A Contractarian Critique of Citizens United

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by

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Abstract

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 already 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 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. The 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 exactly because the contracts at stake are often not in fact bargained for freely or fairly, as the theoreticians argue, that there is need for government regulation to make sure that the contracting process and the resulting bargains are fair. I use contract law jurisprudence to show that defenses to contract enforcement ex post, can justify government regulation of corporations ex ante. Further, I develop this idea into a general analytical framework for assessing whether and when regulation of a corporation is both constitutional and prudential. I then illustrate how to use this paradigm by applying it to the Citizens United decision and to proposed regulatory responses to that decision.

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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“Political speech does not lose First Amendment protection 'simply because its source is a corporation.’”

-Justice Kennedy, for the 5–4 majority in *Citizens United*¹

“…corporations have no consciences, no beliefs, no feelings, no thoughts, no desires... they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”

-Justice Stevens, dissenting in *Citizens United*²

### 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.³

The catalyst for this battle was *Citizens United v. Federal Election Commission*, decided in January of 2010.⁴ 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.⁵ According to the *Citizens United* majority, this is an area where corporations are entitled to the same First Amendment protection as natural persons.⁶ Thus, the majority struck down what it deemed an unconstitutional restraint on corporate First Amendment free speech rights.⁷

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² *Id.* at 930 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
³ In his dissent, Justice Stevens described the opinion as threatening “to undermine the integrity of elected institutions across the Nation. *Citizens United*, 131 S. Ct. at 931(Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
⁴ *Id.*
⁵ *Id.* at 900.
⁶ *Id.* at 904–08.
⁷ *Id.* at 903 and 907.
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 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. The 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 exactly because the contracts at stake are often not in fact bargained for freely or fairly, as the theoreticians argue, that there is need for government regulation to make sure that the contracting process and the resulting bargains are fair. I use contract law jurisprudence to show that defenses to contract enforcement *ex post*, can justify government regulation of corporations *ex ante*.

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

**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 that was not presented by the parties to establish new precedent that further frees the corporation from government regulation.

**Part Two** of this article will discuss two of the dominate paradigms for understanding a corporation discussed in corporate law scholarship. However,
this part will focus on the prevailing economic perspective to 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 include fully developing 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 then discuss some of the responses that have been proposed to remediate the Citizens United decision. It will then assess those responses using the contractarian framework developed in Part II. It will ultimately recommend further advocacy of a corporation’s appropriately regulated place in both our economy and our democracy.

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 already been written about Citizens United and the opinion itself spans more than 100 pages, including the concurrences and dissents.9 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 attempt to (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 the broad question of whether the statute in question was constitutional, despite the fact that the litigants not requesting the Court 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 this 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 corporations

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should play in politics and, at the moment at least, 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. Relying on decades of similar legislation and precedent that reacted to that legislation, Congress carefully crafted and enacted the restricting regulation, the Bi-partisan Campaign Reform Act of 2002 (the BCRA). The impetus for the enactment was Congress’s findings 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.

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 and the Exchange Act of 1934. Both of those acts implicate the First Amendment because they involve forced speech in the form of disclosure requirements for corporations. The most recent Congressional attempts to regulate modern abuses of the corporate form are the Sarbanes-Oxley Act in 2002, and the Dodd-Frank Act in 2010.

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10Congress has wrestled for many decades 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. & Politics 243, 268–80 (1991). Congress has regularly spoken on these matters. See generally e.g., infra nn. 144–46.


12There 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. See, 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, 185–87 (2006).


17Pub. L. No. 111–203, §§ 165, 312 (2010). For an assessment of proposed regulatory solutions to recent corporate misconduct, see, Daniel J. Morrisey, Symposium: Regulation and Recession:
Second, the Supreme Court spoke in its majority opinion in the *Citizens United* case. 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. The Court spoke aggressively about speech being an “essential mechanism of democracy.” It facilitates the citizens’ paramount right “to inquire, to hear, to speak and to use information.” 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.” But even the *Citizens United* Court was split. The split had 5 Justices in the majority, while 4 Justices proffered a scathing dissent.

Third, the President of the United States has spoken. In his State of the Union address that followed the release of the *Citizens United* opinion, President Obama was clear.

“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 victory for big oil, Wall Street banks, health

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18 *Citizens United*, 130 S. Ct. at 904–08.
19 *Id.* at 898.
20 *Id.*
21 *Id.*
22 *Id.*
23 As has all too often been the case in recent years, the First Amendment aspects of the Court’s opinion was split along partisan lines. Conservative justices were in the majority (Justices Alito, Kennedy, Roberts, Scalia, and Thomas) and the liberal justices were outnumbered (Justices Breyer, Ginsberg, Sotomayor, and Stevens). Dean Irwin Chemirinsky has recently authored 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). In that article he goes as far as to say that “you can understand the Roberts Court better by reading the 2008 Republican platform than by reading the Federalist Papers.” *Id.* at 581. *See also*, Gene Nichol, *Citizens United and the Roberts Court’s War on Democracy*, 27 Ga. St. U. L. Rev. 1007, 1007–09 (2011) (criticizing the United States Supreme Court for failing to remain politically neutral with a particular aim at Chief Justice Roberts because of his hypocrisy in promising to only call “balls and strikes” before appointment).
insurance companies and other powerful interests that… drown out the voices of everyday Americans.”

Perhaps speaking from his background as a Constitutional Law professor at the University of Chicago, President Obama went on to critique the Court’s decision as unjustifiably reversing one hundred years of established precedent regulating corporate involvement in campaign finance.

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 nodding his head in disagreement with the President’s *Citizens United* assessment. Justice Alito went so far as to mouth the words, “not true”. Justice Alito was, of course, part of the majority.

But perhaps more important than what any particular branch of the government says, the people that 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, the people began demanding more accountability and transparency; not just from government, but also from the corporations and banks bailed out by the government. But the Occupy Wall Street Movement stands apart from the Tea Party Movement, and it has swept through cities around the country. There are no particular individuals leading the Occupy Wall Street Movement. However, the movement’s central message

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24 President Barrack Obama in his Presidential State of the Union Address, January 21, 2010.
25 Id.
28 See, Credit Crisis – Bailout Plan (TARP), New York Times, available at http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/bailout_plan/index.htm (posted Dec. 7, 2010). The New York Times explains: “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.” Id.
condemns corporate domination of elections and the manipulation of the political and economic system by the economic elite in the United States.\(^{30}\)

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*.\(^{31}\) 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… the Courts have taken this [campaign finance area] over, we [in Congress] have to take it back.”\(^{32}\)

### B. The Factual Context

The regulation at stake in *Citizens United* is the Bipartisan Campaign Reform Act of 2002 (BCRA).\(^{33}\) That act amended previous election finance regulations to prohibit corporations from spending any of their treasury funds on electioneering communications and also required certain disclosure and reporting requirements for permitted electioneering communications.\(^{34}\) 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’.\(^{35}\)

In December of 2007 Citizens United, a nonprofit corporation, sought to distribute a documentary film assessing the candidacy of then presidential candidate Hillary Clinton. The film was entitled *Hillary: The Movie*.\(^{36}\) The distribution would have occurred within 30 days of the 2008 primary elections for president and thus arguably was precluded by the BCRA. 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.\(^{37}\)


\(^{32}\) Id.


\(^{34}\) Id.


\(^{36}\) Id. at 887.

\(^{37}\) Id. at 888.
Citizens United claimed that the movie was just a documentary and therefore should not be deemed electioneering in any way.\textsuperscript{38} 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?”\textsuperscript{39} The movie goes on to describe her as “Machiavellian.”\textsuperscript{40} 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.”\textsuperscript{41}

The District Court ruled in favor of the FEC, finding that the statute clearly applied to the movie and thus Citizens United was precluded from airing the movie within the prescribed period.\textsuperscript{42} The Supreme Court took the case on appeal.

The Supreme Court did not just rule that the statute was unconstitutional as applied to Citizens United – it went further by also ruling that the statute was unconstitutional all together.\textsuperscript{43} 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.\textsuperscript{44} Thus, the Court held that the enactment placed an unconstitutional restraint on the corporation’s First Amendment right to free speech.\textsuperscript{45} Under this reasoning, corporations are entitled to the same First Amendment protection in this area as are natural persons.

\textit{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.\textsuperscript{46} In his dissent, Justice Stevens could not exhibit 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.\textsuperscript{47} The litigating party sought only a limited ruling that the statute did not apply to it, so that it could distribute its film.\textsuperscript{48}

\textsuperscript{38} Specifically, Citizens United had proffered the ironic argument that \textit{Hillary: The Movie} was not express advocacy for or against a specific candidate. \textit{Citizens United v. FEC}, 530 F. Supp. 2d 274, 278–79 (2008).
\textsuperscript{39} \textit{Id.} at 280.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 281–82.
\textsuperscript{43} \textit{Citizens United}, 131 S. Ct. at 913.
\textsuperscript{44} \textit{Id.} at 898–99.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 892–96.
\textsuperscript{47} \textit{Id.} at 931–32 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
\textsuperscript{48} \textit{Id.}
emphasizes that it is extraordinary for the Supreme Court to take on questions that are not brought by the litigants themselves.\footnote{49 Id. at 932 (citing Youakim v. Miller, 425 U.S. 231, 234 (1976) (“It is only in exceptional cases coming here from federal courts that the questions not pressed or passed upon below are reviewed.”)).}

Moreover, “facial challenges are disfavored”\footnote{50 Id. (citing Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008)).} in order to preserve as much of the legislature’s work as possible.\footnote{51 Id. (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).} In Justice Stevens’ 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.”\footnote{52 Id.} 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.\footnote{53 Id.} In his dissent Justice Stevens cited another cardinal principle of the judicial process, “if it is not necessary to decide more, then it is necessary not to decide more.”\footnote{54 Id.} In other words, the Supreme Court should not extend the reach of its opinions beyond what is absolutely necessary.

Further, Justice Stevens argues that the majority’s approach flouts 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.\footnote{55 Id.} “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.”\footnote{56 Id.}

The majority takes Justice Stevens’ critique to heart and addresses 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.\footnote{57 Id. at 892 (majority).} If it did not, the resulting prohibition of films like \textit{Hillary: the Movie} would untenably chill political speech. 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.”\footnote{58 Id.}

\begin{itemize}
\item \textit{Oddly, the majority cited Marbury v. Madison, 1 Cranch 137 (1803), to justify departing from precedent. See, Citizens United, 130 S. Ct. at 913 (majority). Justice Stevens declares the majority’s Marbury cite is “perplexing.” Id. at 934 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting). See also, infra n. 73 and 91.}
\item \textit{Id. at 937 (citing PDK Labs., Inc. v. Drug Enforcement Admin., 362 F. 3d 786, 799 (C.A.D.C. 2004)).}
\item \textit{Id. at 933.}
\item \textit{Id.}
\item \textit{Id. at 892 (majority).}
\item \textit{Id.}
\end{itemize}
Moreover, Kennedy explained that even though Citizens United had dropped its facial challenge to the constitutionality of the BCRA, it had initially been raised (though also rejected) at the federal district court level and therefore could be reconsidered on appeal. Additionally, the Court explained that since Citizens United was making a First Amendment argument, any theories to support that argument could be entertained. 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. 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 both warranted and indeed necessary.

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.” 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).

Thus, despite the strenuous objections of Justice Stevens on behalf of four of the Justices, and the cannons of constitutional interpretation mentioned above, including the maxim of judicial restraint, the majority went to great lengths to make sure that it took on the larger facial question to the constitutionality of the regulation. 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**

Having taken on the larger 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. If so, the BCRA could not withstand constitutional scrutiny under the First Amendment. The justices on both sides of the answer to this question used a wide range of constitutional interpretive tools to justify their conclusion. Embedded in their discussion were implicit notions about the very
nature of a corporation.\textsuperscript{67} 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 \textit{stare decisis}, and (iii) the balancing of interests.

(i) \textit{With no evidence, 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.”\textsuperscript{68} 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.\textsuperscript{69}

Kennedy, speaking for the Court makes 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.”\textsuperscript{70} However, the Court does acknowledge that laws that burden political speech are permissible if they pass a strict scrutiny test, i.e. that the government can prove that the regulation “furthers a compelling interest and is narrowly tailored to achieve that interest.”\textsuperscript{71} Of course, as is further developed in Part I. C. (iii) below, the majority never did find such a compelling interest.\textsuperscript{72}

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.\textsuperscript{73} Justice Stevens discussed at great length his view that the founding fathers would have never extended individual rights to a corporation.\textsuperscript{74} That the entire bill of rights was designed to protect individual rights (the rights of natural people) and, in his words, there is not a “scintilla of evidence to support the notion that anyone believed” that corporations should be given the free speech rights of individuals.\textsuperscript{75}

\textsuperscript{67}This is abundantly clear from some of the attacks on Justice Stevens’ dissent. \textit{Id.} at 925 (Scalia, Alito, and Thomas, JJ., 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?”).

\textsuperscript{68} \textit{Id.} at 886 (majority) (quoting \textit{FEC v. Wisconsin Right to Life, Inc.} (“\textit{WRTL}”), 551 U.S. 449, 490 (2007)). \textit{See also}, \textit{id.} at 906 (discussing the Founding Father’s intent to allow people to speak through associations and newspapers).

\textsuperscript{69} \textit{Id.} at 888–89.

\textsuperscript{70} \textit{Id.} at 898.

\textsuperscript{71} \textit{Id.} (quoting \textit{WRTL}, 551 U.S. at 464).

\textsuperscript{72} \textit{WRTL}, 551 U.S. at 464.

\textsuperscript{73} \textit{Citizens United}, 130 S. Ct. at 948–51 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} at 948.
Justice Stevens discussed what the founding fathers would have understood about corporations. That at the end of the 18th Century there were only a few hundred corporations in the entire country and that each needed to specifically petition their local state government for a charter that would entitle them to do anything at all. 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. In Justice Stevens' words this notion is not only a misinterpretation of the Constitution in a close case, it is absolutely “implausible.”

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

Justice Stevens went on to explain that in fact corporations were feared in the early days of our nation. 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.” In an early case from 1819 then Chief Justice Marshall (ironically cited by the majority for his *Marbury* opinion) wrote that, “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a creature of law, it possesses only those properties which the charter of its creation confers upon it.”

The historic distrust of a corporation described by Justice Stevens in his dissent is reflected in scholarship and jurisprudence up to this day. As will be further developed in Part II of this article, Justice Stevens is describing the founding fathers’ understanding of the corporation which today is known as the state entity theory. In accord with that theory, a corporation is not entitled to any constitutional protections, it is granted rights and privileges by the state that

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76 Id. at 948–51.
77 Id. at 949 n. 53.
78 Id. at n. 54.
79 Id. at 950.
80 Id. at 949.
81 Id. at 949.
82 See, supra n. 62.
83 See, e.g., Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. Davis Bus. L. J. 221 (arguing that the majority must have viewed a corporation in accord with a “real entity” theory that views a corporation as a natural person; Professor Marcantel goes on in his article to argue that this cannot be what the drafters of the Constitution meant. Id. at 275).
created and empowered it. Accordingly, it can also be regulated and limited by the state.

Modern corporate scholars continue to emphasize this view of the corporation. 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.

The ever Machiavellian Scalia, writing in a concurrence with the majority, takes on Justice Stevens’ concept of what the founding fathers would have thought about extending First Amendment protections to corporations. Scalia attempts 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.

In his concurrence, Scalia claims that if the founding fathers had wanted to exclude corporations from free speech rights, the First Amendment would have specifically said so. Since the First Amendment talks generally about Congress not abridging rights to free speech, corporations must be included, so his logic goes.

Of course, where the Constitution discusses political leaders being elected by the “People” it likewise did not specifically exclude corporations. 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). But, none of that seems troubling to Scalia or his machinations. He is, of course, solely focused here on “ancient First Amendment principles.”

Justice Stevens responds to Scalia directly. He retorts that the very idea of giving individual rights to a corporation was so inconceivable to the founding

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89 *Citizens United*, 130 S. Ct. at 926 (Scalia, Alito, and Thomas, JJ., concurring).

90 *Id.* at 926–28.

91 *Id.*

92 *Id.*

93 *Id.* at 948 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
fathers’ thinking, that specifically writing into the constitution that corporations were not entitled to individual rights would never have crossed their minds.  

Like Justice Stevens, scholars have also criticized the majority’s invocation of originalism in support of their Citizens United decision. One such scholar states clearly that the opinion “fails to persuade…” that the Framers actually wanted to empower corporations with first amendment rights. And that, instead, the opinion “takes us on a long journey” and nowhere arrives at evidence of original intent.  

Throughout their discussion of original intent, the majority and concurrences seem to be manipulating any true or even remotely accurate reading of the historical moment when the Constitution and the Bill of Rights were passed. Their rhetorical description of their faithfulness to original noble principles is inspiring but indeed, as Justice Stevens himself points out, appears to be completely disingenuous. Instead, original intent seems to be used by the majority here as nothing more than a forceful rhetorical tool put into the service of an end result, empowering the corporation.

(ii) 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. Citing precedent, the majority specifically rejected the argument that corporations could or should be treated differently from natural people with respect to campaign finance restrictions. “Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” In addition, the majority cautioned that the very act of favoring certain speakers and disadvantaging others might also be unconstitutional. The majority conceded that some regulations that do discriminate based on the speaker have been upheld in past cases as constitutional. However, it surveyed those cases and found that those restrictions were all crucial to the effective functioning of government, an interest

\[94\] Id. at 951–52.  
\[96\] Id.  
\[97\] Id. at 952.  
\[98\] Id. at 886 and 911–12 (majority); id. at 920–21 (Roberts, C.J. and Alito, J., concurring); and id. at 938–42 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting). See also, Reza Dibadj, Citizens United as Corporate Law Narrative, 16 Nexus: Chap. J. L. & Pol’y 39 (arguing that the Citizens United majority opinion was remarkable in that it paid “precision little attention to stare decisis” id. at 39).  
\[99\] Id. at 899–900 (majority).  
\[100\] Id. at 899.  
\[101\] Id.  
\[102\] Id.
that in the majority’s opinion was not implicated by the BCRA’s general ban on corporate electioneering.\textsuperscript{103}

The majority placed primary reliance on \textit{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 person.’”\textsuperscript{104} Decided by the Supreme Court in 1978, \textit{Bellotti} involved a state statute that restricted corporate expenditures related to certain referendum items.\textsuperscript{105} It is important to emphasize here that the \textit{Bellotti} case was not dealing with restrictions relating to the election of politicians, but was focused on general referendum items, issues not as likely to incite corruption as support for, or opposition to, specific candidates.\textsuperscript{106} The \textit{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.\textsuperscript{107}

The majority uses this opinion as its cornerstone to support the idea that no distinctions could ever be made between corporations and individuals with respect to free speech rights.\textsuperscript{108} The majority does not seem troubled by the fact that the issue in \textit{Bellotti} and the issue in \textit{Citizens United} had a crucial distinction. Indeed cases like \textit{Austin v. Michigan Chamber of Commerce}\textsuperscript{109} (decided after \textit{Bellotti}) confronted the exact issue confronting the Court in \textit{Citizens United} and upheld the BCRA.\textsuperscript{110} Those cases distinguished \textit{Bellotti} because the restriction in \textit{Bellotti} related to referendum items, items not likely to incite corruption, and not individual politicians seeking office.\textsuperscript{111}

The \textit{Citizens United} majority also relied on \textit{Buckley v. Valeo}.\textsuperscript{112} In \textit{Buckley}, decided just two years before \textit{Bellotti} in 1976, the Court confronted a general ban on independent expenditures from individuals as well as corporations and unions.\textsuperscript{113} The \textit{Buckley} Court found that regulation to be an unconstitutional

\textsuperscript{103} Id. Despite the Court’s dismissal of this rational as applied to the constitutionality of the BCRA, the argument could easily be made that the distorting effects of corporate electioneers do indeed directly interfere with the effective functioning of elections, and thus the very composition of the government and whether it does indeed represent the people it governs. \textit{See generally}, James A. Gardner, \textit{Anti-regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope}, 20 Cornell J. L. & Pub. Pol’y 673 (2011).

\textsuperscript{104} Id. at 904.

\textsuperscript{105} Id. at 902.

\textsuperscript{106} Id. at 904.

\textsuperscript{107} Id. at 902.


\textsuperscript{109} Id. at 655.

\textsuperscript{110} In fact, the \textit{Bellotti} opinion “squarely disavowed the proposition for which the majority cites it” i.e. that corporations and unions could not be treated differently from individuals for purposes of campaign regulation. \textit{Citizens United}, 130 S. Ct. at 958 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).

\textsuperscript{111} 424 U.S. 1 (1976).

\textsuperscript{112} Id. at 7.
burden on free speech since the Court found that the regulation did not serve any compelling purpose in combating *quid pro quo* corruption.\textsuperscript{114}

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.\textsuperscript{115} 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.\textsuperscript{116} In other words, *Buckley* did not confront the same question that the *Citizens United* Court was confronting, but the majority relies on *Buckley* nonetheless, because the reasoning alone in that case suggested to them that the BCRA should be ruled unconstitutional.\textsuperscript{117}

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, including *Austin* \textsuperscript{118} (just discussed above) and *McConnell v. FEC*.\textsuperscript{119} 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*.\textsuperscript{120} 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.\textsuperscript{121}

In *Austin*, decided essentially 20 years prior to *Citizens United*, the Court confronted a Michigan state statute restricting independent expenditures by corporations supporting or opposing political candidates.\textsuperscript{122} *Austin* upheld the restriction on corporations reasoning that corporate electioneering could have a corrupting and distorting effect on elections.\textsuperscript{123} Thus, the regulations in question were justified and passed constitutional scrutiny.\textsuperscript{124} *McConnell*, decided seven years before *Citizens United*, scrutinized the very same statute under consideration in *Citizens United*, the BCRA.\textsuperscript{125} 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.\textsuperscript{126}

\begin{itemize}
\item \textsuperscript{114} *Id.* at 45.
\item \textsuperscript{115} *Id.* at 29 n. 31.
\item \textsuperscript{116} *Citizens United*, 130 S. Ct. at 901–02.
\item \textsuperscript{117} *Id.* at 908.
\item \textsuperscript{118} 494 U.S. 652 (1990).
\item \textsuperscript{119} 540 U.S. 93 (2003).
\item \textsuperscript{120} *Citizens United*, 130 S. Ct. at 910–15.
\item \textsuperscript{121} *Id.* at 912–13.
\item \textsuperscript{122} *Austin*, 494 U.S. at 655–56.
\item \textsuperscript{123} *Id.* at 661.
\item \textsuperscript{124} *Id.*
\item \textsuperscript{125} 540 U.S. at 114.
\item \textsuperscript{126} *Id.* at 205.
\end{itemize}
One of the primary criticisms of the *Citizens United* dissent (and of President Obama) was that the majority of the Court was overturning a century of established precedent allowing for regulations of corporations in the area of corporate finance. 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.”

In his dissent, Justice Stevens states, “The final principle of judicial process that the majority violates is the most transparent: *stare decisis.*” Indeed, as just discussed, the majority did specifically overturn *Austin* and that portion of *McConnell* that upheld the BCRA’s regulation of corporate electioneering. However, the *Citizens United* majority was also clear that *Austin* and part of *McConnell* were the only cases that needed to be overturned. As both cases were decided within the past 20 years, in 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 the aberration.

With specific deference to precedent, the *Citizens United* majority reiterated its previous position that “*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision.” The Court made clear that it would respect precedent unless respecting precedent put it “on a course of clear error.” 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.

Justice Stevens lambasted the majority, explaining in clear and harsh terms why *stare decisis* is so crucial and then arguing that the majority violates the principle, ignoring a century of precedent in order to reach the result it desired in this case. Justice Stevens cited laws and cases that were over 100 years old to support the notion that corporations could be treated differently than individuals for free speech purposes in the context of elections. He cited the Tillman Act of 1907 as banning all corporate contributions to candidates. The

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127 See, supra n. 23.
130 *Id.* at 938.
131 *Id.* at 913 (majority).
132 *Id.* at 912–13.
133 *Id.* at 912 (quoting *Helvering v. Hallock*, 309 U.S. 106 (1940)).
134 *Id.* at 911–12.
135 *Id.* at 912–13.
136 *Id.* at 938–42 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
137 *Id.* at 952–57.
138 *Id.* at 952–53.
debate revolving around the passage of that act over 100 years ago discussed the enormous power of corporations and both the actual and perceived corrupting affects corporations have on elections. The Taft-Hartley Act of 1947 enacted restrictions on indirect corporate expenditures on elections. 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.

In addition to those legislative acts, Justice Stevens of course discussed Austin and McConnell, the very cases the majority decided were resolved incorrectly. Suddenly, argued Justice Stevens, the majority had decided that corporations should not be regulated differently than individuals in this context of campaign finance. According to Justice Stevens, the majority’s decision lies in stark contrast to over 100 years of precedent and practice and the rhetoric that somehow the constitutional right to free speech has been diminished is 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]”.

Justice Stevens discussed the reliance aspects of stare decisis. He explained that individuals and politicians all rely on stare decisis to shape their behavior. Individuals behave in accordance with the new case law. Law makers fashion subsequent regulations understanding the parameters of prior decisions. In this specific case, Justice Stevens pointed out that Congress had

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139 See, Tillman Act of 1907, Pub. L. No. 59–36, 34 Stat. 864 (codified as amended at 2 U.S.C §441(b)(2006)) (prohibiting campaign contributions by corporations). See also, Citizens United, 130 S. Ct. at 952–52 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (quoting S. Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906)) (“[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.”) (internal quotation marks omitted).


142 Citizens United, 130 S. Ct. at 938–79 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (very extensive treatment of both cases).

143 Id. at 960–61.

144 Id.

145 Id. at 941.

146 Id. at 940.

147 Id.

148 Id.
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.\textsuperscript{149} The dialogue between the branches of government is not to be taken lightly.\textsuperscript{150} Justice Stevens describes the overruling of Austin and the relevant part of McConnell as “pulling out the rug beneath Congress.”\textsuperscript{151} Justice Stevens goes on to describe the majority’s behavior as “procedural dereliction.”\textsuperscript{152}

In its opinion the majority had appealed to one of the primary tools of constitutional interpretation, looking to precedent and respecting the principle of \textit{stare decisis}.\textsuperscript{153} It paid deference to those principles, but, of course, in this case found an exception and overruled the well-established precedent cases of Austin and McConnell.\textsuperscript{154} It ignored legislation regulating corporations that has been passed periodically for over 100 years.\textsuperscript{155} 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 that presented in \textit{Citizens United}.\textsuperscript{156} Austin and McConnell, the cases the majority overruled, did confront the same question.\textsuperscript{157} The majority went out of its way to overturn those cases and the principle of \textit{stare decisis} in order to empower the corporation.

\begin{enumerate}
\item[(iii)] \textit{Majority finds no interest sufficient to limit a corporation’s free speech}
\end{enumerate}

Of course, as mentioned briefly above, the \textit{Citizens United} majority did acknowledge that some restrictions on First Amendment freedom of speech are permissible.\textsuperscript{158} The jurisprudential test that has evolved to balance the constitutional interest against the interest promoted by the regulation is the strict scrutiny test.\textsuperscript{159} In accord with that test the government must prove that the regulation furthers a “compelling interest” and is “narrowly tailored to achieve that interest.”\textsuperscript{160}

The FEC’s defense of the BCRA built off of the Austin case, which acknowledged that three interests were sufficient to support regulating corporations in the campaign finance area.\textsuperscript{161} Those interests are anticorruption, antidistortion, and, perhaps most importantly for our inquiry into the nature of a
corporation, shareholder protection.\textsuperscript{162} The majority of the \textit{Citizens United} Court considered those rationales and rejected all three of them in concert with the overturning of \textit{Austin} and part of \textit{McConnell}.\textsuperscript{163} With no compelling interest left to support the BCRA, the Court reasoned that the regulation did not pass strict scrutiny.\textsuperscript{164}

\begin{itemize}
  \item \textbf{(a) Anticorruption}
\end{itemize}

The majority discusses these three rationales relatively briefly, given the expanse of its opinion. With respect to corruption, the majority reviews relevant cases that discussed corruption and determined that those cases essentially acknowledged that safeguarding against \textit{quid pro quo} corruption was a sufficient purpose to allow for some limitations on free speech.\textsuperscript{165} The majority relied on \textit{Buckley}.\textsuperscript{166} The \textit{Buckley} Court upheld limitations on direct contributions to candidates, reasoning that the possibility of \textit{quid pro quo} corruption was sufficient to justify the limitations.\textsuperscript{167} However, the \textit{Buckley} Court struck down limits on electioneering that applied to corporations, unions, and individuals alike.\textsuperscript{168} With respect to those electioneering limitations, the \textit{Buckley} Court found that there was no reason to assume that \textit{quid pro quo} corruption was at risk with electioneering since there is no arrangement with a candidate in advance.\textsuperscript{169} Thus, the \textit{Buckley} Court struck down that limitation on free speech as not being justified by the anti-corruption rationale.\textsuperscript{170} It bears repeating, however, that the electioneering restriction struck down in \textit{Buckley} applied not only to entities like corporations and unions, but also to individuals. Thus, the \textit{Buckley} case is distinguishable from the \textit{Citizens United} case, where no individual’s right to free speech was at stake at all. \textit{Austin} and \textit{McConnell} both recognized this distinction and were able to uphold restrictions on corporations, consonant with \textit{Buckley}.\textsuperscript{171}

The \textit{Citizens United} majority also relied on \textit{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.\textsuperscript{172} Once again, though, the \textit{Citizens United} majority glossed over the fact that the restriction on electioneering in the \textit{Belotti} case related only to referendum items, arguably issues where corruption would be less likely than electioneering related directly to a political candidate.\textsuperscript{173} The \textit{Citizens United} majority did acknowledge that a footnote in the \textit{Bellotti} case left open the possibility that corporate electioneering could, in fact, lead to

\begin{itemize}
  \item \textsuperscript{162} \textit{Id.}
  \item \textsuperscript{163} \textit{Id. at} 904–11.
  \item \textsuperscript{164} \textit{Id. at} 913.
  \item \textsuperscript{165} \textit{Id. at} 908.
  \item \textsuperscript{166} 242 U.S. 1 (1976).
  \item \textsuperscript{167} \textit{Id. at} 45.
  \item \textsuperscript{168} \textit{Id. at} 45–50.
  \item \textsuperscript{169} \textit{Id. at} 47.
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} \textit{Citizens United}, 130 S. Ct. at 960 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
  \item \textsuperscript{172} \textit{Id. at} 909 (majority).
  \item \textsuperscript{173} \textit{Id. at} 958–59 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).\
\end{itemize}
However, the *Citizens United* majority quickly dismissed the significance of that footnote and returned to its reliance on *Buckley*. The court overlooked once again the distinction that the regulation at stake in the *Buckley* case also was regulating independent expenditures by individuals.

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

In his dissent, Justice Stevens lambasts the majority’s “crabbed view of corruption.” Justice Stevens writes sarcastically to say that the rhetoric of the majority’s opinion has some appeal, but that it does not even begin to approach the reality of the political arena. The majority argues 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. The majority confines corruption to clear examples of *quid pro quo* corruption and submits that only such clear examples of corruption should be allowed to interfere with the right to free speech.

Justice Stevens accuses the majority’s approach to corruption as lacking of any serious analysis. Justice Stevens cited to the district court opinion, written by Judge Kollar Kotelly. That opinion discussed the subtleties of corruption and the evidence that electioneering involves indirect forms of influence peddling. 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. She also discovered that politicians routinely communicate with corporations to thank them for distributing those messages. In addition, she found that a vast portion of the American public – 80% -- believe that corporations get pay backs for engaging in political electioneering. One lobbyist had even testified that indirect expenditures in

174 Id. at 909 (majority).
175 Id. at 909–10.
176 Id. at 959 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
177 Id. at 910–11 (majority).
178 Id.
179 Id. at 961 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting) (quoting *McConnell*, 540 U.S. at 152).
180 Id.
181 Id. at 979.
182 Id. at 898–99 (majority).
183 Id. at 965–66 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
184 Id. at 961–63 and 966.
185 Id. at 961.
186 Id. at 961–62.
187 Id. at 962.
fact generate more influence with politicians than direct contributions.\textsuperscript{188} That testimony went uncontroverted.\textsuperscript{189}

In addition to Judge Kollar Kotelly’s findings, Justice Stevens cites to the voluminous legislative record – over 1000 pages -- supporting the electioneering restriction that was under consideration.\textsuperscript{190} Congress had studied the issue and concluded that corporations involved in electioneering were routinely granted more access to politicians, and gained favor with them.\textsuperscript{191} Somehow those findings of Judge Kollar Kotelly and of Congress were not sufficient for the majority.

\textit{(b) Antidistortion}

The \textit{Citizens United} majority confronted the antidistortion rationale.\textsuperscript{192} That rationale was developed clearly in the \textit{Austin} case.\textsuperscript{193} As mentioned above, in \textit{Austin} a Michigan statute forbade corporate electioneering designed to support or denounce any particular political candidate.\textsuperscript{194} The \textit{Austin} Court ruled that the massive accumulation of wealth in a corporation can have a distorting effect on elections.\textsuperscript{195} Preventing that distortion was sufficient justification to support the statute, despite its limitation on corporate free speech.\textsuperscript{196}

The \textit{Citizens United} majority considered this antidistortion rationale and rejected it.\textsuperscript{197} 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.\textsuperscript{198}

The majority went further to address the notion that the corporation uses funds accumulated for other purposes and may not be accurately reflecting the views of its shareholders.\textsuperscript{199} Instead, corporate electioneering is likely to distort or even controvert the views of its shareholders.\textsuperscript{200} The majority finds this idea to be without merit, arguing that all political speakers fund their speech through

\begin{footnotesize}
\textsuperscript{188} Id. at 966.
\textsuperscript{189} Id. at 961–62.
\textsuperscript{190} Id. (citing \textit{McConnell v. FEC}, 251 F. Supp. 2d 176, 555–60, 622–25, 804–05, and 813 n. 143 (D.D.C. 2003)).
\textsuperscript{191} Id. at 961 and 966.
\textsuperscript{192} Id. at 904–08 (majority).
\textsuperscript{193} Id. at 904.
\textsuperscript{194} \textit{Austin}, 494 U.S. at 655–56.
\textsuperscript{195} Id. at 668–69.
\textsuperscript{196} Id. at 659.
\textsuperscript{197} \textit{Citizens United}, 130 S. Ct. at 904–08.
\textsuperscript{198} Id. at 904–05.
\textsuperscript{199} Id. at 911.
\textsuperscript{200} Id. at 953 and 977 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
\end{footnotesize}
some market mechanism.\textsuperscript{201} It is simply unacceptable to use that argument to restrict free speech, or all free speech could be so regulated.\textsuperscript{202}

The majority also argued that the anti-distortion rational could enable possible restrictions on media corporations, which obviously have a potential to distort public opinion.\textsuperscript{203} Such restrictions on the media would simply also be unacceptable in our democracy.\textsuperscript{204} It is interesting to note, however, that restrictions on media corporations were specifically carved out of the regulation under consideration in \textit{Citizens United}.\textsuperscript{205} 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.\textsuperscript{206} Here Justice Stevens actually does consider the nature of a corporation and its difference from natural people.\textsuperscript{207} He is again sarcastic with the majority claiming that they seem not to notice that difference at all.\textsuperscript{208} He states that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”\textsuperscript{209} He argues that corporations “are not themselves members of ‘We the People’ by whom and for whom our constitution was established.”\textsuperscript{210} Further, corporations are able to amass large amounts of resources in their treasury “war chests” but that a corporation’s accumulation of capital has very little if anything to do with the political proclivities of its constituents – including investors and customers.\textsuperscript{211} 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 proclivities of the corporation’s constituents.\textsuperscript{212}

Because of the power and influence of corporations in our marketplace, corporations could come to dominate our elections and indeed our democracy.\textsuperscript{213} This domination might diminish the inclination of citizens to feel vested in the political process at all.\textsuperscript{214} It may, in fact, leave citizens (rightly or wrongly) feeling completely disenfranchised and incapable of any meaningful discipline of elected officials.\textsuperscript{215} Justice Stevens is again caustic with the majority and

\textsuperscript{201} Id. at 888–889 and 904 (majority).
\textsuperscript{202} Id. at 905–06.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 906–08.
\textsuperscript{205} Id. at 943–44 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
\textsuperscript{206} Id. at 971–75.
\textsuperscript{207} Id. at 971–72.
\textsuperscript{208} Id. at 975–76.
\textsuperscript{209} Id. at 972.
\textsuperscript{210} Id.
\textsuperscript{211} Id. at 976.
\textsuperscript{212} Id. at 974.
\textsuperscript{213} Id. at 976.
\textsuperscript{214} Id. at 976.
\textsuperscript{215} Id.
describes the majority’s approach to this antidistortion rational as “facile” and one that simply “assumes away all of these complexities.”\textsuperscript{216}

\textsuperscript{216} \textit{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. The shareholder protection rational was partly described above in Justice Stevens’ reaction to the majority’s antidistortion arguments. Shareholders do not typically invest in corporations to make any conscious political statement. When a corporation then takes general corporate funds to advance a particular political issue it is not speaking for its shareholders, but instead speaking for the officers or directors who made the decision to engage in the political speech. Thus, restrictions on that type of electioneering in fact protect shareholders from funding the political interest of their corporation’s managers. Even assuming the 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.

The majority dismissed this shareholder protection rationale out of hand, explaining that such a rational 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). Thus, this slippery slope of permitting such regulations is simply an unacceptable limitation on the free speech enshrined by the First Amendment.

The majority continued its argument, saying that the BCRA was both too broad and too narrow to withstand strict scrutiny. The BCRA is too broad because there are more narrow measures the government could have enacted to protect shareholders from conflicting political messages espoused by corporate managers. The BCRA is too narrow for at least two reasons. First, media corporations are exempted. Thus, shareholders in those corporations are left unprotected. Second, the electioneering restrictions are only in effect for certain relatively short time frames before an election. If shareholders need

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217 Id. at 911 (majority).
218 Id. at 971 and 977 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
219 Id. at 977–78.
220 Id. at 972.
221 Id.
222 Id.
223 Id. at 905–08 (majority).
224 Id.
225 Id. at 911.
226 Id.
227 Id.
228 Id.
229 Id.
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protection, then surely they need protection beyond just those limited time periods.\(^{230}\)

Justice Stevens for the dissent again takes on the majority and argues that the regulation under consideration in this case, the BCRA, in fact “protects the rights of shareholders from a kind of coerced speech – electioneering expenditures that do not reflect their support.”\(^{231}\) Justice Stevens argues that this shareholder protection rationale was considered and endorsed by Congress in its enactments that extend back over 100 years to the Tillman Act.\(^{232}\)

Justice Stevens goes on to consider the argument that corporate democracy should function in a way that already protects the shareholders.\(^{233}\) If the shareholders do not like the message its corporation endorses it can vote for new management or can simply rely on the “Wall Street Rule” and sell the shares it owns in that corporation. In addition, a shareholder could bring a law suit against any manager who puts their own interests above those of the corporation.\(^{234}\)

Interestingly, Justice Stevens retorts that the idea of a corporate democracy is a fragile one.\(^{235}\) Justice Stevens cites to recent works of corporate scholarship to emphasize the reality of the modern investment marketplace.\(^{236}\) Most individuals own stock through intermediaries and seldom make individual trades.\(^{237}\) 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. Stevens offers an assessment of the specific mechanisms of corporate democracy – voting for management and/or bringing suit against management. He cites to the scholars Blair & Stout indicating his agreement with them that in this area shareholder “rights are so limited as to be almost nonexistent.”\(^{238}\)

\(^{230}\) Id.
\(^{231}\) Id. at 977–79 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting).
\(^{232}\) Id. at 977.
\(^{233}\) Id. at 978.
\(^{234}\) See also, Lucian A. Bebchuk and Robert J. Jackson, Jr. Corporate Political Speech: Who Decides? 124 Harv. L. Rev. 83 (2010) (discussing 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).
\(^{235}\) Id.
\(^{236}\) Id.
\(^{237}\) See, e.g., Jennifer S. Taub, Able but Not Willing: The Failure of Mutual Fund Advisors to Advocate for Shareholders’ Rights, 34 J. Corp. L. 843 (2009) (discussing the separation of beneficial ownership by investors and legal ownership of corporate shares by intermediaries; and arguing further that those intermediaries typically vote with inside corporate managers and do not typically advocate for shareholder rights. Id. at 845).
\(^{238}\) Id.
Other advocates have pointed out the weakness in the market mechanisms that the majority claims can protect shareholders.239 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 over $3 trillion in institutional market investments. 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. Such investors simply are not likely to exercise the “Wall Street Rule” and sell their shares whenever they are dissatisfied.240 Ms. Yerger went further in her testimony to state 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.241

Corporate scholar John Coffee, attacked majority’s reasoning regarding shareholder protection in testimony before a Congressional committee immediately following the Citizens United decision. In that testimony, he commented that the majority assumed that shareholders have adequate recourse for unchecked political spending by their corporations.242 In reality, “shareholders are actually very constrained in what they can do.”243

Professor Laurence Tribe went as far at to say that “talk of shareholder democracy is illusory.”244 Further, he stated that the problem of allowing corporate managers to use shareholder assets to advance their own political agenda is “undeniable.”245 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.246

In sum, as Part I just illustrated, the Citizens United case represents a turning point in jurisprudence that is at the intersection of contract, corporate, and

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239 See, e.g., and Reza Dibadj, Expressive Rights for Shareholders After Citizens United, 46 U.S.F. L. Rev. 479 (2011) (discussing and dismissing the arguments that (i) corporate law is sufficient to protect shareholders, (ii) that the Wall Street Rule works).
241 Id. at 816.
243 Id. at 767.
245 Id.
constitutional law. The conservative majority of the Court contravened well accepted cannons of judicial behavior to take on a facial challenge to a corporate regulation that was not raised by the parties themselves.247 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.248 Furthermore, the analysis of the majority lacks any coherent conception of what a corporation truly 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 majority achieved a result that portends a much more dominant role of corporations in both the American economy, as well as American politics.

247 Id. at 979.
248 Id.
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 establishes 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.\(^{249}\)

By contrast, Justice Stevens, for the dissent, seems to both discuss and adopt what has been known as the state entity theory of a corporation.\(^{250}\) This part will more fully examine the state entity theory, described by Justice Stevens. However, this Part II will highlight what is arguably the prevailing theory of a corporation, the contractarian’s nexus of contracts theory.\(^{251}\) Both of these theoretical perspectives lead to a necessary conclusion that the majority decided *Citizens United* incorrectly.

This Part II 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 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 himself refers specifically to the state entity theory of the firm in a footnote in his dissent. Ironically, there he explains that his analysis of the *Citizens United* case does not depend specifically on accepting one or another of the prevailing theories of a corporation,\(^{252}\) however his description of a corporation coincides directly with the state entity theory (also known as the artificial entity theory or the concession theory).\(^{253}\)

\(^{249}\) See, supra, n. 9.
\(^{250}\) *Citizens United* at 271 (Stevens, dissenting).
\(^{251}\) 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, Margaret M. Blair and Lynn A. Stout, *Team Production in Business Organizations: An Introduction*, 24 J. Corp. L. 743 (1999).
\(^{252}\) Id.
\(^{253}\) He specifically cites to the state entity (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.
Justice Stevens characterizes this theory as conceptualizing a corporation as a grantee of a state concession.254 Justice Stevens does point out that the Austin case, discussed above, did describe the firm as a grantee of concessions from the state (and upheld the restrictions on corporate electioneering).255 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.256

The view of a corporation offered by proponents of the state entity theory of the corporation matches the description of a corporation Justice Stevens put forth in his dissent.257 Justice Stevens framed his description of the corporation with a historical perspective.258 As Justice Stevens detailed, when the Constitution was written there only a few hundred corporations in existence.259 Unlike today, however, early incorporations were done by individual acts of the legislature.260 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.”261 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.262 Any activity that is beyond the stated purpose was considered to be ultra vires, 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. 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.

254 Citizens United at 271 (Stevens, dissenting).
255 Id. (“Austin referred to the structure and the advantages of corporations as “state-conferred” in several places”).
257 Citizens United at 947–951 (Stevens, dissenting).
258 Id.
259 Id.
261 Citizens United, 130 S. Ct. at 949 (citing L. Friedman, A History of American Law 194 (2d ed. 1985)).
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 back to the landmark Dartmouth College case, decided in 1819. In that case, 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 control of the corporation. (In that case, New Hampshire had attempted to take over Dartmouth by taking control over the appointment of the trustees of the college.) Justice Marshall stated that a corporation “is an artificial being, invisible, intangible, and existing only in contemplation of law.” While a state could not take over a corporation, Justice Marshall’s view of the corporation “left ample room for state regulation.”

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. 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.

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.

The state entity or concession theory of a corporation has had varying degrees of prominence over the years. Over the past 30 years, the neo-classical economic view of a corporation as a nexus of contracts (the contractarian paradigm) has taken center stage. However, the state entity theory still has traction as indicated by the Citizens United dissent itself, in which Justice Stevens’ description of a corporation that coincides with a view of the corporation as a grantee of state concessions.

265 Id. at 1006 (quoting Trustees of Dartmouth College, 17 U.S. 518).
266 Id. at 1007. 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.
267 Id. See also, David Millon, Theories of the Corporation, 1990 Duke L. J. 201, 206–211 “...the 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.” Id. at 211.
Most recently, Professor Hillary Sale has made a call for public corporations to be viewed in a new public way, a way that focuses on those corporations being the product of a variety of forces exerted throughout society, including the media, the internet, and the state.\textsuperscript{268} 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 currently public corporations are indeed less about private orderings than ever with an increasing regulatory role being exerted by the state.\textsuperscript{269}

The implications of the state entity theory for the regulatory environment are clear. Government regulation of corporations is appropriate and should be done to best maximize 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 \textit{Citizens United} case echoed the \textit{Austin} cases when it discussed the purpose of the type of campaign finance regulation at stake here as being threefold: (i) to reduce corruption in politics, (ii) to reduce any distortion that corporations might have on the political process, and (iii) to protect shareholders from allowing corporate managers to use shareholder assets to support candidates the shareholders might not.\textsuperscript{270} Any of those rationales would be sufficient justifications for the BCRA for any proponent of the state entity theory.

Indeed, Justice Stevens comes to the same conclusion in his dissent, that the BCRA was entirely constitutional. 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 the government that created it. Instead, proponents of this theory, empower the government with the right to regulate the corporation.

\textbf{B. The Contractarian Paradigm}

The nexus of contracts theory of the corporation stands in contrast to the state entity theory. It is the leading economic perspective on the corporation and is also known as the contractarian theory of the firm.\textsuperscript{271} This theory began to be discussed actively in the 1980s and is now probably the predominant theory of corporations discussed by corporate scholars.\textsuperscript{272}

\textsuperscript{269} Id. at 148 (arguing that as a result of recent corporate scandals, more government regulation of corporations is likely).
\textsuperscript{270} \textit{Citizens United} at 978 (Steven, Ginsburg, Breyer, Sotomayor, JJ. Dissenting).
\textsuperscript{271} The notion of a corporation being viewed as a nexus of contracts was introduced in Michael C. Jensen & William H. Meckling, \textit{The theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure}, 3 J. Fin. Econ. 305 (1976).
\textsuperscript{272} See, Stephen Bainbridge, \textit{Corporations Law and Economics Vol. 5} (2002). Professor Bainbridge claims therein that the economic theory of the firm has taken over all serious corporate law scholarship and, in a particularly aggressive characterization of that predominance has
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 quite differently than the state entity proponents. Contractarians give the act of chartering much less significance and view that act 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. 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.

This contractarian view of the firm is built on the fundamental notion, one arguably embedded in the U.S. Constitution, that individuals should have the liberty of contract to structure their own arrangements without the undue interference of the government. This notion, of course, is where the contractarians typically diverge from the state entity theorists. While the state entity proponents argue that whatever is created by the state can be regulated by it, 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.

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 accordance 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. 278

Contractarians would argue that all of these parties should strike the bargain that they find acceptable and live within the terms of that bargain, or find themselves in breach and possibly subject to legal recourse from their counterparties. Again, the traditional contractarian argument is that there is therefore no compelling need for government regulation or oversight beyond the policing and enforcement of the contractual bargains. 279

(ii) Constitutional Support for Liberty of Contract

This liberty of contract idea finds its source in the 5th and 14th Amendments to the Constitution. Both provisions discuss the primacy of an individual’s liberty, stating that the government “shall not deprive” an individual of “liberty... without due process of law.” 280

Dating back to the late 1800s, federal case law interpreted that clause 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 (striking down as unconstitutional a Louisiana regulation making it criminal to enter into an insurance contract with an out of state insurer that did not comply with Louisiana law). 281 In that case, Justice Peckam made the now famous statement that:

The “liberty” mentioned in that [14th] 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. 282

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278 This notion of limited government regulation of corporations underscores the fact that many corporate laws are default laws, which allow the 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, 526-527 (1999).
279 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).
280 U.S. Const. Amendments V and XIV.
281 The first federal case to discuss liberty of contract was Allgeyer v. Louisiana, 165 U.S. 578 (1897).
282 Id. at 589.
The most notorious case for enshrining this notion of a liberty of contract is *Lochner v. New York*, decided in the early 1900s. 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 14th Amendment. The Supreme Court found that the primacy of 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.

The *Lochner* case was later demonized as being a perfect example of judicial activism, with the federal judges enforcing their own libertarian preferences for a *laissez faire* economy, contrary to the policies that certain legislatures were enacting. Cases decided just a few decades after *Lochner* would question what this liberty of contract was and where was it found in the Constitution. 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, in contravention to the precedent that seemed to be 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. On the contrary, if government has sufficient reasoning for asserting a regulation then the liberty of contract interest can be limited. Therefore, a contractarian view of the corporation is compatible with and supportive of government regulation, where the regulation has sufficient justification.

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283 198 U.S. 45 (1905).
284 Id. at 53.
285 Id.
286 Justice Holmes wrote the dissent and described the majority opinion as promoting a laissez faire political and economic agenda. Other scholars have seized on that dissent to decry the opinion as being judicial activism at its worst. See generally, David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 Hastings Const. L. Q. 217, 218–219 (2009).
288 See, e.g., *United States v Carolene Products Co.*, 304 U.S. 144 (1938).
290 For a slightly different application of this idea, see Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 Fordham L. Rev. 1161 (2010). In that article, Professor Means argues that regulation of corporations is compatible with a contractual approach to corporations because the state is enforcing “implicit contractual obligations of good faith and fair dealing.” Id. at 1161.
As the *Lochner* case itself explained, the liberty of contract interest found in the 5th and 14th Amendments to the Constitution was not without limits. If government regulation is “fair, reasonable, and appropriate” then the regulation should withstand constitutional scrutiny. So, for example, in the *Lochner* case itself, the Supreme Court examined the question of whether there was any important reason for regulating the working hours of bakers. The majority of that Court found none and thus the Court struck down the regulation.

The dissent, however, argued vociferously that there was ample evidence of harsh working conditions in the baking industry and that bakers themselves were being subjected to unhealthy norms. “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.” The standard set up by the *Lochner* majority for finding a regulation to be constitutional could have easily been met if the majority had agreed with the dissent’s reasoning.

(iii)  Modern Contract Law Jurisprudence Justifies Regulation

The liberty of contract notion is premised on the assumption that parties freely enter into bargains and that therefore 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.

Moreover, 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, good faith and fair dealing. 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 often not true, the resulting maxim that there should be limited government regulation 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 indeed lead to the contract being unenforceable. It is therefore my argument that if government can show that there is a likelihood for a category of contracts to be infected by some structural defect, then government can justify regulation in that

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292 *Id.* at 56.
293 *Id.* at 58–60.
294 *Id.* at 70.
area in advance (i.e. *ex ante*). Not only is such regulation justifiable, it is prudent and should be encouraged.

(iv) The Contractarian Paradigm as an Assessment Tool

As has just been discussed, the contractarian paradigm can be used as an assessment tool to determine whether and when corporate regulation is appropriate. When applying the contractarian paradigm, there is a distinction that 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 perhaps more difficult to understand conceptually. Any regulation must first be justified constitutionally, and second must not offend any other provision of the constitution. The commerce clause will provide the most likely justification for a federal corporate regulation and so the first prong of the constitutional analysis will not likely prove controversial.

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. Under the contractarian paradigm, the constitutional interest at stake is not a freedom of speech right of the corporation, as the majority in *Citizens United* decided. Under the contractarian paradigm, the constitutional interest involved is the liberty of contract to enter into any bargain that each individual constituent of a corporation deems appropriate. Constitutionally, the government should only be allowed to intrude on that liberty interest if there is a sufficient reason. The liberty of contract cases from the *Lochner* era used broad language suggesting constitutionality when the regulation is “fair, reasonable, and appropriate.”

Under today’s jurisprudential tests applied to the 5th and 14th Amendments due process clause, the court uses three levels of scrutiny to assess whether that clause of the Constitution is offended (rational basis, intermediate and strict scrutiny). Where a right is not deemed fundamental, then only rational basis review is used and regulations are allowed to prevail if they are adopted for some rational purpose. If courts apply this framework for constitutional analysis, then the liberty of contract interest will likely receive only rational review, unless some fundamental right is also involved in the subject of the contract.


\[298\] For a general discussion of this idea, see, e.g., *Loving v. Virginia* 388 U.S. 1 (1967).


\[300\] So, for example, a contract relating to child custody may implicate a fundamental right that triggers a heightened level of scrutiny for government regulation.
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 don’t discriminate or otherwise offend the Constitution).

The second and separate question is whether any 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. 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 the transactions that relate to the corporation (those caught 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 that they deem to be appropriate. In economic terms, it allows parties to maximize their own value or utility from each transaction.

However, it is my argument here 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 systematically defective in a way that might even result in litigation after the contract has been struck. It is here that 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 and in need of some regulation to attempt to redress those deficiencies. Included among those defenses are fraud, misrepresentation, duress, unconscionability, good faith, and fair dealing.

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 arrive at the most prudent regulatory solutions.

301 See generally, Jeffery Rosen, The Supreme Court: Judicial Temperament and the Democratic Ideal, 47 Washburn L.J. 1 (2007) (comparing Chief Justice John Roberts to Chief Justice John Marshall with respect to exercising judicial restraint). Roberts himself repeatedly used the metaphor that judges are meant to act as umpire and only call the balls and the strikes.

C. A Contractarian View of Citizens United

In accord with the nexus of contracts paradigm, the Citizens United case would likely have come out in the opposite way, 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. 303 Put into the contractarian framework this argument becomes better viewed 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. So in most cases the company is not even technically a party to the bargain. As was discussed, critics of the nexus of contracts model would point to this fact to say that the contractarian paradigm is really not even applicable. 304

However, again, that criticism misses the point. The paradigm is instructive because it helps assess what the constituents of a corporation are expecting 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 indeed 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 mistaken 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 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

303 Compare, Citizens United, 130 S. Ct. at 911 (majority) with id. at 977-79 (Stevens, Ginsburg, Breyer, Sotomayor, JJ, (dissenting)).
304 See, e.g., Grant M. Hayden and Matthew T. Brodie, The Uncorporation and the Unraveling of “Nexus of Contracts Theory, 109 Mich. L. Rev. 1127 (2011). In that article Hayden and Brodie discuss the notion the nexus of contracts theory is meant to be an instructive metaphor but lampoon it for its use which is sometimes seemingly meant to be a description of reality and sometimes a metaphor. Id. at 1134 Those authors are critiquing a new book by Professor Larry 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. 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 1129.
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, then any rational basis for the statute would allow it to pass constitutional muster. Here protecting the shareholders from managers using corporate funds to promote their own political agenda would be more than a sufficient rational basis for the BCRA. Moreover, the BCRA also was designed to decrease even the appearance of corruption in the political process. Again, that is more than sufficient to form a rational basis for the regulation.

But beyond the Court’s ability to challenge a corporation regulation as unconstitutional, the contractarian paradigm can also be useful to legislators. Using the BCRA as an illustration, legislators might have begun their analysis with deference to a starting point that would allow investors freedom to contract with a corporation with no government interference or regulation. However, the deference favoring liberty of contract and the absence of regulation would shift in the case after observing corporate electioneering is not likely to be a part of the bargain shareholders believe is being struck when they invest in a corporation. Indeed, allowing corporate electioneering might result in a bargain between shareholders and the corporation that could be deemed unconscionable.

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.\(^{305}\) 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 on behalf of the corporation has simply never a part of that bargain. Thus, the investor might be lured into the investment, hoping for profits, while unwittingly supporting a variety of political candidates that are perhaps not even acceptable 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, were electioneering to be unregulated, a contractarian analysis would conclude that regulation in this area is not only constitutional, it is appropriate. Of course the exact design of the regulation is left to Congress.

The conclusion that investors do not imagine unbridled 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.

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\(^{305}\) See, Restatement (Second) Contracts §208 (1981).
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 over 100 years. Further, dating back earlier than that, corporations were specifically and individually chartered by the state to engage in certain limited and authorized activities. That history forms the backdrop for investors perspectives on the bargain struck when purchasing stock in a corporation. Investors simply expect there to be limits on what a corporation can do, and specifically limits in the area of political spending.

Another retort might be simply 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 now choose not to invest in the first place, understanding that corporations are now allowed to use treasury funds to support or oppose political candidates.

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, diverting funds from profit making and into politics. The primary reason shareholders invest in stock is profit. Recent studies have in fact concluded that corporations have not been able to show a positive correlation between support for political candidates and profitability.

Moreover, the temptation of 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 also runs contrary to the fundamental bargain of the shareholder. Conflict of interest transactions are prohibited under every state’s law.

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306 *Compare, Citizens United*, 30 S.Ct. at 925-28 (majority) with *id.* at 948-51 (Stevens, Ginsburg, Breyer, and Sotomayor, JJ., dissenting.)

307 See, Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prison’s Dilemma*, 27 Ga. St. U. L. Rev. 1105 (2011) (arguing that as a result of Citizens United corporations will be coerced into donating more and more money to politics; and since many corporations will be similarly coerced, any profitability of the donations will not increase with the increased donations; instead the results may be a harmful inefficient allocation of resources. *Id.* at 1106).

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 interests of the company. Given the complexity and variety of positions taken by any particular 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 II, I have discussed and described the leading theories that help scholars and policy makers understand corporations and their role in society. The state entity theory seems to have been described by the dissent 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 II 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. This Part II has attempted to outline more generally how the contractarian paradigm can guide decision makers in assessing regulations.

The majority of the Court in *Citizens United* ignores this prevailing contractarian theory as well as the state entity theory. In doing so, the majority arrives at the dangerous conclusion that corporations are entitled to the same First Amendment free speech rights as individuals. Had the majority considered the contractarian paradigm, it would likely have arrived at a different conclusion.

**Part Three:**
**A Contractarian Analysis of Responses to *Citizens United***

As we have seen in Parts I and II, 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.

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This part will use the contractarian paradigm discussed and developed in Part II to assess proposed responses to the *Citizens United* case. The most dramatic response to the case has been Senator Tom Udall’s call for a constitutional amendment to effectively overturn *Citizens United*.\footnote{See supra, n. 30 (and accompanying text).} 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 those 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 corporation. Both of these responses will be discussed and assessed here in accord with the contractarian paradigm described in Part II.

### 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 all of their political contributions, with some exception for de minimus amounts. A group of ten law professors who specialize in corporate law have petitioned the SEC to effect just such a regulation (hereinafter the Disclosure Petition).\footnote{Lucian A. Bebchuk, Bernard S. Black, John C. Coffee, James D. Cox, Jeffrey N. Gordon, Ronald J. Gilson, Henry Hansmann, Robert J. Jackson, Jr., Donald C. Langevoort, and Hillary A. Sale, *Committee on Disclosure of Corporate Political Spending Petition for Rulemaking* (submitted to the Secretary of the SEC, Elizabeth M. Murphy) (Aug. 3, 2011), available at http://sec.gov/rules/petitions/2011/petn4-637.pdf (hereinafter “SEC Disclosure Petition”).} 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 insure corporate accountability.\footnote{Id. at 2, 7–9}

In a follow up letter to the SEC written in December of 2011, the Brennan Center for Justice at New York University School of Law wrote to support the Disclosure Petition submitted by the law professors.\footnote{J. Adam Skaggs, Senior Counsel to the Brennan Center, Letter to the Secretary of the SEC Elizabeth M. Murphy (December 21, 2011).} The Brennan Center is a leading non-profit institute for policy analysis and focuses much of its work on election law. “The Brennan Center urges the Commission to use its authority to bring transparency and accountability to corporate political spending.”\footnote{Id. at 1.}

Other scholars embrace the idea of more disclosure as an appropriate legislative response to *Citizens United*.\footnote{See, e.g., John C. Coates IV and John F. Cogan, Jr., *Fulfilling Kennedy’s Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity*, Public Citizen (September 2011)} Almost immediately following the
Citizens United decision, Professor Laurence Tribe called for more disclosure of specifics regarding who is funding particular electioneering communications.\textsuperscript{317} Professor Tribe described such regulations as clearly within Congress’s power to regulate interstate commerce.\textsuperscript{318}

Moreover, the Supreme Court itself in the \textit{Citizens United} case opined that disclosure requirements regarding corporate political contributions would likely be constitutional.

\ldots prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.\textsuperscript{319}

Eight of the nine Justices on the Supreme Court concurred on this part of the \textit{Citizens United} opinion.\textsuperscript{320} Despite the strong support for this disclosure regulation and even likely Supreme Court approval, the SEC has not yet taken action to put any disclosure requirement into the rule making pipeline.\textsuperscript{321}

When thinking about a corporation from the contractarian paradigm, such a disclosure requirement is likely to be 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.\textsuperscript{322} Recommendations for appropriate regulation flow from that analysis.

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


\textsuperscript{318} \textit{Id.}

\textsuperscript{319} \textit{Citizens United} at 916.

\textsuperscript{320} \textit{Id.}

\textsuperscript{321} 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., Petitions for Rulemaking Submitted to the SEC, available at http://www.sec.gov/comments/4-637/4-637.shtml (Feb. 10, 2012).

From a prudential point of view, the starting point for policy makers 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 defects would that deference shift in favor of regulation. Where the regulation seeks to overcome some categorical infirmity in the contracts under consideration, then the regulation will likely be deemed prudent.

Here, if corporate electioneering is allowed to proceed with no disclosure requirement, then shareholders can simply not adequately evaluate their bargain – i.e. their decision to invest or to continue holding stock in any particular company. Indeed, a majority of the largest public companies in the United States have actually voluntarily begun to disclose their electioneering publicly. Some critics of disclosure requirements argue that the market place will achieve the optimal amount of disclosure that shareholders need and want and that will not be overly burdensome or costly for corporations.

However, a requirement that corporations disclose their electioneering would help shareholders of every public company to better 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 all together.

In this more specific example involving disclosure of political contributions, the same logic applies. More disclosure should lead to a more fair bargain. Conversely, the ability of a corporation to hide its political contributions leads to a bargain with investors that is potentially unfair. Investors could become unwitting contributors to candidates whom they simply 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. This is an approach that was actually put into place in England in 2000 as an amendment to the British Companies Act. The amendment was enacted in response to the perception that corporate money there

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325 For an excellent overview of this suggestion, see, Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, The Brennan Center for Justice (2010).
was being used to buy influence. The amendment was an attempt to create more transparency and accountability at the corporate level.\(^{327}\)

The exact details of such a plan are beyond the scope of this article. For example, corporations could be required to get prior shareholder approval to spend up to a certain fixed amount on political donations 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 is investor protection and 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 as discussed, the resulting bargain with the shareholder can be potentially 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 significant 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. Further, corporate support for any particular candidate is likely to run counter to the political preferences of many shareholders. Without the

\(^{327}\) See, Torres-Spelliscy, supra n. 299, at 16 (discussing the problem of corporate money in politics in the UK before the enactment of the shareholder approval amendment and citing 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.”).
ability to approve political spending (or even 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 this notion that corporate political spending is often said to be in the best interests of 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.” Coffee cites to the Center for Political Accountability which has found that corporations often fund “political causes or issues having no obvious relationship to their corporation’s interests.”

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. Most individual shareholders throw away their proxy materials and never cast their vote even when it comes to electing a board of directors. 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.

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 incented 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, “It is hardly radical to urge that they [shareholders] be given a say in how it [their corporation] is run.”

Professor Larry Ribstein has argued that regulatory efforts designed to improve shareholder rights may ultimately protect some shareholders at the cost

328 See Coffee, supra at n. ___ at 773.
329 Id. citing Center for Political Accountability, HIDDEN RIVERS: How Trade Associations Conceal Political Spending, Its Threat to Companies, and What Shareholders Can Do (2008) at 1.
331 Id.
332 Id.
333 See Coffee, supra at n. ___, at 785.
of harming others.\textsuperscript{334} Professor Ribstein concludes that on balance, the public might indeed be better off without the imposition of incoherent regulations.\textsuperscript{335}

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 a certain aspect of unfairness from infecting that bargain.

**Conclusion**

*Citizens United* has spawned a huge flood of interest in the effect that 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 have 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, there are statistics to show that corporate political spending has grown exponentially and, at least in the governors’ elections, the money is going to republicans four times as often as it is to democrats.\textsuperscript{336}

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 for analytical purposes. That prevailing contractarian paradigm would focus on the rights of the various constituents of a corporation and not on any rights the corporation itself might be said to possess. The contractarian paradigm recognizes the fiction of corporate personhood and limits that fiction by putting it in service to the corporation’s constituents.


\textsuperscript{335} *Id*.

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 it is 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 government should avoid any mandatory regulatory action. However, it is my thesis that because so many of those contracts as a class are flawed that regulation designed to correct for those flaws is not only constitutional, but also appropriate.

I have set forth this contractarian framework for analysis in Part II and then used it to assess the *Citizens United* decision itself and, in Part III 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 only serves to protect the interests of the shareholders in their bargain.

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 & 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,

“…is not a person,” finished Greenfield, to laughter and applause.\(^{337}\)

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.