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Larry Ribstein

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THE FIRST AMENDMENT AND CORPORATE GOVERNANCE

Larry E. Ribstein*

Corporations' right to participate in political debate is one of the most contentious current constitutional and political issues. The debate has intensified in recent years as government seeks to rein in corporations' increasing global reach and corporations react by stepping up their participation in politics. The debate came to a head with the Supreme Court's decision in *Citizens United v. Federal Election Commission*[1] that the First Amendment restricts laws aimed at corporate political campaign activities.

The case concerned a documentary criticizing then presidential candidate Hillary Clinton by Citizens United, a nonprofit corporation financed in part by general treasury funds of for-profit corporations. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA)[2] prohibits corporations and unions from using their general funds to finance certain publicly distributed communications referring to identified candidates for federal office. The Court overruled prior law upholding these limits and invalidated BCRA's restrictions on corporate and union expenditures. The majority reasoned that the provision was a ban on speech that could be upheld under the First Amendment only if it "furthers a compelling interest and is narrowly tailored to achieve that interest."[3] The provision at issue failed to pass this test.

The majority bluntly opined that the First Amendment makes no exception for corporations, noting that it "protects speech and speaker, and the ideas that flow from each,"[4] and "does not permit

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* Mildred van Voorhis Jones Chair, University of Illinois College of Law. Thanks for helpful comments by participants in the Georgia State University College of Law Symposium on Citizens United, Kurt Lash and Stefan Padfield.

1. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).
2. 2 U.S.C. § 441b (2006).
3. *Citizens United*, 130 S. Ct. at 898 (citing Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007).
4. *Id.* at 899.

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Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech."[5] Justices Scalia, Alito, and Thomas added that the text of the First Amendment

> 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. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise . . . . Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.[6]

Perhaps most importantly, the *Citizens United* majority rejected corporate speech's potential distorting effect on political debate as a rationale for regulation.[7] The Court reasoned that regulation under the anti-distortion rationale would potentially muffle a large segment of the population, concluding that

> [w]hen Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.[8]

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5. *Citizens United*, 130 S. Ct. at 913.
6. *Id.* at 929.
7. For a critique of the anti-distortion argument and of other justifications for restricting corporate political speech under the First Amendment, see Larry E. Ribstein, *Corporate Political Speech*, 49 WASH & LEE L. REV. 109 (1992).
8. *Citizens United*, 130 S. Ct. at 908.

Citizens United, in short, was more concerned with the potential excesses of government power than with those of private corporations.

Citizens United did not, however, end the debate over corporate speech anymore than did *Austin v. Michigan Chamber of Commerce*,[9] and *McConnell v. Federal Election Commmission*,[10] which *Citizens United* overruled. Many believe the Supreme Court unleashed a corporate monster that will drown out the rest of the populace. For example, one commentator opined on the eve of the 2010 election that "[u]nder this system [unleashed by *CU*], the game is over. Our democracy is dead."[11] The author concluded that corporations could use their spare cash to buy elections and noted that money is flooding into "right-wing groups."[12] The public reaction to the *Citizens United* case suggests that the controversy over corporate speech was not quelled by the Court's narrowly divided vote.

The Court's holding arguably left an opportunity for its opponents to erode its protection of corporate speech despite the majority opinion's absolute language. The opinion upheld the disclosure and disclaimer provisions of the law in question[13] and suggested that regulation of corporate governance might pass constitutional muster.[14] Congress quickly sought to exploit these loopholes with the DISCLOSE Act,[15] which passed the House in June 2010, and the Shareholder Protection Act,[16] which passed the House Financial Services Committee the following month. Passage of such laws could set up yet another Supreme Court decision on this divisive issue.

This article shows that *Citizens United* shifted the debate over corporate speech from corporations' power to distort political debate

9. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
10. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).
11. Brett Arends, *Death of a Democracy*, MARKET WATCH, Oct. 19, 2010, http://www.marketwatch.com/story/death-of-a-democracy-2010-10-19?pagenumber=1.
12. *Id.*
13. *Citizens United*, 130 S. Ct. at 913–16.
14. *See infra* text accompanying notes 30–31.
15. H.R. 5175, 111th Cong. (2nd Sess. 2010).
16. H.R. 4790, 111th Cong. (2nd Sess. 2010).

to the corporate governance processes that authorize this speech. The corporate governance move is a facially plausible strategy. It seems to be a content-neutral pursuit of objectives other than restricting speech and, therefore, to escape strict scrutiny under the First Amendment. This move also recognizes that corporations, as artificial entities, cannot speak in the same sense as humans do, and that the First Amendment is more properly concerned with the expressive rights of the individuals who speak through corporations than with the rights of artificial entities. Jurisprudentially, looking through the corporation to its owners and agents arguably reconciles the majority's concern for liberty with the dissent's concern with equality and the corporation's potential to distort public debate.[17]

Despite the corporate governance strategy's apparent advantages, it provides a weak basis for regulating corporate speech under the First Amendment. Regulation of the corporate processes that produce corporate speech is still speech regulation even if it sails under the corporate governance flag. Whether the regulation survives First Amendment scrutiny under *Citizens United* thus depends on whether corporate governance regulation reasonably effectuates expression of shareholder beliefs. Testing the corporate governance theory in light of the realities of corporate finance and governance, this paper finds that the dispersed, passive, and anonymous shareholders that corporate-governance-based regulation purports to protect are unlikely to have much expressive interest at stake in corporate activities. Moreover, regulation protecting this interest is likely to have little value and to pit various stakeholders against each other. Thus, any expressive interest shareholders have is more likely to be thwarted than promoted by corporate governance regulation. This paper also discusses the uncertain implications of the corporate governance theory for regulation of corporate governance, non-election-related commercial speech, and speech outside the context of publicly traded corporations.

It is important to clarify the limits of my analysis. I do not claim that the corporate governance basis for regulating corporate speech

17. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

can never survive First Amendment scrutiny. I seek only to analyze the specific question of whether regulation of corporate governance can be sustained on the ground that it vindicates shareholders' expressive rights. This claim has significant problems because of the inherent limits on the efficacy of government regulation in this area, such regulation's potential for actually harming expressive rights, and the uncertain implications of this rationale for contexts beyond that involved in *Citizens United*. Claims that shareholders' expressive rights can sustain regulation of corporate governance under the First Amendment must deal with these problems or risk being trumped by the majority's concerns with listeners' rights and government censorship. If they do not, it is likely that this argument would be trumped by the listeners' rights to receive the information emphasized in the majority opinion.

This paper proceeds as follows. Part I discusses the support in *Citizens United* for regulation of corporate speech under a corporate governance theory. Part II places this rationale under the lens of corporate finance theory and discerns serious flaws with the theory as a justification for regulating corporate speech under the First Amendment. Part III explores some implications of the corporate governance theory for types of firms and speech other than those dealt with directly in *Citizens United*. The complications revealed by this analysis provide an additional reason to be skeptical of this rationale for regulating business association speech under the First Amendment.

I. THE CORPORATE GOVERNANCE RATIONALE FOR REGULATING CORPORATE SPEECH

An understanding of the corporate governance argument for corporate speech regulation begins with distinguishing it from the main rationale for regulating corporate speech under prior cases and the dissenting opinion in *Citizens United*. More specifically, this analysis involves distinguishing "external" distortion, or the effect of corporate speech on *public* debate, from "internal" distortion, or whether corporate speech represents the views of the firm's owners.

The dissenters expressed concern with external distortion resulting from corporations' corporate advantages in funding political speech. They noted that corporations have special features, including limited liability, perpetual life, and separation of ownership and control, which enable them to "amass and deploy financial resources on a scale few natural persons can match."[18] Corporations, they said

> are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is 'far more destructive' than what noncorporations are capable of. [19]

The dissenters also observed that the marketplace directs resources to corporations for economic reasons and not because of their ideas.[20] Corporations' economic power could cause elections to misrepresent the views of the electorate as a whole. Nor was it even clear who was "speaking when a business corporation places an advertisement that endorses or attacks a particular candidate."[21] The dissenters thought the customers, employees, and shareholders are too remote from the decision to count, and that the executives who presumably decide to place the ad are barred by their fiduciary duties from doing so to express their personal views.[22] Since corporations do not have personal views on who should win elections, their participation in elections "is more transactional than ideological."[23]

As noted above,[24] the majority rejected external distortion as a basis for regulating corporate speech. The Court concluded that any

18. *Citizens United*, 130 S. Ct. at 974.

19. *Id.* at 975 (citing Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1113 (2002)).

20. *Id.* at 974.

21. *Id.* at 972.

22. *Id.*

23. *Id.* at 973 (quoting Supp. Brief for Committee for Economic Development as Amicus Curiae Supporting Appellee at 10, Citizens United v. Fed. Elections Comm'n, 130 S. Ct. 876 (2010) (No. 08-205).

24. *See supra* note 7 and accompanying text.

concern for distortion was trumped by the dangers posed by the remedy—government "censorship to control thought."[25] The vigor of the majority's rejection of the distortion argument apparently leaves little basis for a prediction that the Court will change course again and return to an equality-based rationale for regulating corporate speech under the First Amendment.

The sharp division between the majority and dissent regarding external distortion suggests a need to look elsewhere for a principle that could unify the Court in future corporate speech cases. This might be found in the dissent's view that "shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions."[26] This theory has the attraction of defending corporate shareholders' freedom of speech rather than the equality interest the Court rejected as a basis for corporate speech restrictions. The dissenters thought shareholder rights were currently "'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."[27] Moreover, they reasoned that shareholders' ability to sell when they learn about objectionable speech is not sufficient protection because of tax and other constraints on sales and because these sales occur after the corporation has engaged in objectionable speech.[28]

The dissent, therefore, would support beefing up the processes for authorizing corporate speech. At the same time, the majority left open the possibility that some regulation aimed at protecting shareholders might pass First Amendment scrutiny. The majority held this rationale could not support BCRA's ban of corporate speech, which extended to the political speech of media corporations and to nonprofit firms and sole proprietorships whose shareholders needed no protection, while leaving shareholders unprotected from the broad

25. *Citizens United*, 130 S. Ct. at 908.
26. *Id.* at 977.
27. *Id.* at 978 (quoting Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999)).
28. *Id.*

swaths of speech BRCA does not cover.[29] The majority reasoned that abuse of shareholders might be protected "through the procedures of corporate democracy"[30] and that the way to protect shareholders "is not to restrict speech but to consider and explore other regulatory mechanisms."[31]

The remainder of this article focuses on the corporate governance rationale for regulating corporate speech and its potential implications.

II. IDENTIFYING THE CORPORATE GOVERNANCE RATIONALE

This Part considers whether and to what extent shareholder protection might support regulation of corporate processes for determining corporate speech. Subpart A discusses the level of First Amendment scrutiny this speech calls for, which turns on whether corporate governance regulation can be characterized as content-neutral regulation of the time, place and manner of communications. Subpart B discusses whether the corporate governance regulation can be said to promote expression by freeing shareholders from endorsing views they do not support. Subpart C discusses specific applications of the corporate governance rationale, particularly including the proposed Shareholder Protection Act and alternative academic proposals for shareholder protection legislation.

A. Applying the First Amendment

One basis of the corporate governance argument for corporate speech regulation is that it avoids strict First Amendment scrutiny by regulating only the time, place, and manner of speech rather than its content. For example, a regulation requiring draft registrants to carry their draft cards could be applied to forbid draft card burning because it reasonably furthered a government interest unrelated to suppressing

29. *Id.* at 911.
30. *Id.* (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).
31. *Id.*

free expression.[32] Although content-neutral regulation may significantly affect speech,[33] it runs less risk of government censorship than legislation that discriminates against particular viewpoints.

General corporate governance regulation that constrains speech as well as other corporate activities probably falls within the content-neutral category. For example, requiring a shareholder vote on all decisions outside the corporation's usual course of business probably would not contravene the First Amendment even if it applies to political activities.

On the other hand, regulation specifically restricting speech by for-profit corporations may be considered viewpoint-discriminatory and subject to a higher level of First Amendment scrutiny. Given corporations' inherent nature as mechanisms for earning profits from employing capital in pursuit of business opportunities, regulating speech by these entities can be viewed as directed at a specific type of activity.[34] The same conclusion might hold even though the regulation deals only with the procedures for authorizing corporate speech rather than prohibiting the speech itself, because the regulation effectively restricts the speech by making it more costly. To be sure, the ultimate constitutional determination would depend on the specific nature of the regulation and, perhaps, the activity to which it is applied. The point here is that corporate governance regulation may be subject to a high level of First Amendment scrutiny. This underscores the need to analyze the government's rationale for regulating corporate speech in order to protect shareholders' expressive rights.

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32. United States v. O'Brien, 391 U.S. 367 (1968). *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

33. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981–82).

34. *See* Ribstein, *supra* note 7, at 119–20.

B. Protecting Shareholders' Right of Expression

Assuming strict First Amendment scrutiny applies to regulation of corporate decisions to engage in speech, the question is whether this regulation can survive this scrutiny. The *Citizens United* dissent makes the key move of asserting that regulating corporate speech protects rather than interferes with free expression. According to the dissent, "[s]hareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions."[35] Regulation of corporate governance accordingly might be acceptable under cases protecting the freedom of association from legal interference and union members from being forced to associate with views they disagree with.[36] Although the freedom-of-expression argument could not save the ban on speech involved in *Citizens United*, the majority suggested that "other regulatory mechanisms" might pass First Amendment muster. The following subsections consider whether corporate governance regulation of corporate speech might be justified under this rationale. As we will see, the application of these principles depends on whether corporate speech interferes with shareholder expression and, if so, whether regulation might do more harm than good for shareholders' expressive rights.

1. Does Corporate Speech Involve Expression by Shareholders?

Corporate governance protection for shareholder expressive rights rests on the assumption that shareholders express themselves through the corporations in which they invest. It follows from this assumption that if shareholders object to managers' use of corporate resources for some corporate speech, this use infringes shareholders' expression.

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35. *Citizens United*, 130 S. Ct. at 977.

36. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010). These authors cite, as to the freedom of association, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) and Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010). With respect to the speech rights of union members, they cite Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) and Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 269–70 (1981) (applying this principle to the corporate law context).

Professors Bebchuk and Jackson, arguing for the need to protect the freedom of expression of shareholders in publicly held corporations, emphasize the potential divergence between the speech preferences of the shareholders and those of corporate executives who control the speech attributed to the corporation. Even if they are correct about this potential divergence, it does not follow that this frustrates anybody's freedom of expression unless shareholders associate themselves with their corporations' speech. The authors' sole evidence that they do is that "[t]he SEC has long recognized that shareholders may have an interest in social policy issues that goes beyond the issues' direct financial relevance."[37] The fact that government has regulated based on a given assumption is not convincing evidence of the correctness of that assumption.

In fact, it is more reasonable to hypothesize based on the nature of the shareholders' investments that most do not identify with the speech of corporations they invest in. Individual shareholders generally invest in publicly held corporations through diversified portfolios and through other institutions such as mutual or pension funds. These shareholders may have little idea which stocks they are holding and are concerned only with the total risk and return of their portfolio. The *Citizens United* dissenters recognized this when noting that it was unclear that anybody, including the shareholders, was speaking for or through corporations.[38] It follows from this analysis that corporate speech is often the expression of the firm's executives or directors who actually decide what the corporation says.

An alternative characterization of corporate speech is that the managers are expressing the shareholders' views, at least to the extent that the speech furthers firms' profit-maximizing objective. Indeed, an argument against corporate speech rights recognizes that corporate managers cater to the pro-profit-maximizing shareholders and ignore their own and other shareholders' preferences for more socially oriented speech.[39] The argument denigrates this expression

37. *See* Bebchuk & Jackson, *supra* note 36, at 96.

38. *See Citizens United*, 130 S. Ct. at 972.

39. *See* Kent Greenfield et al., *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 880 (2007) ("Apolitical, amoral, investors create massive pressure on every company to act

on the ground that it is dictated by corporate law and policy. But this position ignores the broad leeway that the business judgment rule gives managers in deciding what to say or do on behalf of the corporation. Moreover, the First Amendment is concerned with the fact of expression, not with why the speakers choose to express themselves in a particular way.

To be sure, some shareholders may not want to be associated with some of the speech financed by their investments. As discussed below in this subpart, this possibility raises the question whether regulation of corporate governance is necessary to protect the expressive rights of these shareholders and whether any such protection would violate the First Amendment because it interferes with the expression of other investors. Speech that expresses the managers' personal views could be actionable self-dealing, but that is not a self-expression-based First Amendment justification for banning the speech. If a thief steals money and uses it for speech, the thief may be prosecuted but the theft is not a reason for banning the thief's speech. The only difference from the dissenting corporate shareholder situation is that the thief speaks for himself rather than purporting to speak for the victim. But this returns to the question just discussed of whether shareholders' self-expression is at stake in this situation.

2. Is the Corporation Entitled to Protection?

Bebchuk and Jackson assert in support of the constitutionality of corporate governance regulation of corporate speech that this regulation is justified in order to protect the freedom of expression of the corporation, which they see as "the bearer of the right" to speak.[40] Their premise is that corporate governance rules simply "determine whether the corporation wishes to speak," which, in turn, depends on

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in the way that those investors believe will maximize stock price."). This argument rests on the view that well-run corporations are like amoral sociopaths because they mono-maniacally seek to maximize profits rather than, like human beings, taking into account the overall human interest in social welfare. *See* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004).

40. Bebchuk & Jackson, *supra* note 36, at 108.

whether the "speech is disfavored by the company's shareholders."[41] This move may justify giving corporate speech less protection than non-corporate speech making the right-holder an artificial entity rather than a natural person.

The Court, however, avoided the artificial entity problem by holding that the First Amendment "protects speech and speaker, and the ideas that flow from each"[42] without regard to the speaker's corporate identity. The Court noted that "[b]y suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[43] In other words, the First Amendment does not guard corporations' expressive rights, but rather the public's interest in hearing what corporations have to say.

A strong form of this listeners' rights argument would invalidate all corporate governance regulation that restricts listeners' rights to hear what corporations would say in the absence of this regulation. The Court's endorsement of some corporate governance regulation appears inconsistent with this strong-form position. It follows that reasonable corporate governance regulation that does not unduly restrict corporate speech may pass muster. The question is whether this includes regulation that protects the shareholders' expressive rights, as discussed above and below in this Part.

Finally, even if the speech theoretically is that of the corporation, it is not clear how to distinguish speech of an artificial entity from that of the real people who speak through the entity. We are then back to the question of whether and how to protect shareholder expression.

3. Is Regulation Justified to Protect Shareholder Expression?

As discussed in subsection 1, most public corporation shareholders either have little or no expressive interest in the speech of corporations in which they have invested or actually agree with the

41. *Id.*
42. *Citizens United*, 130 S. Ct. at 899.
43. *Id.* at 907.

corporations' profit-maximizing speech. The question then becomes whether the First Amendment allows corporate governance regulation that protects the interests of the remaining shareholders who have an expressive interest in, and disagree with, their corporations' speech.

The *Citizens United* dissenters provide little support for such regulation in the corporate context. They rely instead on quotes from articles that do not support their position. For example, the Sitkoff article the dissenters quote from[44] actually concludes that "[t]here is nothing special about managerial control over corporate political speech that warrants abandoning ordinary modes of corporate governance in favor of a mandatory rule and criminalization," and ultimately explains corporate speech restrictions in terms of *corporate* demands for restrictions on political rent extraction by legislators.[45] The dissenters also rely on Blair and Stout[46] who actually advocate *managerial* power to allocate corporate resources among various corporate constituencies. This view would support managers' speaking for the corporate "team" rather than for shareholders as the dissent advocates.

As noted at the beginning of this subpart, Bebchuk and Jackson find support for regulating corporate governance on self-expression grounds in cases dealing with union members.[47] The authors concede that these cases can be distinguished on the ground that workers may be required to join unions and therefore to associate with their political positions.[48] Even where this is not the case, a worker's association with his union almost certainly is closer than that between a corporation and its diversified investors. Bebchuk and Jackson find the union analogy in problems with corporate governance, and specifically in the assertion that "the volitional nature of being a shareholder in a public company does not protect shareholders from

44. *Id.* at 975.
45. *See* Sitkoff, *supra* note 19, at 1165.
46. *See supra* text accompanying note 27.
47. *See supra* note 36 and accompanying text.
48. *Id.*

the consequences of political speech they disfavor."[49] This raises the question whether regulation of corporate governance intended to fix this "volitional" problem can survive First Amendment scrutiny. As the *Citizens United* majority made clear in emphasizing the overbreadth of the regulation at issue in that case,[50] the reasonableness of the regulation in accomplishing its stated purpose is an important factor in assessing its constitutionality under the First Amendment.

Regulation of corporate decisions to engage in speech collides with the fact that markets operate fairly well to constrain managers' use of shareholders' money, including on corporate speech. Managers' potential misuse of corporate funds contrary to shareholders' wishes is part of the broader category of "agency costs"—the costs of delegating power, including over corporate speech, to a non-owner agent. These include not only the costs of agent cheating but also the costs of monitoring by principals and bonding by agents to minimize this cheating.[51] There are many potential mechanisms for controlling these costs, including independent directors, shareholder voting mechanisms, transferable shares, fiduciary duties and remedies, disclosure rules, and gatekeeper responsibilities.[52] Agency costs are never zero: as cheating declines, the costs of controlling it rise. These costs, including controlling an agent's use of his power to engage in speech to which the principal objects, can be avoided only by not having agents, which is an unacceptable price to pay in many situations. Firms' value depends in part on their selection of the mix of agency cost control devices that minimizes the total of managerial cheating and agency cost control. Firms can choose from a "horizontal" menu of various state and national laws and a "vertical" menu of organizational forms available in each jurisdiction, including various types of corporations, partnerships, and hybrid firms offering

49. *See* Bebchuk & Jackson, *supra* note 36, at 114.

50. *See supra* text accompanying note 29.

51. *See* Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

52. For a review and analysis of these choices, see REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2d ed. 2009).

a mixture of partnership and corporate features.[53] These contract choices are priced in securities markets. This helps ensure both that investors get the quality of agency cost control they are paying for, and that firms have incentives to provide for appropriate levels of investor protection.

These various agency cost controls apply to corporate speech. Moreover, as with agency costs generally, markets discipline firms' speech. Corporations compete for capital in highly competitive capital markets. Firms that waste money on speech that does not help their bottom line will have to pay more for capital. The efficiency of corporate speech expenditures depends on how the speech affects all aspects of a firm's business. Thus, managers can serve shareholders only by also catering to customers' interests.[54] For example, when Target donated $150,000 for use by a Minnesota gubernatorial candidate who happened to be an outspoken opponent of gay marriage the firm was subject to highly visible protests by gay-rights advocates that caused the managers to review the firm's decision.[55] Target's experience illustrates firms' reputational risks from political contributions.

Even if markets imperfectly discipline agency costs in general, the particular type of agency costs inherent in corporate speech that interferes with shareholders' expression is likely to be more susceptible to market discipline than agent conduct generally. Although corporate agents might misbehave when they stand to earn monetary benefits at the firm's expense, markets and corporate governance generally can deal with lesser temptations such as inadequate care or mildly self-interested conduct. Shareholders might have to worry about lucrative compensation packages or costly empire-building acquisitions, but executives would be unlikely to risk board dismissal for potentially embarrassing or costly political speech whose potential benefits are long-range and speculative. Market

53. *See generally* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010).

54. Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 N.D. L. REV. 1431, 1452–56 (2006).

55. *See* Ira Boudway, *Target's Off-Target Campaign Contribution*, BLOOMBERG BUSINESS WEEK, Aug. 5, 2010, http://www.businessweek.com/magazine/content/10_33/b4191032682244.htm.

discipline helps explain why fiduciary duties focus on clearly selfish conduct and leave other types of agent misbehavior to the light touch of the business judgment rule.[56]

Notwithstanding general theory casting doubt on justifications for governance regulation of corporate speech, data might paint a different picture. Bebchuk and Jackson cite limited empirical work suggesting a misalignment of incentives, including a working paper by Professor John Coates.[57] Coates presents evidence negatively correlating corporate political activity with shareholder democracy variables and with corporate value (measured by Tobin's Q).[58] There are questions about what the data shows. For example, the negative correlation with Tobin's Q may be because firms hurt most by government regulation must engage in more political activity.

Coates's negative correlation with shareholder democracy raises the separate issue of variations in shareholders' expressive preferences. Shareholders who have an expressive interest in corporate speech are most likely to be activists in general or to have significant stakes in particular firms. Rather than investing in diversified portfolios, these shareholders can choose to invest only in firms that empower them to influence corporate speech. Also, some shareholders may have idiosyncratic preferences at odds with the general run of shareholders who favor profit-maximization. These idiosyncratic investors can exclude from their portfolios firms whose objectives they disagree with. Many investors do engage in such "social" investing.[59] Coates's data may indicate not that corporate speech hurts or is disfavored by shareholders generally, but that the sorting suggested in this paragraph is actually occurring.

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56. *See* Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209 (2005).

57. Bebchuk & Jackson, *supra* note 36, at 92 n.25. *See* John C. Coates, IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?*, (Harvard Law School John M. Olin Center for Law, Economics, and Business, Discussion Paper 684, Sept. 21, 2010), *available at* http://w4.stern.nyu.edu/emplibrary/Coates%20SSRN-id1680861.pdf.

58. Coates, *supra* note 57. An earlier study had also shown a negative correlation between corporate political activity and corporate returns. *See generally* Rajesh K. Aggarwal et al., *Corporate Political Donations: Investment or Agency?* (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670.

59. *See* Ribstein, *supra* note 56, at 228.

All of this is not to say that corporate speech perfectly reflects shareholders' expressive preferences. However, any divergence of corporate speech from shareholder preferences must be viewed as just one page in the much larger agency cost story. The design of agency cost controls is highly complex and disciplined by robust markets. These considerations suggest that even if regulation of corporate governance processes connected with corporate speech could marginally increase protection of expression by some shareholders, the regulation still might be unconstitutional because it excessively burdens speech. Moreover, as discussed in the next section, any divergence of interests among shareholders may raise more serious questions as to whose expression corporate governance regulation should protect.

4. Regulatory Interference with Free Expression

Even if some corporate governance regulation serves to protect shareholders from funding or being associated with speech they disagree with, and even if the benefits of this regulation outweigh the costs in terms of restricting the total amount of corporate speech, the regulation still might not be justified under the First Amendment because it interferes with the expressive rights of some individual investors.

First, regulation of governance processes related to corporate speech might favor the views of some shareholders over others, thus interfering with expressive rights as much as or more than do unregulated governance processes. Although some shareholders may object to the pro-business interests for-profit firms advocate, other shareholders may favor these views. Shareholder-maximizing firms may be the most efficient way for these shareholders to express and effectuate these pro-business views.[60] Corporations are particularly important for expressing pro-business views because corporations'

60. It has been argued that corporate altruism may be the best way for shareholders to express and effectuate altruistic views. *See* M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009). This supports rather than undermines the point made in the text by showing that shareholders have a variety of potential interests that can be represented through the corporations they invest in.

role in promoting for-profit speech faces less competition from philanthropic organizations than does corporations' altruistic speech. To be sure, some non-profit organizations such as the American Enterprise Institute advocate for free markets. However, individual firms and the industry groups to which they contribute play an important role in advocating for specific business interests.[61] It follows that regulating shareholder-maximizing firms' speech may frustrate the self-expression of investors who favor the pro-business views that, in the absence of regulation, individual firms would engage in.

Regulation of corporate governance theoretically could be designed to enable all shareholders to participate in determining what their corporations say, thereby helping to ensure that corporate speech best represents this combination of views. In practice, however, the pro-business shareholders may be most likely to be those with broadly diversified portfolios or who invest through intermediaries and, therefore, are least able to participate actively in governance processes aimed at shaping corporate speech. Even activists' pro-business interests may differ from passive shareholders' pro-business interests. For example, the activist shareholders may be undiversified and favor takeovers that affect costly wealth transfers between firms, while the passive shareholders own diversified portfolios and therefore favor only those takeovers that maximize the value of their entire portfolios.[62] Regulation that protects hedge funds may not serve the expressive interests of diversified shareholders.[63]

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61. Bebchuk & Jackson, *supra* note 36, present some data on the political activity of businesses and some pro-business groups. Although the presentation of this data is intended to highlight problematic corporate political activity, whether it is a problem depends shareholders' expressive interests, as discussed in the text.

62. *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Outsider Trading as an Incentive Device*, 40 U. C. DAVIS L. REV. 21, 41–46 (2006).

63. A prominent Delaware jurist has characterized this as a conflict between long-term and short-term ownership, which he refers to as the "separation of 'ownership from ownership.'" *See* Leo E. Strine, Jr., *Why Excessive Risk-Taking Is Not Unexpected*, N.Y. TIMES DEALBOOK, Oct. 5, 2009, *available at* http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/ (last visited Feb. 24, 2011) ("[The financial] intermediaries who invest their capital . . . have powerful incentives . . . to push corporate boards to engage in risky activities that may be adverse to the interest of long-term investors and society. That is, there is now a separation of 'ownership from ownership' that creates conflicts of its

Thus, corporate activism, even if apparently designed to level the playing field, may actually slant it toward particular shareholders, and frustrate the others' expressive rights.

Apart from which shareholders regulation should favor, there is the additional question of why shareholders' interests should weigh more heavily than those of other stakeholders. For example, preferred shareholders may have only minimal governance rights and creditor-like interests in equity, while convertible debenture holders may have a significant shareholder-like interest in the residual left after paying other claimants. Moreover, the interests even of claimants with conventional rights may depend on particular circumstances. Derivative securities may enable shareholders to convey away their voting rights,[64] while in firms approaching insolvency, creditors may resemble shareholders and the original shareholders may be left with only a highly contingent claim.[65] Perhaps most importantly, it is not clear why shareholders' expressive interests should take precedence over those of employees, who are likely to identify far more closely with their employer's speech than do shareholders with broadly diversified portfolios, or over the executives who may have actually formulated the speech.

Given this proliferation of interests among corporate stakeholders, procedures that enable all those who care about corporate speech to be heard could sharply constrain corporations' ability to speak at all. This could frustrate the public's right to hear corporate speech and thus fall outside *Citizens United*'s limited exception for corporate governance regulation. Procedures protecting individual shareholders' expressive rights could create an "anti-commons" that would cripple the corporation's power to speak by leaving no one in control of it.[66] Moreover, government manipulation of corporate

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own that are analogous to those of the paradigmatic, but increasingly outdated, Berle-Means model for separation of ownership from control.").

64. *See generally* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2005−06).

65. *See* Larry E. Ribstein & Kelli A. Alces, *Directors' Duties in Failing Firms*, 1 J. BUS. & TECH. L. 529, 531 (2007).

66. *See generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY (2008) (explaining how various types of legal rules can hobble the practical ability to exercise control over property).

governance processes to protect the expression of various corporate participants could lend itself to the government's use of "censorship to control thought" the Court warned about.[67]

The alternative to the potential chaos and restrictions on corporate speech that could result from trying to protect individual shareholders' expressive rights is the strong board primacy inherent in the corporate form.[68] The agency costs inherent in delegating control over corporate speech to managers can be constrained by the devices and market forces discussed in section 3. If regulation is necessary, it should apply to corporate decision-making generally.

To be sure, the above discussion might underestimate the benefits of corporate speech regulation in protecting shareholders' expression and overestimate the costs. However, the Court made clear in *Citizens United* that the risk inherent in government censorship is a paramount consideration. This suggests that proponents of corporate governance-type regulation of corporate speech bear the burden of proof in the cost-benefit analysis.

5. Free Expression and Distortion

In the final analysis, it is not clear that corporate speech regulation advocated on corporate governance grounds is really about protecting the expression of shareholders or others connected with the corporate speakers. The dissenters noted that "the *Austin* Court did not hold [the shareholder protection rationale] out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the anti-distortion rationale, in part by providing a reason "for doubting that these 'expenditures reflect actual public support for the political ideas espoused.'"[69] The dissenters' real concern, in other words, is with what might be called the potential for "external" distortion by corporate speech rather than "internal" distortion of particular shareholders' views. Regulating

67. *Citizens United*, 130 S. Ct. at 908.

68. *See* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735 (2006).

69. *Citizens United*, 130 S. Ct. at 975 (quoting Austin v. Mich. Chamber of Comm., 494 U.S. 652, 677 (1990)).

corporate speech through the procedures of corporate democracy is just a second-best way of accomplishing what the dissenters really want to do but cannot do after *Citizens United*—correcting distortion in public debate by banning certain corporate speech.

The Court is unlikely to accept this end-run around its rejection of the distortion rationale. The external distortion rationale for regulating corporate speech is not only different from but also incompatible with the concern for protecting shareholders' expression. The external distortion rationale is not based on a concern that corporations would be wasting shareholders' money on corporate speech, but rather that they might use it too well to gain political influence. Thus, the *Citizens United* dissenters said that corporations

> are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is 'far more destructive' than what noncorporations are capable of.[70]

Indeed, as discussed above in section 4, corporate governance laws are likely to hamper corporate operations by weakening the centralized management that is critical to this structure. Those who embrace the corporate governance approach as a second-best solution to the problem of corporate speech see this weakening as a feature rather than a bug. Yet this approach also undermines its own premises since it frustrates the objectives of many, if not most, of the shareholders it purports to serve.

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70. *Id.* at 975 (citing Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1113 (2002)). The divergence between internal and external distortion, however, may not be as great as the proponents of corporate speech restrictions believe, because corporations' interest in profits is likely to constrain their political activity. Investments in political activity rarely have positive net present value given for-profit firms' opportunity costs for their capital and these investments also may impose rent-seeking costs on shareholders who hold widely diversified portfolios and do not gain from zero-sum inter-firm wealth transfers. *See* Ribstein, *supra* note 7, at 138.

In short, there is a tension between regulating corporate speech on the ground that it distorts the electorate's view and regulating it in order to protect shareholders' self-expression. *Citizens United* made clear that, at most, only the latter counts as a justification for regulating corporate speech under the First Amendment.

C. Proposed Governance Regulation

Even assuming that corporate speech regulation may be justified to protect shareholder expression, there is a question of how far this regulation may go. Whatever the purported basis of this regulation, it is likely to have some effect on corporate speech. Even if the Court accepts the general corporate governance rationale for regulating corporate speech, it is likely to set limits on the extent to which governance-oriented regulation can restrict corporate speech.

These issues are directly implicated by the proposed Shareholder Protection Act (SPA).[71] This Act would, among other things, require extensive quarterly and annual disclosures of corporate speech expenditures and majority shareholder authorization of "specific" expenditures a year in advance and impose damages for unauthorized expenditures.[72]

The SPA makes clear that its purpose goes beyond merely protecting shareholders. As the bill's "purpose and summary" notes in its opening sentences, "The [*Citizens United*] ruling invalidated longstanding provisions in U.S. election laws and raised fresh concerns about corporate influence in our political process. To address those concerns, the Shareholder Protection Act gives shareholders of public companies the right to vote on the company's annual budget for political expenditures."[73] In other words, the proposed Act is concerned with "corporate influence."[74] This illustrates the tension discussed above between the concern for

71. *See generally* Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).
72. *Id.* at 9–10.
73. H.R. Rep. No. 111-620, at 4 (2010).
74. *Id.* at 5.

shareholder expression and that for corporate distortion of the political process.[75]

Apart from the uncertainty of the Act's intended goal, its means of implementing this goal probably cannot survive First Amendment scrutiny under *Citizens United*.[76] First, the Court suggested that, while a corporate governance regulation might pass, a remedy "based on speech, contravenes the First Amendment."[77] The SPA, like the restrictions at issue in *Citizens United*, is "based on speech." This raises the question whether the proposed Act's restrictions can be sustained on shareholder-protection grounds discussed above in this Part.

Second, the SPA favors the expression of some stakeholders to the detriment of more passive shareholders. The provisions requiring authorization of expenditures may, depending on the applicable voting rules, empower activist shareholders, such as public pension funds, while submerging the preferences of many, perhaps a majority, of others.

Third, the Act's requirement that corporations get advance shareholder approval for corporate political activity sharply constrains all such speech by essentially requiring firms to lock in their political activity for a year from the close of a fiscal year. This prevents firms from dealing effectively with a dynamic political landscape. Managers' treble damage "fiduciary" liability for unauthorized speech reinforces this inflexibility. Imposing these burdens on speech would be inconsistent with *Citizens United*'s emphasis on the social value of corporate speech.[78]

Bebchuk and Jackson's governance proposals[79] may fare better under the First Amendment because they are more squarely aimed at corporate governance and the internal distortion problem. The authors suggest requiring the shareholders approve the firm's overall

75. *See infra* Part II.B.5.

76. Note that these comments apply to federal legislation like the Shareholder Protection Act and not to state corporate law. *See infra* Part III.E.

77. *Citizens United*, 130 S. Ct. at 911.

78. *Id.* at 978 n.76.

79. *See generally* Bebchuk & Jackson, *supra* note 36, at 96–117.

spending budget, allowing shareholders to submit binding resolutions on corporate speech for shareholder vote, requiring that independent directors make decisions on corporate speech, and mandating more disclosure concerning corporate speech decisions.[80] These provisions are probably less onerous than those in the SPA, depending on their specific implementation, including how they interact with the rules for shareholder voting under federal and state law.[81] Bebchuk and Jackson also would enable shareholders to opt out of the regulation, which further mitigates the impact on corporate speech.[82]

The main problem with the Bebchuk-Jackson proposal is that it allows for possible super-majority shareholder authorization of corporate speech in order to protect the expressive rights of minority shareholders. As discussed in subpart B, protecting the expressive rights of some shareholders may infringe the expression of other stakeholders and unacceptably restrict corporate speech under the *Citizens United* listeners' rights rationale. These concerns increase with the level of protection for minority shareholders. Bebchuk and Jackson even suggest any level of shareholder approval is acceptable that enables "a practically meaningful opportunity to obtain the required approval."[83] The authors draw this standard from cases on whether state antitakeover law preempts federal law protecting shareholders' rights.[84] The preemption standard is based on the intent underlying federal takeover law and has little to do with determining corporations' and corporate stakeholders' rights regarding corporate speech.[85]

In short, in determining the constitutionality of governance regulation, courts must weigh protection of shareholder expression against frustrating corporate speech generally and the expression

80. *Id.* at 98–99.

81. As to the interaction between federal and state corporate law on corporate speech regulation, *See infra* Part III.E.

82. *See* Bebchuk & Jackson, *supra* note 36, at 97, 102–03.

83. *Id.* at 116.

84. *Id.* at 96.

85. However, these preemption decisions are indirectly relevant in showing how governance regulation might combine with the First Amendment to help federalize state corporation law. *See infra* note 118 and accompanying text.

rights of particular shareholders and stakeholders. The proposed SPA's burden on corporate speech is likely to be too great even without this balancing.

III. CORPORATE SPEECH BEYOND *CITIZENS UNITED*

The governance rationale for regulating corporate speech has several general implications for the application of the First Amendment to business association speech beyond the specific contexts that *Citizens United* deals with. Subparts A and B discuss types of firms other than the publicly held for-profit corporations, subparts C and D discuss speech other than campaign contributions, and subpart E discusses state law. These implications highlight additional difficulties with the governance rationale for regulating business association speech under the First Amendment.

A. Non-Profits

Congress and the Court have struggled with the application of BCRA to non-profit corporations formed to promote political ideas. Because these firms are formed for expressive purposes, they may not seem to involve the external distortion problem. This conclusion, however, is questionable given the political power of some of these organizations and the fact that they do not operate under the constraints for-profits face in using their funds for business purposes. Moreover, the Court and Congress have found it difficult to design a for-profit exception that would appropriately distinguish organizations according to their distortion potential without giving for-profit corporations a big loophole from constraints on expenditures. In *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*,[86] the Court held unconstitutional expenditure limitations as applied to political-purpose non-profits. This case and the Snowe-Jeffords amendment to BCRA effectuating it[87] would not have exempted Citizens United because it was funded partly by for-

86. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986).
87. *See generally* 2 U.S.C. § 441b(2) (2002).

profit corporations, and the Court in *Citizens United* declined to read into the Act an exception that would effectively allow for-profit corporations to use general treasury funds for independent expenditures by funneling them through non-profits.[88]

Questions about how to deal with non-profits are not solved but rather intensified under the corporate governance approach to regulating corporate speech. The basic problem is the failure to recognize that the underlying agency cost problem applies to delegation of control in all types of associations. Indeed, agency costs arguably are even higher in non-profits than in for-profits. The contributors to charitable-type non-profits usually are not merely passive, like public corporations shareholders, but have no governance rights at all. This leaves the state as the only monitor.

Contributors' only option in opposing speech of an organization with which they disagree is to exit and stop contributing.[89] But non-profits can exploit their members' moral commitment to the cause, geographical proximity, or social incentives to join, and can offer politicians not only money but member votes.[90] Indeed, members or contributors might be more willing to tolerate use of funds gathered for ideological aims with which they disagree than owners of for-profits, because the latter can choose from a wider range of firms expressing similar views. Contributors to non-profits are left with a choice between the greater clout of a large organization that imperfectly expresses their views and the lesser clout of a smaller organization with whose positions they completely agree. Thus, even if they have less total revenues than for-profits, non-profits may be able to use contributor loyalty to outbid for-profits for candidates' political support.

Allowing an exception for non-profits not only ignores the agency problems in these organizations but also could exacerbate them in for-profit corporations. Political action committees, in particular, interfere with shareholder expression by channeling corporate

88. *Citizens United*, 130 S. Ct. at 891.
89. *See generally* Ribstein, *supra* note 7, at 137.
90. *See id.* at 138.

political activity further away from shareholder control and into organizations controlled solely by managers.[91] Addressing this problem may require imposing a costly and intrusive disclosure regime or prohibiting all corporations and their agents not only from not making direct contributions but also from contributing through any other associations.

Even if agency costs are lower and expressive fidelity is higher in non-profits than in for-profits, the question remains whether these differences justify sharply different treatment of for-profits under the First Amendment. The relevant question is whether the costs in terms of potential government censorship of speech and interference with expression by some stakeholders outweigh the benefits in vindicating other stakeholders' expressive rights. As the Court said in *Citizens United*, "[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers."[92] This may be the effect of restricting for-profit corporate speech but not the speech of non-profit associations.

B. Types of For-Profit Firms

The *Citizens United* majority notes that BCRA applies not only to large corporations but also to closely held firms that not only do not raise the distortion problem highlighted by the dissent, but also are at a disadvantage because of large firms' ability to use their substantial resources for lobbying.[93] Thus, the majority was concerned that millions of small firms would be pointlessly disenfranchised and saw this as an argument against the external distortion rationale for regulating corporate speech.[94] The distinctions among types of for-profit firms from the standpoint of the governance rationale for regulating business association speech raise additional questions about regulating corporate speech.

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91. *See* Ribstein, *supra* note 7, at 141; Sullivan, *supra* note 17, at 172.
92. *Citizens United*, 130 S. Ct. at 899.
93. *Id.* at 908.
94. *Id.*

The ubiquity of agency costs raises questions about distinctions between types of for-profits as it does about distinctions between for-profits and non-profits. The potential for distorted expression exists whenever there is a delegation of power that creates a separation of ownership and control. Small firms may not involve the same sort of internal distortion as in large firms because concentrated shareholders who can interact personally can express their views through the firm more effectively than can thousands of dispersed shareholders. However, small firms involve a different type of agency problem resulting from the delegation of power to a majority of shareholders and the consequent lock-out of minority shareholders. Thus, in the famous case of *Dodge v. Ford*, controlling shareholder Henry Ford sought to use the firm's resources for the ostensible purpose of helping consumers over the objection of minority shareholders.[95] A similar problem would arise if Ford were using the Dodges' money for speech rather than lowering the price of its cars.

Agency problems and therefore internal distortion are, if anything, more serious in closely held than in publicly held firms. In a publicly held firm with dispersed shareholders, the directors may be able to control day-to-day acts but still need shareholder approval of extraordinary acts, such as a transfer of control. When passive shareholders sell, their shares may end up with contestants for control who are in a position to challenge incumbent managers. By contrast, in a closely held firm, the majority's plenary control over corporate acts may result in complete silencing of minority shareholders with substantial investments. More importantly, the owners of closely held corporations, which do not trade in public securities markets, may have no ability to object to corporate speech by exiting as do shareholders in publicly traded firms.

Even if closely held firms could be said to involve less of a problem with shareholder expression than publicly held firms, it is not clear that this distinction justifies different treatment of publicly

95. Dodge v. Ford Motor Co., 170 N.W. 668, 671 (Mich. 1919). In fact, Ford may have been more interested in squeezing out the Dodge Brothers or at least preventing them from setting up a competing company. *See* Edward Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 519–23 (1992).

and closely held firms under the First Amendment. Moreover, further distinctions among firms might be necessary to mesh the scope of speech regulation with its rationale and avoid over-inclusiveness or under-inclusiveness. For example, should corporations with a controlling interest be distinguished from management-controlled firms? If so, what level of control should be deemed sufficient to prevent adequate expression by minority shareholders?

A specific question that arises in applying the First Amendment to closely held firms is how the law should approach unincorporated firms (i.e., uncorporations) under the shareholder protection rationale. These firms generally trade off corporate-type agency cost controls, such as fiduciary duties, shareholder voting, and the market for control for uncorporate devices, particularly including an enhanced power to cash out of the firm.[96] Since owner exit is effective even without coordination with other owners, this device arguably results in less distortion of owner interests in both publicly and closely held uncorporations. On the other hand, if internal distortion depends solely on owners' self-expression, enhanced exit might not avoid distortion even if it minimizes overall agency costs.

First Amendment-based distinctions among types of firms thus open the corporate governance rationale to a Pandora's Box of complications. The amount and types of agency costs, and therefore internal distortion and the need for regulation, depend on firms' contractual arrangements, organizational form, and size. In addition to the distinctions already discussed, there are other factors affecting shareholder control, including the use of financial derivatives to separate control from economic ownership,[97] and the use of securitization to separate firms' assets from their operations through special purpose vehicles. These structures raise the question of how much and what type of control capital contributors must have over resources used for political activity in order to justify regulation on shareholder protection grounds.

96. *See* Ribstein, *supra* note 53, at Chapter 2.
97. *See* Hu & Black, *supra* note 64.

C. Non-Political Speech

Citizens United dealt with certain publicly distributed communications referring to identified candidates for federal office. This raises the question of how the First Amendment, and specifically the corporate governance rationale for regulation, would apply to other types of corporate speech.

This question invokes the distinction between "commercial" and other types of speech. The Court has held that speech proposing a commercial transaction is entitled to a lower level of First Amendment protection than other types of speech.[98] One reason for the distinction is that corporations have more robust incentives to engage in commercial speech and, therefore, are less likely to be deterred by regulation from engaging in socially valuable speech.[99] Thus, applying the same level of regulation to both types of speech could unbalance public debate by over-weighting commercial discourse. Corporate speech on a public issue, such as an advertisement advocating legislation to reduce global warming, arguably does not fit this definition of "commercial speech" and therefore, would seem to be entitled to the highest level of protection.

On the other hand, corporations inherently blur the distinction between commercial and non-commercial speech since they often may use social responsibility to sell their products[100] and have an extra incentive to do so if this helps them avoid regulation.[101] The most adamant opponents of corporate speech likely would agree concerning the artificiality of distinguishing commercial and non-commercial corporate speech, since they claim that corporations are monomaniacal profit-maximizers regardless of the language they use in their advertising.[102]

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98. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. 447 U.S. 557, 562–63 (1980).

99. *See* Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163 (1994–95) (discussing the rationale of the commercial speech doctrine).

100. *See generally* Ribstein, *supra* note 54.

101. *See* Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 195 (2010) (discussing this tactic as a form of "alchemy").

102. *See* Greenfield, *supra* note 39.

Applying the shareholder protection rationale for regulating corporate speech further complicates the distinction between commercial and non-commercial speech. Investors who seek maximum returns would favor profit-maximizing commercial speech. This suggests that commercial speech poses less risk of internal distortion than non-commercial speech. Conversely, these shareholders may object to corporations' non-political expressions of support for good causes.[103]

After *Citizens United*, the debate over distinguishing commercial and non-commercial speech might be settled in favor of the majority's listeners' rights rationale, particularly given the above complications of applying the opinion's other rationales. Since both types of advertisements express ideas that are important in a commercial economy—support for a particular product and opposition to a general type of product (e.g., one that threatens global warming)—both would seem equally entitled to First Amendment protection.[104]

D. Corporate Governance Speech

The analysis so far in this paper suggests that the First Amendment would not permit regulating corporate speech on the theory that this regulation is necessary to protect shareholders' right of self expression. This has direct application to regulating corporations' internal governance speech, such as communications to shareholders regarding corporate elections.

An important pre-*Citizens United* case on corporate governance speech is *Pacific Gas & Electric Co. v. Public Utilities Commission* (PGE),[105] where the Court struck down under the First Amendment a law compelling speech by a corporation in the form of mandatory inserts in its power bills. Justice Stevens, the *Citizens United*

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103. *See* Bebchuk & Jackson, *supra* note 36, n.97 ("[L]ike political speech, there may be reason to believe that special rules are needed to ensure that decisions regarding corporate charitable contributions are in shareholders' interests."); Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191 (2002).

104. *See* Butler & Ribstein, *supra* note 99.

105. 475 U.S. 1 (1986).

dissenter, also dissented in *PGE*, comparing the regulation at issue to the SEC's shareholder proposal rule, which requires corporations to distribute statements to its shareholders in connection with corporate elections.[106] The majority rejected the analogy because the shareholder proposal rule does "not limit the range of information that the corporation may contribute to the public debate" and because proxy regulation governs managers' use of corporate property.[107]

The *PGE* distinction makes some sense in terms of the shareholder protection rationale. Under that reasoning, it is arguably acceptable to regulate speech within the corporation in order to protect shareholders' control of corporate resources. This would seem to be an even more important consideration post-*Citizens United*, given corporations' new freedom to spend their resources on political speech. On the other hand, *PGE*'s fine distinction between proxy and other types of corporate speech would not square with *Citizens United*'s broad listener-based rationale. Thus, corporate governance, and specifically proxy regulation, may be a significant battleground for *Citizens United*'s shareholder protection rationale for regulating corporate speech.

This reasoning is particularly relevant to the SEC's new Rule 14a-11 providing that large, long-term shareholders (i.e., those who have held a three percent interest for three years) may use the corporation's proxy materials to nominate directors.[108] It has been argued that the *PGE* distinction between billing inserts and shareholder proposals would not apply to this rule because it affects the speech of shareholders such as hedge funds and not just corporate officials.[109] However, the speech would still relate to internal corporate governance rather than to the corporation's external speech, and therefore arguably would fall within one of *PGE*'s rationales.

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106. *Id.* at 39–40.
107. *Id.* at 14 n.10.
108. 17 C.F.R. § 240.14a-11 (2010).
109. *See* Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America at 58–59, Bus. Roundtable and Chamber of Commerce of the United States v. SEC, No. 10-1305 (D.C. Cir. Nov. 30, 2010), http://blogs.law.harvard.edu/corpgov/files/2010/12/Gibson-Dunn_Brief_proxy-access-rule-challenge.pdf.

The shareholder protection argument seems to support *PGE*'s internal-external speech distinction. In order to ensure that corporate speech reflects shareholders' views—that is, to protect against internal distortion—the First Amendment arguably permits not only direct regulation of authorization of corporate speech, such as via the proposed Shareholder Protection Act, but regulation of corporate governance processes that might affect control over corporate speech, such as Rule 14a-11.

On the other hand, the analysis comes out differently under *Citizens United*'s listeners' right rationale. As corporate activities are more regulated and therefore seek to play an increasing role in public discourse, their internal governance debates increasingly relate to political debates occurring outside the corporation.[110] This suggests a direct conflict between the shareholder protection rationale, which seeks to regulate internal governance because of its effect on public debate, and the special need for First Amendment protection of speech related to that debate.

A further quandary in applying the shareholder protection rationale of regulating corporate speech concerns the question of which shareholders. This is raised directly by Rule 14a-11, which, as noted above, favors certain large long-term shareholders. Larger shareholders may favor rent-seeking actions that seek to transfer wealth among the firms in their broadly diversified portfolios. On the other hand, smaller, diversified shareholders, who own substantial amounts of large corporations' shares, would favor actions that benefit their whole portfolios and not costly wealth transfers between individual firms in those portfolios.

Citizens United's listeners' rights rationale raises additional questions concerning the constitutionality of other securities law provisions constraining truthful speech, particularly including prohibition of speech in unregistered public offerings under the

110. One commentator seems to suggest that this connection with public debate actually favors regulation. *See* Siebecker, *supra* note 101, at 164–65 (arguing for a "discourse" theory of proxy regulation on the ground that "the ability to direct corporate decisions represents the ability to control political life"). Whether or not this theory makes sense as a normative matter, its relationship with public debate would heighten the First Amendment concern.

Securities Act of 1933[111] and Regulation FD, which penalizes selective disclosure of material information to securities analysts.[112] These examples suggest that securities regulation may come under broad constitutional scrutiny following *Citizens United*.[113]

E. State vs. Federal Law

The constitutional proscription arguably applies only to *federal mandatory* law. Firms' ability to shop for corporate governance law under the "internal affairs" choice of law rule takes the teeth out of any speech regulation in state law and thus insulates these laws from a First Amendment challenge. This is analogous to Bebchuk and Jackson's defense of shareholder opt-out rules for federal regulation.[114] By contrast, state election law that applies to corporations doing business in the state (as opposed to those incorporated in the state) should be treated the same as federal law for First Amendment purposes, since it may be as hard for firms with shareholders in every state to avoid being subject to these statutes as it is for them to avoid federal law.

Additional questions concern the interaction between state and federal governance law. Federal statutes like the Shareholder Protection Act and the Bebchuk-Jackson proposals call for authorization of corporate speech through governance procedures that are basically established by state law. Thus, a federal statute that requires a shareholder vote but is otherwise silent may implicate state procedures for determining such issues as who may vote, how the votes are counted, and when and how meetings are called. Provisions for director votes on corporate speech depend on state procedures for

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111. *See* Butler & Ribstein, *supra* note 99. Regulation of this speech is being tested in Bulldog Investors Gen. & Others v. Sec'y. of Commonwealth, SJC-10756, which is challenging a Massachusetts law forbidding general advertising of unregistered offerings of hedge fund shares. *See* Larry E. Ribstein, *The First Amendment, the Securities Laws and Hedge Funds*, TRUTH ON THE MARKET, Jan. 3, 2011, http://truthonthemarket.com/2011/01/03/the-first-amendment-the-securities-laws-and-hedge-funds/.

112. *See* Larry Ribstein, *SEC "Fair Disclosure" Rule is Constitutionally Suspect*, 10 WASH. LEGAL FOUND. LEGAL OPINION LETTER 17 (Oct. 6, 2000).

113. For a general analysis of the application of the First Amendment to securities regulation, *See* Butler and Ribstein, *supra* note 99.

114. *See* Bebchuk & Jackson, *supra* note 36, at 103–04.

electing directors. It follows that the constitutionality of these statutes may depend on their associated state procedures. Moreover, provisions protecting minority shareholders raise questions concerning the level of minority control under state law at which these provisions are unnecessary to protect shareholder expression and, therefore, unconstitutional under the First Amendment.

This analysis suggests that federal laws enacted under the shareholder protection rationale could have the indirect effect of broadly subjecting state corporate law to First Amendment scrutiny.[115] This is another reason to be concerned about such laws.

IV. CONCLUSION

The debate over the constitutionality of corporate speech regulation took a significant turn in *Citizens United* but did not end with that case. The Court's liberation of corporate political speech touched off a furor that the bare majority decision is unlikely to quell. Moreover, although the majority's broad listener-based rights approach attempts to settle corporations' First Amendment rights, it leaves room for regulation that does not attempt to directly limit corporate speech.

Some of the post-*Citizens United* debate focuses on the central dispute between the majority and dissenting opinions regarding the impact of corporate speech on public debate. The majority opinion reasoned that the corporate identity of the speaker should not diminish the application of the First Amendment. This addresses arguments that speech emanating from artificial entities is not entitled to First Amendment protection.

Although the majority opinion clarified that corporate speech is fully protected under the First Amendment, it opened another issue concerning the constitutionality of regulating the corporate decision-making processes that authorize this speech. This approach seems to

115. This is analogous to the question of when state corporate law should be preempted because it unduly impedes the functioning of federal takeover law. *See* Larry E. Ribstein, *Preemption as Micromanagement*, 65 BUS. LAW. 789 (2010).

have advantages over the distortion argument, including its recognition that "corporate" speech is really the speech of the individuals who contract through the corporation rather than that of an artificial entity.

Despite the superficial attraction of the corporate governance move, this paper shows that approaching corporate speech through its governance processes fails to provide a coherent basis for regulation under the First Amendment. It is far from clear that regulation is justified to protect shareholders' expressive interests. Moreover, regulation that protects some shareholders could harm the expressive interests of other corporate stakeholders.

In the final analysis, the majority's listeners' rights theory may be the only viable approach for dealing with political and commercial corporate speech. Now that it is clear that protection of corporate speech under the First Amendment cannot be diminished by shunting the speech off into an artificial entity, any justification for regulation would have to grapple with the complexities of corporate finance and governance and with the myriad variations among business and non-business associations. Add the risks inherent in politicians deciding who can speak and the better course is to err on the side of free speech.