funding political messages that conflict with their own.<sup>235</sup> The BCRA is too narrow for at least two reasons. First, media corporations are exempted.<sup>236</sup> Thus, shareholders in those corporations are left unprotected.<sup>237</sup> Second, the electioneering restrictions are only in effect for certain relatively short timeframes before an election.<sup>238</sup> If shareholders need protection, then surely they need protection beyond just those limited time periods.<sup>239</sup>

Justice Stevens for the dissent again took on the majority and argued that the regulation under consideration in this case, the BCRA, in fact “protect[s] the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not reflect their support.”<sup>240</sup> Justice Stevens argued that this shareholder protection rationale was considered and endorsed by Congress in its enactments that extend back more than a hundred years to the Tillman Act.<sup>241</sup>

Justice Stevens went on to consider the majority’s argument that corporate democracy should function in a way that already protects the shareholders.<sup>242</sup> If the shareholders do not like the message the corporation

<sup>234</sup> *Id.* at 911 (concluding that “[the BCRA] is both underinclusive and overinclusive”).

<sup>235</sup> *Id.* (“[T]he statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms.”).

<sup>236</sup> *Id.* at 905 (“The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.”).

<sup>237</sup> *Id.* at 911 (noting that if “a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses,” then under the shareholder protection rationale, the government would also have “the authority to restrict the media corporation’s political speech”).

<sup>238</sup> *Id.* (“[I]f Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election.”).

<sup>239</sup> *Cf. id.* (“A dissenting shareholder’s interests would be implicated by speech in any media at any time.”).

<sup>240</sup> *Id.* at 977 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660–61 (1990), *overruled by Citizens United*, 130 S. Ct. at 913).

<sup>241</sup> *Id.* (“The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation.”).

<sup>242</sup> *Id.* at 978 (addressing the majority’s claim that “abuses of shareholder money can be corrected ‘through the procedures of corporate democracy’” (quoting *id.* at 911) (majority opinion)).

endorses, they can vote for new management or can simply rely on the “Wall Street Rule” and sell their shares in that corporation.<sup>243</sup> In addition, a shareholder could bring a lawsuit against any manager who puts his or her own interests above those of the corporation.<sup>244</sup>

Interestingly, Justice Stevens retorted that the idea of a corporate democracy is a fragile one.<sup>245</sup> Justice Stevens cited recent works of corporate scholarship to emphasize the reality of the modern investment marketplace.<sup>246</sup> Most individuals own stock through intermediaries and seldom make individual trades.<sup>247</sup> Moreover, it is extremely difficult for an individual to track and identify what corporate electioneering communications have been made by the corporations that such investor holds.<sup>248</sup> Justice Stevens offered an assessment of the specific mechanisms of corporate democracy—voting for management and/or bringing suit against management.<sup>249</sup> He cited to scholars Margaret Blair and Lynn Stout,

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243 *Id.* (concluding that “by ‘corporate democracy,’ presumably the Court means the rights of shareholders to vote” and acknowledging that shareholders who are dissatisfied with the independent expenditures being made by a corporation “can divest”).

244 *Id.* (examining the ability of shareholders “to bring derivative suits for breach of fiduciary duty,” which is a component of the majority’s invocation of “corporate democracy”). For a discussion of how the interests of management and shareholders may significantly diverge in the area of political speech, and how management decisions in this area will likely be shielded from any shareholder input like other business decisions, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010).

245 *Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (pointing out that “many corporate lawyers will tell you that ‘these rights [supposedly included in the concept of corporate democracy] are so limited as to be almost nonexistent,’ given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule” (quoting Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999))).

246 *Id.* (citing Blair & Stout, *supra* note 245, at 298–315, 320; Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1117 (2009); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 165–66, 199–200 (1998)).

247 *See id.* (“Studies show that a majority of individual investors make no trades at all during a given year.” (citing Evans, *supra* note 246, at 1117)); Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisors to Advocate for Shareholders’ Rights*, 34 J. CORP. L. 843, 845 (2009) (discussing the separation of beneficial ownership by investors and legal ownership of corporate shares by intermediaries, and arguing that those intermediaries typically vote with inside corporate managers and do not typically advocate for shareholder rights).

248 *Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (pointing out that, “if the corporation in question operates a PAC, an investor who sees the company’s ads may not know whether they are being funded through the PAC or through the general treasury”).

249 *Id.* (concluding that “[b]y ‘corporate democracy,’ presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty”).

indicating his agreement with them that in this area shareholder “rights are so limited as to be almost nonexistent.”<sup>250</sup>

Other advocates have pointed out the weakness in the market mechanisms that the majority claimed can protect shareholders.<sup>251</sup> Ann Yerger, the Executive Director of the Council of Institutional Investors, testified before a congressional subcommittee after the *Citizens United* decision was made. In that testimony, she explained that the members of her council represent more than three trillion dollars in institutional market investments.<sup>252</sup> Those investors represent pension and other employee benefit funds that by design have a long-term passive investment strategy to protect the pensions of their beneficiaries.<sup>253</sup> Such investors simply are not likely to exercise the “Wall Street Rule” and sell their shares whenever they are dissatisfied.<sup>254</sup> Ms. Yerger further stated in her testimony that the notion of corporate democracy in America is an embarrassment and boils down to little more than shareholders rubber-stamping management’s monopoly on power.<sup>255</sup>

Corporate scholar John Coffee attacked the majority’s reasoning regarding shareholder protection in testimony before a congressional committee immediately after the *Citizens United* decision. In that testimony, he commented that the majority assumed that shareholders have adequate recourse for unchecked political spending by corporations<sup>256</sup> when in reality, “shareholders are actually very constrained in what they can do.”<sup>257</sup>

250 *Id.* (quoting Blair & Stout, *supra* note 245, at 320) (internal quotation marks omitted).

251 *See, e.g.,* Reza Dibadj, *Expressive Rights for Shareholders After Citizens United*, 46 U.S.F. L. REV. 459 (2011) (discussing and dismissing the arguments that: (i) corporate law is sufficient to protect shareholders; (ii) the Wall Street Rule works; and (iii) constitutional rights violations may not be claimed against corporations).

252 *Corporate Governance After Citizens United: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the United States H. Comm. on Financial Services*, 111th Cong. 10 (2010) (statement of Ann Yerger, Executive Director, Council of Institutional Investors) (“[T]he Council is a nonpartisan association of public, union, and corporate employee benefit plans with assets exceeding \$3 trillion.”).

253 *Id.* (explaining that the Council “is a nonpartisan association of public, union, and corporate employee benefit plans” who are “long-term patient investors due to their lengthy investment horizons and heavy commitment to passive investment strategies”).

254 *Corporate Governance After Citizens United: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the United States H. Comm. on Financial Services*, 111th Cong. 91 (2010) (testimony of Ann Yerger, Executive Director, Council of Institutional Investors) (“Because these passive strategies restrict Council members from exercising the ‘Wall Street walk’ and selling their shares when they are dissatisfied, corporate governance issues are of great interest to our members.”).

255 *Id.* at 99 (“The current system of rubber stamp voting and management’s monopoly of the ballot are embarrassingly unworthy of our democracy.”).

256 *Corporate Governance After Citizens United: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the United States H. Comm. on Financial Services*, 111th Cong. 45 (2010) (testimony of John C. Coffee, Jr., Adolf A. Berle



Professor Laurence Tribe went as far as to say that “talk of shareholder democracy is largely illusory.”<sup>258</sup> Further, he stated that the problem of allowing corporate managers to use shareholder assets to advance their own political agenda is “undeniable.”<sup>259</sup> Finally, other scholars have expressed concerns that allowing corporate managers to make political contributions with corporate funds amounts to coercing shareholders to support political speech.<sup>260</sup>

In sum, the *Citizens United* case represents a turning point in jurisprudence that is at the intersection of contract, corporate, and constitutional law. The conservative majority of the Court contravened well-accepted canons of judicial behavior to take on a facial challenge to a corporate regulation that was not raised by the parties themselves.<sup>261</sup> To the dismay of the dissent, the majority went on to contravene precedent and elevate and act on rhetoric instead of a well-considered analysis of the circumstances surrounding the regulation.<sup>262</sup> Furthermore, the analysis of the majority lacks any coherent conception of what a corporation is and how it functions in society. Indeed, the majority seems to ignore prevailing corporate law scholarship that helps describe what a corporation is, what its role in society is, and when and how it might be regulated. In the end, the

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Professor of Law, Columbia Law School) (“[B]oth the majority and Justice Scalia’s concurring opinion in *Citizen United* [sic] assume and state that shareholders have the power to curb and restrict the use of corporate funds for political or electioneering purposes.”).

257 *Id.*

258 Tribe, *supra* note 136 (“To be sure, the statutory and decisional laws of every state already create theoretical rights in individual shareholders to sue corporate boards under state law for making ‘wasteful’ expenditures, expenditures that do not advance the corporation’s interests, but talk of shareholder democracy is largely illusory in a world where there are countless obstacles to vigilant oversight of corporate management by the widely dispersed ‘owners’ of the underlying enterprise, especially when most of those owners have only the most attenuated link to their stock holdings, a link made all the more tenuous by the fact, noted in the Stevens dissent in *Citizens United*, that ‘[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, . . . which makes it more difficult both to monitor and to alter particular holdings.” (alteration in original) (quoting *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 978 (2010) (Stevens, J., concurring in part and dissenting in part))).

259 *Id.* (“[I]n the context of for-profit, business corporations, that problem is undeniable.”).

260 See, e.g., Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 499 (2011) (arguing that “unrestricted corporate political speech poses a risk of compelled speech”).

261 See *Citizens United*, 130 S. Ct. at 979 (Stevens, J., concurring in part and dissenting in part) (“Today’s decision is backwards in many senses. It elevates the majority’s agenda over the litigants’ submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.”).

262 *Id.*

majority achieved a result that portends a much more dominant role of corporations in the American economy as well as American politics.

## II. PART TWO: THE CONTRACTARIAN ANALYSIS

As has just been discussed, the *Citizens United* decision has empowered corporations with the constitutional rights of individuals, at least in the context of campaign finance. The decision is decidedly de-regulatory in nature. It has established new precedent that will make it more difficult for legislative bodies to regulate corporations in the future. However, the majority's decision established this new precedent while largely ignoring corporate law scholarship that presents a variety of theories through which the courts might more appropriately view a corporation and its role in society.<sup>263</sup>

By contrast, Justice Stevens for the dissent seemed to discuss and adopt what has been known as the state entity theory of a corporation.<sup>264</sup> This Part will more fully examine the state entity theory. It will also highlight what is arguably the prevailing theory of a corporation: the contractarian's nexus of contracts theory.<sup>265</sup> Both of these theoretical perspectives lead to a necessary conclusion that the majority decided *Citizens United* incorrectly.

Part Two will provide support for future judicial and legislative bodies to resist the corporate de-regulatory movement represented so starkly by the *Citizens United* majority. More generally, this Part will explain how the contractarian paradigm can provide a framework for courts and legislatures in the future to set and evaluate appropriate regulations on corporations.

### A. *The Corporation as a State Entity*

Justice Stevens referred specifically to the state entity theory of the firm in a footnote in his dissent.<sup>266</sup> Ironically, there he explained that his analysis of the *Citizens United* case does not depend specifically on accepting one or

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<sup>263</sup> For examples of that corporate law scholarship, see *supra* text accompanying note 9.

<sup>264</sup> See *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part) (distinguishing corporations from natural people and arguing that "[t]he conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case").

<sup>265</sup> Although this Part focuses on the state entity and contractarian theories, there are other theories of the corporation that have significant support. One of those is the team production model, which discusses a corporation as a team of resources that work together to produce a profit. The focus of that model is then how to divide the profits. See Blair & Stout, *supra* note 245.

<sup>266</sup> *Citizens United*, 130 S. Ct. at 971 n.72 (Stevens, J., concurring in part and dissenting in part).

another of the prevailing theories of a corporation;<sup>267</sup> however, his description of a corporation coincided directly with the state entity theory (also known as the artificial entity theory or the concession theory).<sup>268</sup>

Justice Stevens characterized this theory as conceptualizing a corporation as “a grantee of a state concession.”<sup>269</sup> Justice Stevens pointed out that the *Austin* case, discussed above, described the firm as a grantee of concessions from the state (and upheld the restrictions on corporate electioneering).<sup>270</sup> This state entity theory essentially posits that because corporations are created by the state (i.e. given a concession to exist and engage in certain activities), the state should have the right to regulate them.<sup>271</sup>

The view of a corporation offered by proponents of the state entity theory matches the description of a corporation that Justice Stevens put forth in his dissent.<sup>272</sup> Justice Stevens framed his description of the corporation with a historical perspective.<sup>273</sup> As Justice Stevens detailed, only a few hundred corporations existed when the Constitution was written.<sup>274</sup> Unlike today, however, early incorporations were created by individual acts

267 *Id.* (“Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model.” (citations omitted)).

268 He specifically cites to the state entity theory (also known as the artificial entity or the concession theory), the nexus of contracts theory, and the team production theory (which will not be discussed in this Article, as it has been overtaken by the nexus of contracts theory as the prevailing paradigm through which current corporate law scholars view and discuss the firm). *Id.* (“Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model.” (internal citations omitted)).

269 *Id.* (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819)).

270 *Id.* (“*Austin* referred to the structure and the advantages of corporations as ‘state-conferred’ in several places.” (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660, 665, 667 (1990), *overruled by Citizens United*, 130 S. Ct. at 913)).

271 See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989) (“Concession theory [also known as state entity theory] comes in degrees. A strong version attributes the corporation’s very existence to state sponsorship. A weaker version sets up state permission as a regulatory prerequisite to doing business.” (footnote omitted)); see also David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 206–11 (1990) (“The corporate entity was considered artificial, in the sense that the corporation owed its existence to the positive law of the state rather than to the private initiative of individual incorporators.”).

272 *Citizens United*, 130 S. Ct. at 947–51 (Stevens, J., concurring in part and dissenting in part) (“Corporations were created, supervised, and conceptualized as quasi-public entities, ‘designed to serve a social function for the state.’” (quoting Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945))).

273 *Id.* at 949–50 (“The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare.”).

274 *Id.* at 949 n.53 (“Scholars have found that only a handful of business corporations were issued charters during the colonial period, and only a few hundred during all of the 18th century.”).

of the legislature.<sup>275</sup> A corporation had to obtain legislative approval to exist and act in any way whatsoever. This individualized method of state authorization to act betrays an early mistrust of corporations.

Justice Stevens quotes a variety of early jurists and commentators in describing corporations as “soulless” and capable of encouraging “the worst urges of whole groups of men.”<sup>276</sup> Early corporations would petition the state for a charter and would limit themselves to certain very specific activities in order to gain the approval of the state for their charter.<sup>277</sup> Any activity that went beyond the stated purpose was considered *ultra vires*, or beyond that corporation’s power.

States began to charter corporations because of the corporation’s unique ability to aggregate resources and accomplish tasks that might have been difficult or impossible otherwise.<sup>278</sup> States grant the shareholders of corporations the privilege of limited liability, making corporations an extremely attractive vehicle for the aggregation and deployment of large amounts of invested resources.<sup>279</sup> Shareholders risk only the amount of their investment, and any further debts of the corporation are discharged solely with corporate assets.

Professor Reuven Avi-Yonah traces the state entity theory to the landmark *Dartmouth College*<sup>280</sup> case, decided in 1819.<sup>281</sup> In that case, Chief Justice Marshall considered what a corporate charter really signified. Was it merely a contract with the state, or did it give the state the power to take

275 See Millon, *supra* note 271, at 206 (describing “the practice of requiring a special act of the state legislature for each instance of incorporation”).

276 *Citizens United*, 130 S. Ct. at 949 (Stevens, J., concurring in part and dissenting in part) (citing FRIEDMAN, *supra* note 86, at 194).

277 Interestingly, early corporations in America often had a public function. So, for example, early corporations involved activities like banking, insurance, and the building and maintaining of public utilities. See generally JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 17 (1970) (“From the 1780’s well into mid-nineteenth century the most frequent and conspicuous use of the business corporation . . . was for one particular type of enterprise, that which we later called public utility and put under particular regulation because of its special impact in the community.”).

278 *Id.* at 20 (discussing the emergence of the corporate form, and explaining that only through the legal grant of the corporate charter were corporations then authorized to “use assets or exact payments or impose burdens on others in ways which would have been either impracticable or illegal or both without the law’s specific sanction”).

279 *Id.* at 27–28 (discussing the value of the limitation on liability that the corporate form affords its shareholders).

280 *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (discussing the validity of corporate charters granted by the British government after the Revolutionary War).

281 Avi-Yonah, *supra* note 9, at 1005 (“These opinions represent the evolution of [Chief Justice Marshall’s] thinking on corporations, which moved from the aggregate view . . . to the artificial entity view, [articulated in] *Dartmouth College* . . .”).

control of the corporation?<sup>282</sup> Justice Marshall stated that a corporation “is an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>283</sup> While a state could not take over a corporation, Justice Marshall’s view of the corporation “left ample room for state regulation.”<sup>284</sup>

Today, corporations do not need to seek specific legislative action to incorporate. Instead, general incorporation statutes allow parties to form corporations, typically electronically, within hours, if not minutes.<sup>285</sup> And corporate activities are not typically restricted as they used to be. Most corporations are incorporated to pursue any legal purpose, dispensing with the notion that a corporation might be acting *ultra vires*.<sup>286</sup>

Nonetheless, proponents of the state entity theory hold that, by enacting general incorporation statutes, states are allowing corporations to come into existence and act as legal persons. Corporations are granted a fictional birth when they are incorporated and at that moment become a fictional legal person with certain rights and privileges. Proponents of the state entity theory believe that the state should have the ability to limit the rights and privileges it grants to corporations if doing so would advance the interests of the political community within which the corporation operates.<sup>287</sup>

The state entity or concession theory of a corporation has had varying degrees of prominence over the years. Over the past thirty years, the neo-classical economic view of a corporation as a nexus of contracts (the

282 In that case, New Hampshire had attempted to take over Dartmouth by taking control over the appointment of the trustees of the college. *Woodward*, 17 U.S. at 518–25.

283 *Id.* at 636.

284 Avi-Yonah, *supra* note 9, at 1007 (“[T]he emphasis on the artificial nature of the corporation left ample room for state regulation via the original charter.”). Note that Professor Avi-Yonah goes on to argue his view that understanding a corporation as a real entity and not just an artificial entity is actually more fitting. *Id.* at 1032 (concluding that one of the reasons for the prevalence of the real entity view is that it “fits reality much more” than either the artificial entity view or the aggregate view).

285 For an example, see Florida’s Sunbiz website, which allows for electronic incorporation, and Delaware’s incorporation procedures, which allow for incorporation by fax of all of the relevant documents. *Electronic Filing & Certification*, FLA. DEP’T OF STATE DIV. OF CORPS., <https://efile.sunbiz.org/onlmenu.html> (last visited Dec. 19, 2012); *How to Form a New Business Entity*, DEL. DEP’T OF STATE: DIV. OF CORPS., <http://corp.delaware.gov/howtoform.shtml> (last updated Nov. 14, 2012).

286 For an example, see Delaware’s corporate law, which states that “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.” Del. Code Ann. tit. 8 § 101(b).

287 *Cf.* Avi-Yonah, *supra* note 9, at 1001 (describing the artificial entity theory’s understanding of a corporation as “a creature of the State”); see also Millon, *supra* note 271, at 211 (“[T]he idea of the corporation as an artificial creature of the state provided the theoretical basis for a body of corporate law that explicitly addressed the relationship between corporate activity and public welfare.”).

contractarian paradigm) has taken center stage.<sup>288</sup> However, the state entity theory still has traction, as indicated by the *Citizens United* dissent itself, in which Justice Stevens's description of a corporation coincides with a view of the corporation as a grantee of state concessions.

Most recently, Professor Sale has made a call for public corporations to be viewed in a new public way that focuses on those corporations as the product of a variety of forces exerted throughout society, including the media, the internet, and the state.<sup>289</sup> Professor Sale does not couch her new call in the traditional theory of the firm as a state entity. Nonetheless, she echoes that theory when she argues that public corporations are now, less than ever before, about private orderings with an increasing regulatory role being exerted by the state.<sup>290</sup>

The implications of the state entity theory for the regulatory environment are clear. Government regulation of corporations is appropriate and should be designed to optimize the role of corporations in society. In accord with this theory, the BCRA would be seen as an entirely legitimate and permissible act by the government.

The *Citizens United* case echoed *Austin* when it discussed a threefold purpose behind the type of campaign finance regulation at stake: to (i) reduce corruption in politics; (ii) reduce distortion corporations might cause in the political process; and (iii) prevent use of shareholder assets to support political candidates whom the shareholders do not support personally.<sup>291</sup> Any of those rationales would be sufficient justifications for the BCRA in the eyes of a proponent of the state entity theory.

Indeed, Justice Stevens came to the same conclusion in his dissent: that the BCRA was entirely constitutional.<sup>292</sup> This state entity theory empowers the corporation only to the extent that the legislature sees appropriate. It does not and would not easily allow a corporation to trump the interests of

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288 See Bainbridge, *supra* note 92, at 859 (arguing that the economic theory of the firm has taken over all serious corporate law scholarship and, in a particularly aggressive characterization of that predominance, proclaiming that the debate over whether the economic view should predominate is "over").

289 Sale, *supra* note 93, at 138 (positing that a "theory of the corporation that operates in a public sphere" and "a need for change in the way that officers and directors understand and do their jobs" are the necessary results of the fact that "the government and the media have increasing influence over public corporations and their governance").

290 *Id.* at 148 (arguing that, as a result of recent corporate scandals, more government regulation of corporations is likely).

291 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 903 (2010) (evaluating in turn the three considerations the FEC argued were compelling interests supporting the BCRA: "the antidistortion rationale on which *Austin* and its progeny rest in part," "an anticorruption interest," and "a shareholder-protection interest" (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 674-75, 678 (1990) (Brennan, J., concurring), *overruled by Citizens United*, 130 S. Ct. at 913)).

292 *Id.* at 979 (Stevens, J., concurring in part and dissenting in part).

the government that created it. Instead, proponents of this theory empower the government with the right to regulate the corporation.

### B. *The Contractarian Paradigm*

The nexus of contracts theory of the corporation stands in contrast to the state entity theory. This theory began to be discussed actively in the 1980s.<sup>293</sup> It has grown in popularity to become the leading economic perspective on the corporation and is now more generally the predominant theory of corporations discussed by corporate scholars.<sup>294</sup>

#### 1. *The Corporation as a Nexus of Contracts*

Like the state entity theorists, so-called contractarians acknowledge that a corporation comes into being when a state grants that corporation its charter. However, these theorists characterize the chartering act differently than the state entity proponents. Contractarians give the act of chartering much less significance, viewing it simply as the state witnessing the emergence of an organization that involves a private ordering among a variety of constituents. Indeed, contractarians view the corporation as a nexus or a hub of privately structured contractual arrangements among all of those constituents.<sup>295</sup> The constituents of a corporation include the corporation's shareholders, managers, customers, suppliers, employees, service providers, creditors, and even arguably the community within which the corporation is located.<sup>296</sup>

This contractarian view of the firm is built on the fundamental notion, arguably embedded in the U.S. Constitution,<sup>297</sup> that individuals should have

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<sup>293</sup> The notion of a corporation being viewed as a nexus of contracts was introduced in Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) ("The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships . . .").

<sup>294</sup> See Bainbridge, *supra* note 91, at 859.

<sup>295</sup> Jensen & Meckling, *supra* note 293, at 311 ("The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships . . .").

<sup>296</sup> *Id.* at 310 ("Contractual relations are the essence of the firm, not only with employees but with suppliers, customers, creditors, etc..").

<sup>297</sup> There is a long history of finding the liberty of contract within the U.S. Constitution. Most notably, there is the provision in Article I, § 10 stating that no State "shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. Moreover, the Fourteenth Amendment's liberty provision has been interpreted by a long line of cases as providing for economic liberty. U.S. CONST. amend. XIV, § 1 (stating that no state shall "deprive any person of life, liberty, or property, without due process of law"). The most infamous case to divine a liberty of contract right from this provision was *Lochner v. New York*. 198 U.S. 45, 53 (1905) ("The general right to make a contract in

the liberty of contract to structure their own arrangements without the undue interference of the government.<sup>298</sup> This notion, of course, is where the contractarians diverge from the state entity theorists. While the state entity proponents argue that whatever the state creates it can regulate, the contractarians argue that the state's role should be limited to enforcing and policing the privately structured contracts that create and sustain the corporation.<sup>299</sup>

So, for example, an employee of a corporation strikes a bargain—i.e. enters a contract—with the corporation when both parties agree to certain terms of employment. Creditors likewise enter into certain agreements with a corporation to provide financing in accord with certain contractual terms. And shareholders should understand that they are getting a bundle of rights with respect to that corporation in exchange for the money they invest.<sup>300</sup>

Contractarians would argue that all of these parties should strike the bargain they find acceptable and live within the terms of that bargain, or else they will find themselves in breach and possibly subject to legal recourse from their counterparties. Again, the traditional contractarian argument is that there is no compelling need for government regulation or oversight beyond the policing and enforcement of the contractual bargains.<sup>301</sup>

## 2. *Constitutional Support for Liberty of Contract*

This liberty of contract idea finds its source in the Fifth and Fourteenth Amendments to the Constitution. Both provisions discuss the primacy of an

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relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

<sup>298</sup> See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15, 22–23 (1991) (asserting that justifications for intervention by the state are not applicable to “intra-corporate affairs”); Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Law*, 89 COLUM. L. REV. 1599 (1989) (discussing the permissive nature of corporate law, which allows parties to structure their own contracts freely).

<sup>299</sup> Bainbridge, *supra* note 91, at 860 (“Contractarians contend that corporate law is generally comprised of default rules, from which shareholders are free to depart, rather than mandatory rules.”).

<sup>300</sup> This notion of limited government regulation of corporations underscores the fact that many corporate laws are default laws, which allow parties to opt out of their application. See, e.g., Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 526–27 (1999) (describing statutes adopted by some jurisdictions that allow shareholders to contract out of common law constraints and adopt different fiduciary standards).

<sup>301</sup> For more discussion of this notion that corporate regulation should be at a minimum, see Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).



individual's liberty, stating that the government shall not "deprive" an individual of "liberty . . . without due process of law."<sup>302</sup>

Dating back to the late 1800s, federal case law interpreted those clauses to indicate that all individuals must have the liberty to structure their lives and their business dealings as they deem proper, and to enter into contracts to effectuate those arrangements. The earliest federal case to discuss this liberty of contract notion was *Allgeyer v. Louisiana*.<sup>303</sup> In that case, Justice Peckham made the now-famous statement that:

The liberty mentioned in [the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out . . . [those] purposes . . . .<sup>304</sup>

The most notorious case for enshrining this notion of a liberty of contract is *Lochner v. New York*, decided in the early 1900s.<sup>305</sup> In that case, a state statute that regulated the working hours for bakers was challenged as violating the liberty of contract interest enshrined by the Fourteenth Amendment.<sup>306</sup> The Supreme Court found that the liberty interest was paramount and struck down the statute for impinging on the individuals' rights to structure their working arrangements as they saw fit.<sup>307</sup>

The *Lochner* case was later demonized as a perfect example of judicial activism, with the Justices enforcing their own libertarian preferences for a laissez-faire economy, contrary to the policies that certain legislative bodies were enacting.<sup>308</sup> Cases decided just a few decades after *Lochner* would

<sup>302</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>303</sup> 165 U.S. 578 (1897) (striking down as unconstitutional a Louisiana regulation that made it criminal to enter into an insurance contract with an out-of-state insurer that did not comply with Louisiana law).

<sup>304</sup> *Id.* at 589.

<sup>305</sup> 198 U.S. 45 (1905).

<sup>306</sup> *Id.* at 53.

<sup>307</sup> *Id.* at 57 ("The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.")

<sup>308</sup> Justice Holmes wrote the dissent and described the majority opinion as promoting a laissez-faire political and economic agenda. *Id.* at 75 (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain."). Other scholars have seized on that dissent to decry the opinion as judicial activism at its worst. See, e.g., David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 218–19 (2009) (referring to the decision as an "egregious instance of judicial activism" and explaining

question what this liberty of contract was and where was it found in the Constitution.<sup>309</sup> Moreover, faced with the Great Depression and pressure from the executive branch, the judiciary in the 1930s and 1940s routinely upheld statutes regulating the workplace<sup>310</sup> in contravention of the precedent set by the *Lochner* case.

Despite the *Lochnerian* tradition falling out of favor, corporate contractarians today still espouse the notion that the constituents of a corporation should be given the liberty of contract to structure their business as they see fit, without undue government interference. However, as I have argued elsewhere, the logical application of the *Lochnerian* liberty of contract is not a libertarian utopia free of government regulation.<sup>311</sup> On the contrary, if the government has sufficient reason for asserting a regulation, then the liberty of contract can be limited. Therefore, a contractarian view of the corporation is compatible with and supportive of government regulation, where the regulation has sufficient justification.<sup>312</sup>

As the *Lochner* case itself explained, the liberty of contract found in the Fifth and Fourteenth Amendments to the Constitution is not without limits.<sup>313</sup> If government regulation is “fair, reasonable, and appropriate” then the regulation should withstand constitutional scrutiny.<sup>314</sup> So, for example, in *Lochner*, the Supreme Court examined whether there was an important reason for regulating the working hours of bakers.<sup>315</sup> The

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that constitutional law casebooks, legal history textbooks, commentaries written by conservatives and liberals, and opinions by Supreme Court justices all share this view).

309 For example, the Court asked in *West Coast Hotel Co. v. Parrish*, “What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty . . . .” 300 U.S. 379, 391 (1937).

310 See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (upholding a statute prohibiting the shipment of filled milk in interstate commerce).

311 See Joseph F. Morrissey, *A Contractarian Defense of Corporate Regulation*, 11 *TRANSACTIONS: TENN. J. BUS. L.* 135, 136 (2009) (disagreeing with the contractarian view that “because corporations involve nothing more than private contractual orderings among various parties, there should be little or no meaningful regulation to impinge on those parties’ liberty to contract as they see fit”).

312 For a slightly different application of this idea, see Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 *FORDHAM L. REV.* 1161, 1161 (2010) (arguing that regulation of corporations is compatible with a contractarian approach to corporations because the state is thereby enforcing “implicit contractual obligations of good faith and fair dealing”).

313 See *Lochner*, 198 U.S. at 53–56 (explaining that the state has the power to prevent individuals from making certain kinds of contracts, but that there is also a limit to the exercise of the police power by the state).

314 *Id.* at 56.

315 *Id.* at 58–64.

majority of that Court found none and thus the Court struck down the regulation.<sup>316</sup>

The dissent, however, argued vociferously that there was ample evidence of harsh working conditions in the baking industry and that bakers were being subjected to unhealthy conditions: “Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living.”<sup>317</sup> The standard the *Lochner* majority set up for finding a regulation constitutional could have easily been met had the majority agreed with the dissent’s reasoning.

### 3. *Modern Contract Law Jurisprudence Justifies Regulation*

The liberty of contract notion is premised on the assumption that parties freely enter into bargains and that the resulting contracts should be upheld and not subject to interference or regulation by the government. As is fairly easy to imagine in the *Lochnerian* example of harsh working conditions for bakers in the early 1900s, it is frequently the case that parties do not have equal bargaining power and that resulting bargains are not freely struck.<sup>318</sup>

Modern principles of contract law acknowledge the potential for defects in the contracting process and for resulting inequitable bargains. Among the doctrinal defenses to the enforcement of a contract are: incapacity, mistake, fraud, misrepresentation, duress, unconscionability, and lack of good faith and fair dealing.<sup>319</sup> Often, entire categories of contracts (like employment agreements with bakers in the early 1900s) are plagued by any of the above-named defenses. Since the assumption that parties freely and fairly enter into contracts is therefore often not true, the maxim that government regulation should be limited becomes fallacious.

If a contract is challenged in court after it has been made (i.e. *ex post*), the successful application of any of those contract law defenses just mentioned may lead to the contract being unenforceable. It is therefore my argument that if the government can show that there is a likelihood for a category of contracts to be infected by some such defect, then government

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<sup>316</sup> *Id.* at 64 (“It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. . . . Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”).

<sup>317</sup> *Id.* at 70.

<sup>318</sup> For a more thorough discussion of this point, see Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 654–55 (2011).

<sup>319</sup> See RESTATEMENT (SECOND) CONTRACTS §§ 12, 151–58, 159–73, 174–77, 205, 208 (1981).

can justify regulation in that area in advance (i.e. *ex ante*). Not only is such regulation justifiable, it is also prudent and should be encouraged.

#### 4. *The Contractarian Paradigm as an Assessment Tool*

As has just been discussed, the contractarian paradigm can be used to assess whether and when corporate regulation is appropriate. When applying the contractarian paradigm, a distinction needs to be drawn between whether a proposed regulation is constitutional and whether the proposed regulation is prudent.

The *constitutional* hurdle is perhaps the easier of the two to meet, but may be more difficult to understand conceptually. Any regulation must first be justified constitutionally as a legitimate exercise of legislative power, and second must not offend any other provision of the Constitution. As the Commerce Clause will provide the most likely justification for a federal corporate regulation, so the first prong of the constitutional analysis likely will not prove controversial.<sup>320</sup>

However, even if the federal government has the authority to enact a statute, it is constitutionally forbidden from violating any other provision of the Constitution.<sup>321</sup> Under the contractarian paradigm, the constitutional interest at stake is not the corporation's free speech right, as the majority in *Citizens United* decided, but the corporate constituents' liberty of contract to enter into any bargain deemed appropriate. Constitutionally, the government should be allowed to intrude on that liberty interest only if there is a sufficient reason. The liberty of contract cases from the *Lochner* era used broad language that suggest a regulation is constitutional when it is "fair, reasonable, and appropriate."<sup>322</sup>

Under today's jurisprudential tests applied to the Fifth and Fourteenth Amendments' Due Process Clauses, the Court uses three levels of scrutiny to assess whether those clauses of the Constitution are offended: rational basis, intermediate scrutiny, and strict scrutiny.<sup>323</sup> Where a Fifth or Fourteenth Amendment right is not deemed fundamental, rational basis review is used

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<sup>320</sup> For a general discussion of the current state of Commerce Clause jurisprudence in the United States, see *Gonzalez v. Raich*, 545 U.S. 1, 2 (2005) (holding that "Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law").

<sup>321</sup> For a general discussion of this idea, see *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that a statutory scheme adopted by Virginia to prevent marriages between persons on the basis of race was inconsistent with and violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

<sup>322</sup> *Lochner*, 198 U.S. at 56.

<sup>323</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 567 (1996) (describing the three tests available to evaluate an Equal Protection claim); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (employing strict scrutiny).

and regulations prevail if they are adopted for some rational purpose.<sup>324</sup> If courts apply the three levels of scrutiny to the liberty of contract interest, that interest will likely receive only rational basis review.<sup>325</sup>

Using this contractarian paradigm, then, regulations that intrude on the liberty of contract of the parties involved will pass the rational basis review and be deemed constitutional when there is any rational purpose for the statute. Correcting for systematic defects in the contracts being regulated would surely qualify as a rational purpose. Thus, regulations adopted after application of the contractarian paradigm are likely to be constitutional (assuming they are not discriminatory and do not otherwise offend the Constitution).

The second question is whether a particular regulation is *prudent* under the contractarian paradigm. Those prudential decisions are not fraught with the jurisprudential complexity of a constitutional analysis, but are likely to be complex policy questions. Those questions should be left for legislators to answer.<sup>326</sup> The contractarian paradigm can help legislators craft appropriate policies.

In assessing the appropriateness of any regulation, the starting point for the contractarian is a liberty of contract position. That position begins with an assumption that the parties to transactions relating to the corporation (those in the nexus of contracts) should be free of regulation. This means that the liberty of contract enjoyed by the parties to the transaction should be honored and preserved to allow those parties to achieve the results they deem appropriate. In economic terms, it allows parties to maximize their own value or utility from each transaction.

However, it is my argument that even for the contractarian, that presumption in favor of the autonomy of the parties and against government regulation must shift when the contracts involved are subject to

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324 The jurisprudential framework for analyzing constitutional rights under the Fifth and Fourteenth Amendments dates back to *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which argued that the judiciary should generally defer to the legislative branch unless there is a fundamental right involved or invidious discrimination against a group needing judicial protection.

325 However, for example, a contract relating to child custody may implicate a fundamental right that triggers a heightened level of scrutiny for government regulation.

326 See Jeffery Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 3 (2007) (holding up Chief Justice John Marshall as a model of judicial restraint, and comparing him in this regard to current Chief Justice John Roberts). Roberts himself has repeatedly used the metaphor that judges are meant to act as umpire and only call the balls and the strikes. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee, C.J. of the U.S. Supreme Court) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

an applicable jurisprudential defense against enforceability. In other words, the presumption would shift when the enforceability of those contracts could be successfully challenged with contract law jurisprudence through ex post litigation, i.e. litigation that occurs after the contract has been struck. This is where contract law jurisprudence is instructive. Any contracts that as a class would trigger any of the defenses to contract enforcement ex post are thereby defective ex ante. It follows that those contracts are in need of regulation to redress those deficiencies. Included among those defenses are fraud, misrepresentation, duress, unconscionability, and lack of good faith and fair dealing.<sup>327</sup>

Courts can and should intervene to opine on the constitutionality of a regulation. However, beyond the constitutional decision, it is for the legislature to craft and adopt regulations that might best redress the contracting flaws involved in any category of transaction being regulated. For those determinations, the elected legislative body is best suited to find the most prudent regulatory solutions.

### C. A Contractarian View of *Citizens United*

In accord with the nexus of contracts paradigm, the *Citizens United* case likely would have had the opposite outcome, finding the electioneering regulation both constitutional and appropriate. As discussed by both the majority and the dissent in *Citizens United*, one argument put forth to uphold the electioneering regulation was the shareholder protection rationale.<sup>328</sup> In the contractarian framework, this argument is stronger as an argument to support and enforce the bargain, or the contract, that the shareholders strike with a corporation when the shareholder makes a decision to buy stock in that company.

This contract or bargain is often not a contract with the corporation in the legal sense, since many shareholders buy stock in the securities markets, long after the company itself has sold the stock. In most cases, the company is not technically a party to the bargain. As was discussed, critics of the nexus of contracts model would point to this fact to argue that the contractarian paradigm does not apply at all in these cases.<sup>329</sup>

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<sup>327</sup> See RESTATEMENT (SECOND) CONTRACTS §§ 12, 151–58, 159–73, 174–77, 205, 208 (1981).

<sup>328</sup> Compare *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911 (2010) (majority opinion) with *id.* at 977–79 (Stevens, J., concurring in part and dissenting in part).

<sup>329</sup> See, e.g., Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1134 (2011) (reviewing LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* (2010)) (discussing the notion that the nexus of contracts theory is meant to be an instructive metaphor, but lampooning it for use that is sometimes seemingly meant to be a description of reality, and sometimes a metaphor). In their article, Hayden and Bodie critique a book by Professor Larry

That criticism misses the point. The paradigm is instructive because it helps assess what the constituents of a corporation expect to get from their connection with the corporation. Putting aside the legal realist argument that there is often not a specific bargain with the corporation, the paradigm still allows analysts to assess whether government regulation might be warranted, or even constitutional.

Even if the *Citizens United* majority was correct to address the facial constitutionality of the BCRA, it was wrong to conclude that it was unconstitutional. As mentioned above, because the contractarian paradigm treats corporations as nothing more than a nexus of contracts among its constituents, it is a mistake to conclude that a corporation should be given the First Amendment protection given to individuals.

Instead, the constitutional analysis would have focused on, first, whether Congress had the constitutional authority to pass the statute, and, second, whether the statute offended any other provision of the Constitution. With respect to the first question, Congress surely had the power under the Commerce Clause to regulate corporations doing business in interstate commerce. With respect to the second question, the Court might have questioned whether the regulation unconstitutionally impinged on shareholders' liberty of contract interest to invest in corporations without government interference or regulation. Because that interest is likely to get only rational basis review, any rational basis for the statute would allow it to pass constitutional muster. Specifically, protecting shareholders from managers using corporate funds to promote their own political agenda would be a sufficient rational basis for the BCRA. Moreover, the BCRA also was designed to decrease corruption in the political process. Again, that is more than sufficient to form a rational basis for the regulation.

In addition to aiding courts in assessing the constitutionality of corporate regulations, the contractarian paradigm can also be useful to legislators. Using the BCRA as an illustration, legislators might have begun their analysis with a starting point that allows investors freedom to contract with a corporation with no government interference or regulation. However, the presumption in favor of liberty of contract and the absence of regulation would shift in this case after observing that corporate electioneering is not likely to be a part of the implied bargain shareholders believe they are striking when they invest in a corporation. Indeed, allowing corporate electioneering might result in implying a bargain between shareholders and the corporation that could be deemed unconscionable.

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Ribstein that argues that, in contrast to other business entities, the corporation is actually a very inflexible creature of the regulatory world and not at all merely a creature of contract. *Id.* at 1128–29. In light of this argument, they attempt to pronounce the nexus of contract theory dead, or at least gasping for its last breath. *Id.* at 1134.

The doctrine of unconscionability requires that the process of the bargain be flawed in some way and that the results themselves involve some sense of gross unfairness.<sup>330</sup> Here, the bargaining process involving the sale of stock could be said to be flawed by something approaching fraud. An investor in a company typically views that investment as a bargain that the target company will attempt to maximize profits, while balancing the interests of its constituents. Unbridled participation in politics by the corporation has never been a part of that bargain. Thus, the investor might be lured into the investment, hoping for profits, while unwittingly supporting political candidates that are unacceptable to that investor. That result could surely be said to be grossly unfair, satisfying the second requirement for a contract to be unconscionable. Because stock purchases across the board could be said to involve this element of unconscionability, a contractarian analysis would conclude that regulation in this area is not only constitutional, but that it is also appropriate. Of course, the exact design of the regulation is left to Congress.

The conclusion that investors do not imagine corporate involvement in politics in their bargain could seem controversial to some. Indeed, the argument could be made that the shareholder bargain does involve giving unbridled discretion to corporate management to do whatever it deems to be in the best interests of the corporation.

However, that argument goes too far. In part, the response to that argument involves some deference to history and tradition. As both the majority and the dissent in the *Citizens United* case acknowledge, corporate involvement in politics has been regulated for more than one hundred years.<sup>331</sup> Further, dating back earlier than that, corporations were specifically and individually chartered by the state to engage in certain limited and authorized activities.<sup>332</sup> That history forms the backdrop for investors' perspectives on the bargain struck when purchasing stock in a corporation. Investors expect there to be limits on what a corporation can do, and specifically limits in the area of political spending.

Another retort might be that a new unregulated era is now at hand, and investors now will know that corporate electioneering is unregulated. Investors can choose to sell their stock if they are not comfortable with that situation. Or investors can choose not to invest in the first place, understanding that corporations are now allowed to use treasury funds to support or oppose political candidates.

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330 See RESTATEMENT (SECOND) CONTRACTS § 208 (1981).

331 Compare *Citizens United*, 130 S. Ct. at 925–28 (Scalia, J., concurring) with *id.* at 948–51 (Stevens, J., concurring in part and dissenting in part).

332 See *supra* text accompanying note 78.



But even if the expectation of limited corporate involvement in politics did not exist, an unregulated ability for corporations to finance political campaigns runs against the shareholders' interests because it diverts funds from profitmaking into politics.<sup>333</sup> The primary reason shareholders invest in stock is profit. In fact, recent studies have concluded that corporations have not been able to show a positive correlation between support for political candidates and profitability.<sup>334</sup>

Moreover, the temptation for corporate managers to support the candidates of their choosing and disguise that personal support as support that is in the best interests of the corporation runs contrary to the fundamental bargain of the shareholder. Conflict of interest transactions are prohibited under every state's corporate law.<sup>335</sup> However, policing those conflicted transactions in the area of electioneering would be almost impossible. All management needs to do to justify electioneering is simply argue that the political support was in the best interest of the company. Given the complexity and variety of positions taken by any given politician, it would be almost impossible to overcome management's claim in support of any such transactions. Thus, again, a contractarian would argue that limiting those conflict of interest transactions ex ante simply supports and ensures the sanctity of the bargain the shareholders expect in the first place.

In this Part, I have discussed and described the leading theories that help scholars and policymakers understand corporations and their role in society. The state entity theory seems to have been described by the dissent

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333 See Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105, 1106 (2011) (arguing that as a result of *Citizens United*, corporations will be coerced into donating more and more money to politics, and that since many corporations will be similarly coerced, any profitability of the donations will not increase with the increased donations, and that the results instead may be a harmful inefficient allocation of resources).

334 See, e.g., CIARA TORRES-SPELLISY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 9 (2010), available at [http://brennan.3cdn.net/54a676e481f019bfb8\\_bvm6ivakn.pdf](http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf) (“[D]espite corporate managers’ attempts to influence public policy through spending on elections, corporate political spending correlates with lower shareholder value.” (citing Rajesh K. Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Contributions: Investment or Agency?* (Apr. 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=972670](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670))); see also John C. Coates, IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?*, HARVARD JOHN M. OLIN DISCUSSION PAPER SERIES NO. 684, at 16 (Sept. 21, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680861##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680861##) (discussing the negative relationship between strong corporate governance and political spending, concluding that firms that are more engaged in political activity result in lower profitability for shareholders).

335 See, e.g., Delaware General Corporations Law §§ 122(17), 144 (2008); Model Business Corporations Act §§ 8.30, 8.70 (2011).

in *Citizens United*, leading to its position that the electioneering restriction at issue was indeed constitutional. Arguably, the prevailing paradigm for understanding a corporation is the economic or contractarian nexus of contracts paradigm. As Part Two has shown, that paradigm focuses on the bargains being struck between the constituents of a corporation in order to assess whether regulation is constitutional and appropriate. Part Two has attempted to outline more generally how the contractarian paradigm can guide decisionmakers in assessing regulations.

The majority of the Court in *Citizens United* ignores this prevailing contractarian theory as well as the state entity theory.<sup>336</sup> In doing so, the majority arrives at the dangerous conclusion that corporations are entitled to the same First Amendment protection in the area of campaign finance as individuals. Had the majority considered the contractarian paradigm, it would surely have arrived at a different conclusion.

### III. PART THREE: A CONTRACTARIAN ANALYSIS OF RESPONSES TO *CITIZENS UNITED*

As we have seen in Parts One and Two, the majority in *Citizens United* disregarded prevailing corporate law scholarship to overturn precedent and find that corporations should have the same First Amendment free speech rights as individuals, at least in the context of federal electioneering regulations. The contractarian paradigm is arguably the prevailing paradigm used by scholars to understand corporate behavior and assess corporate regulation. It is my argument that this contractarian paradigm can and should be used to effectively assess when regulations are constitutional and prudent.

This Part will use the contractarian paradigm discussed and developed in Part Two to assess proposed responses to the *Citizens United* case. The most dramatic response has been Senator Tom Udall's call for a constitutional amendment to effectively overturn *Citizens United*.<sup>337</sup> A constitutional amendment, duly enacted, would be beyond reproach from the courts.

Aside from that dramatic proposal, however, there have been two other significant proposals to attempt to redress the *Citizens United* case. Both of these proposals involve regulatory responses. The first involves mandating disclosure of all electioneering expenditures. The second demands specific shareholder approval for any electioneering expenditures made by a

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<sup>336</sup> See Padfield, *The Dodd-Frank Corporation*, *supra* note 8, at 224; *supra* text accompanying note 9 (describing examples of corporate theoretical scholarship, such as were disregarded by the *Citizens United* majority).

<sup>337</sup> See *supra* text accompanying note 34.

corporation. Both of these responses will be discussed and assessed here in accord with the contractarian paradigm described in Part Two.

#### A. Disclosure

In the aftermath of the *Citizens United* decision, many scholars and commentators have advocated for a Securities and Exchange Commission (“SEC”) regulation that would require corporations to disclose their political contributions, with some exception for de minimis amounts. A group of ten law professors who specialize in corporate law have petitioned the SEC to effect just such a regulation (“SEC Disclosure Petition”).<sup>338</sup> In their Disclosure Petition, those professors argue that there is a growing investor appetite to know the details of corporate political spending, and that, perhaps most importantly, such disclosure is necessary to ensure corporate accountability.<sup>339</sup>

In a follow-up letter to the SEC written in December 2011, the Brennan Center for Justice at New York University School of Law wrote to support the Disclosure Petition submitted by the law professors.<sup>340</sup> The Brennan Center is a leading non-profit institute for policy analysis and focuses much of its work on election law. “[T]he Brennan Center urges the Commission to use its authority to bring transparency and accountability to corporate political spending.”<sup>341</sup>

Other scholars embrace the idea of more disclosure as an appropriate legislative response to *Citizens United*.<sup>342</sup> Almost immediately following the decision, Professor Tribe called for more disclosure of specifics regarding who is funding particular electioneering communications.<sup>343</sup> Professor Tribe described such regulations as clearly within Congress’ power to regulate interstate commerce.<sup>344</sup>

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338 Petition for Rulemaking from The Committee on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary of the Securities and Exchange Commission (Aug. 3, 2011), *available at* <http://sec.gov/rules/petitions/2011/petn4-637.pdf> [hereinafter “SEC Disclosure Petition”].

339 *Id.* at 2, 7–9.

340 Letter from J. Adam Skaggs, Senior Counsel to the Brennan Center for Justice, to Elizabeth M. Murphy, Secretary of the Securities and Exchange Commission (Dec. 21, 2011), *available at* <http://www.sec.gov/comments/4-637/4637-20.pdf>.

341 *Id.* at 1.

342 *See, e.g.*, John Coates & Taylor Lincoln, *Fulfilling Kennedy’s Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity*, PUBLIC CITIZEN 10–11 (Sept. 2011) (arguing that corporations that voluntarily make political disclosures actually showed statistically higher market valuations).

343 Tribe, *supra* note 136.

344 *Id.*

Moreover, the Supreme Court itself in the *Citizens United* case opined that disclosure requirements regarding corporate political contributions would likely be constitutional:

[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests.<sup>345</sup>

Eight of the nine Justices on the Supreme Court concurred on this part of the *Citizens United* opinion.<sup>346</sup> Despite the strong support for this disclosure regulation and even likely Supreme Court approval, the SEC has not taken action to put a disclosure requirement into the rulemaking pipeline.<sup>347</sup>

From the contractarian paradigm, such a disclosure requirement is both constitutional and prudent. Again, one of the benefits of using the contractual analysis of a corporation is the insight gained from analyzing the bargaining dynamics that exist between the corporation and its constituents.<sup>348</sup> Recommendations for appropriate regulation flow from that analysis.

From a constitutional point of view, such a regulation would be within the commerce power of Congress (here as delegated to the SEC). Further, the injury to the right to liberty of contract of the parties would be overcome by the rational basis for enacting the regulation, i.e. ensuring that investors better understand what their corporate managers are doing with corporate profits.

From a prudential point of view, the starting point for policymakers again would be contractarian deference to the liberty of the parties to freely contract for whatever they intend. Only where the bargain would be infected by some defect would that deference shift in favor of regulation. Where the regulation seeks to overcome some categorical infirmity in the contracts under consideration, the regulation would be deemed prudent.

If corporate electioneering is allowed to proceed with no disclosure requirement, then shareholders cannot adequately evaluate their bargain—i.e. their decision to invest or to continue holding stock in any particular

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<sup>345</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010) (internal citations omitted) (internal quotation marks omitted).

<sup>346</sup> *Id.* at 886.

<sup>347</sup> The SEC acknowledges receipt of the petition, and compared to other Petitions for Rulemaking, there has been an extraordinary amount of additional comments received in response. See, e.g., *Comments on Rulemaking Petition*, SEC, available at <http://www.sec.gov/comments/4-637/4-637.shtml> (last visited Jan. 12, 2013).

<sup>348</sup> Cf. Bainbridge, *supra* note 91, at 864–69.

company. Indeed, a majority of the largest public companies in the United States have actually begun to disclose their electioneering voluntarily.<sup>349</sup> Some critics of disclosure requirements argue that the marketplace will achieve the optimal amount of disclosure that shareholders need and want and that will not be overly burdensome or costly for corporations.<sup>350</sup>

However, a requirement that corporations disclose their electioneering would help shareholders of every public company understand the nature of their investment decision. Disclosure generally aids parties in making a bargain that is more fair, or might lead parties to avoid the bargain altogether.

In this more specific example involving disclosure of political contributions, the same logic applies. More disclosure should lead to a fairer bargain. Conversely, the ability of a corporation to hide its political contributions leads to a potentially unfair bargain with investors. Investors could become unwitting contributors to candidates they do not support.

### B. Shareholder Approval

Another possible regulatory response to the *Citizens United* decision is to require specific shareholder approval of corporate electioneering expenditures before they happen.<sup>351</sup> This approach was actually put into place in England in 2000 as an amendment to the British Companies Act.<sup>352</sup> The amendment was enacted in response to the perception that corporate money was being used to buy influence. The amendment was an attempt to create more transparency and accountability at the corporate level.<sup>353</sup>

The exact details of such a plan are beyond the scope of this Article. However, as an example, corporations could be required to get shareholder approval to spend up to a certain fixed amount on political donations

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349 See, e.g., TORRES-PELLISCY, *supra* note 334, at 21 (“At the very least, Congress should require corporations to disclose their political spending, as many top firms have already volunteered to do.”).

350 See Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL’Y 21, 24–29 (2012) (arguing that in order “[t]o properly function, public discussion must exist in an open, self-regulating marketplace”).

351 For an excellent overview of this suggestion, see TORRES-PELLISCY, *supra* note 334, at 16–20 (analyzing a British law that has implemented shareholder approval requirements).

352 Political Parties, Elections and Referendums Act, 2000, at c. 41, § 50 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2000/41/contents>; see also Bebchuk & Jackson, *supra* note 244, at 98–99 (discussing the British law requiring shareholder consent for political spending in excess of £5000).

353 See TORRES-PELLISCY, *supra* note 334, at 16 (discussing the problem of corporate money in politics in the United Kingdom before the enactment of the shareholder approval amendment, and quoting Lord Neill, who chaired the Committee on Standards in Public Life as saying the reform was needed “to bring the United Kingdom into line with best practice in other mature democracies”).

generally. Alternatively, corporations might be required to get approval for each specific donation, specifying amount and recipient. Regardless of how such a proposal is crafted in the United States, the basic idea of requiring shareholder approval for corporate political donations can also be evaluated in accord with the contractarian nexus of contracts paradigm.

Once again, the constitutional analysis is fairly simple to satisfy. Congress or the SEC would surely have power to enact such a regulation on the basis of the Commerce Clause. Moreover, any rational basis for the statute will satisfy any issues with interference in any liberty of contract interest. Here, the rational basis for the regulation—investor protection—is surely sufficient to uphold the regulation against a constitutional challenge.

The prudential analysis of the policy is more difficult but is aided by using the contractarian paradigm. The starting point for the contractarian is a default position that would defer to the liberty of contract of the parties and would prefer that no regulation interfere with that liberty of contract. But again, if there is some defect in the set of bargains under consideration, then the default position would shift and would support regulation that is appropriately tailored to address the defect.

When considering this proposal for shareholder approval of political contributions, the defect present in the class of contracts under consideration is the same defect discussed above in connection with the disclosure proposal. If corporations are allowed to electioneer in an unregulated and undisclosed way, then the resulting bargain with the shareholder can be viewed as defective. It might involve unconscionability, on the basis of the unfairness present. It might involve a lack of good faith on that same basis. It might involve misrepresentation on the basis that the shareholder would not and should not expect any profits to be routed into politics without shareholder consent.

Shareholders make their investment bargain in order to maximize profits, not to support or oppose candidates for office. Unregulated and unbridled electioneering spending of corporate funds has no illustrated positive correlation with profitability.<sup>354</sup> Further, corporate support for any particular candidate is likely to run counter to the political preferences of many shareholders. Without the ability to approve political spending (or even to know the extent of it) shareholders enter into a bargain with unforeseen consequences, consequences that may indeed be opposed to the general reason the bargain was made in the first place: maximizing profits.

In his testimony before a congressional subcommittee immediately after *Citizens United* was decided, Professor John Coffee spoke to the notion that corporate political spending is often said to be in the best interest of

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354 See *supra* text accompanying note 309.

shareholders. To the contrary, he states that “the interests of shareholders and managers do not appear to be well aligned with respect to political contributions.”<sup>355</sup> Coffee cites to the Center for Political Accountability, which he explains has found that corporations often fund “political causes or issues having no obvious relationship to their corporation’s interests.”<sup>356</sup>

The shareholder approval proposal goes directly to solving this contracting problem. In this case, the proposal corrects the defects present in allowing unchecked spending by ensuring shareholder approval of the political support.

One complication of this scheme comes from a legal realist perspective. Critics of corporate democracy often claim that shareholders, especially individual shareholders, are rationally detached from participation in any aspects of corporate governance.<sup>357</sup> Most individual shareholders throw away their proxy materials and never cast their vote even when it comes to electing a board of directors.<sup>358</sup> Moreover, for many shareholders, ownership in a corporation is indirect. Their shares are held in a mutual fund or some other investment vehicle and managed by institutional managers.<sup>359</sup>

If individual shareholders opt out of voting to approve or disapprove political spending, then they do so implicitly accepting either outcome. It is less likely that institutional managers will opt out of approving or disapproving political spending. Instead, such institutional shareholders will be incentivized by their own desire for profits to push corporate managers to show that the political spending contemplated will help the corporation improve profitability. As Professor Coffee stated, “[I]t is hardly radical to urge that [shareholders] be given a say in how [their corporation] is run.”<sup>360</sup>

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355 *Corporate Governance After Citizens United: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the United States H. Comm. on Financial Services*, 111th Cong. 51 (2010) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School).

356 *Id.* (citing CENTER FOR POLITICAL ACCOUNTABILITY, *HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO* (2006)).

357 See Michael K. Molitor, *The Crucial Role of the Nominating Committee: Re-Inventing Nominating Committees in the Aftermath of Shareholder Access to the Proxy*, 11 U.C. DAVIS BUS. L.J. 97, 136–38 (2010) (“[T]he ‘typical’ shareholder in a public corporation is said to be rationally apathetic.”).

358 *Id.* at 138 (describing shareholder “apathy” that leads to “very little incentive to nominate directors”).

359 *Id.* (noting that in recent decades there has been a “rise of ‘institutional’ shareholders, particularly mutual funds”).

360 See *Corporate Governance After Citizens United: Hearing Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the United States H. Comm. on Financial Services*, 111th Cong. 64 (2010) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School).

Professor Larry Ribstein has argued that regulatory efforts designed to improve shareholder rights may ultimately protect some shareholders at the cost of harming others.<sup>361</sup> Professor Ribstein concludes that on balance, the public might indeed be better off without the imposition of incoherent regulations.<sup>362</sup>

Despite these criticisms, under a contractarian perspective the shareholder approval mechanism would certainly be constitutional, despite impinging on the parties' freedom of contract, and would likely be prudent as well. Again, the mechanism is designed to allow shareholders to know what they are getting from their investment bargain and to prevent unfairness from infecting that bargain.

### CONCLUSION

In this Article, I have argued that the contractarian view of a corporation is not only helpful in analyzing the constitutionality of any corporation regulation, but also instructive when assessing the prudence of any such proposed regulation. Contractarians typically assert that individuals should be allowed the liberty of contract to design their own transactions and that government should avoid mandatory regulatory action. However, it is my thesis that because so many of those contracts as a class are flawed, regulation designed to correct those flaws is not only constitutional, but also appropriate. I use contracts generally here to indicate that my thesis has broad application to any set of transactions that could be said to have flawed contracts at their core—from shareholders purchasing stock to consumers agreeing to credit card terms. I set forth this contractarian framework for analysis in Part Two and then used it to assess the *Citizens United* decision itself and, in Part Three, two of the more widely proposed regulatory responses to the *Citizens United* decision. In all three cases, because the bargain shareholders are making does not include the prospect of a corporation giving corporate funds away in an unregulated and unbridled way, regulation in this area serves to protect the interests of the shareholders in their bargain. Regulation of election spending is all the more justified in this case because the very nature of our democratic system is at stake.

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<sup>361</sup> Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1043 (2011) (arguing that “protecting the expressive rights of some shareholders may infringe the expression of other stakeholders and unacceptably restrict corporate speech”).

<sup>362</sup> *Id.* at 1043–44 (advocating that “in determining the constitutionality of governance regulation, courts must weigh protection of shareholder expression against frustrating corporate speech generally and the expression rights of particular shareholders and stakeholders” but concluding that “[t]he proposed . . . burden on corporate speech is likely to be too great even without this balancing”).



*Citizens United* has spawned a flood of interest in the effect corporate money has on politics in the United States. Moreover, the majority's opinion was the subject of a scathing dissent, and criticisms from both of the other branches of our government. President Obama rebuked the Justices in the majority. A group of senators has proposed a constitutional amendment to undo the opinion.

While the lack of corporate disclosure of political spending makes it difficult to assess the effect the decision is actually having in our political system, statistics show that corporate political spending has grown exponentially and, at least in the gubernatorial elections, the money is going to Republicans three times as often as it is to Democrats.<sup>363</sup>

The majority opinion in *Citizens United* spoke of safeguarding a fundamental principle of our Constitution, the First Amendment, to support its decision. However, it failed to consider any of the prevailing corporate law scholarship when making its ruling. The most widely accepted paradigm for understanding a corporation characterizes a corporation as nothing more than a nexus of contracts. That paradigm would focus on the rights of the various constituents of a corporation rather than rights the corporation itself might possess. The contractarian paradigm recognizes the fiction of corporate personhood and limits that fiction by putting it in service to the corporation's constituents.

The *Citizens United* opinion is complex, just as its implications are. However, sometimes it is helpful to see how simple complex issues can actually be. Ben and Jerry, the corporate owners of the ice cream company, were speaking to a convocation recently and left the audience with this observation:

“‘I’m Ben,’ began Ben & Jerry’s founder Ben Cohen. ‘I’m a person.’

‘I’m Jerry,’ continued his partner, Jerry Greenfield. ‘I’m a person.’

‘Ben & Jerry’s Ice Cream, Inc. . . ’ proceeded Cohen,

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<sup>363</sup> Ciara Torres-Spelliscy, *The \$500 Million Question: Are the Democratic And Republican Governors Associations Really State PACs Under Buckley’s Major Purpose Test?*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 485, 502 (2012) (citing statistics showing that in 2010, the Republican Governors Association had raised and spent approximately three times as much as the Democratic Governors Association); *see also* ANNE KIM, A THUMB ON THE SCALES: OUTSIDE SPENDING IN 2010 SENATE RACES 3 (Feb. 2012), *available at* [http://progressivepolicy.org/wp-content/uploads/2012/02/2.2012-Kim\\_A-Thumb-on-the-Scales\\_Outside-Spending-in-2010-Senate-Races.pdf](http://progressivepolicy.org/wp-content/uploads/2012/02/2.2012-Kim_A-Thumb-on-the-Scales_Outside-Spending-in-2010-Senate-Races.pdf) (describing the relative spending by conservative and liberal groups in the 2010 Senate elections); Stephanie Ferrell et al., *Super PAC spending*, L.A. TIMES (Feb. 16, 2012), <http://graphics.latimes.com/2012-election-superpac-spending/> (depicting in graphical manner the amount spent by PACs supporting the various candidates for president in 2012).

'... is not a person,' finished Greenfield, to laughter and applause."<sup>364</sup>

The contractarian paradigm should empower both judicial and legislative bodies to appropriately regulate and even limit the activities of corporations. It is my hope that this Article might encourage jurists and legislators to do just that.

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<sup>364</sup> Carl Etner, *Montpelier Citizens United forum draws standing-room crowd*, VTDIGGER.ORG (Nov. 30, 2011), <http://vtdigger.org/2011/11/30/montpelier-citizens-united-forum-draws-standing-room-crowd/>.