Shareholder Rights: Citizens United and Delaware Corporate Governance Law

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The facts that determine whether a constitutional provision applies may be very different from facts like a person’s age or the amount of the grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them. And this can be tricky.

David Souter

I. INTRODUCTION

The decision in Citizens United v. Federal Elections Commission is a triumph of political speech doctrine of the first amendment. This doctrine holds that because “Speech is an essential mechanism of democracy” As such, “[g]overnment may not suppress political speech on the basis of the speaker’s identity.” The Court, therefore, ruled unconstitutional provisions of the Bipartisan Campaign Reform Act, overturned portions of McConnell v. F.C.C., a case just six years old and the twenty year old case that McConnell relied on, Austin v. Michigan Chamber of Commerce. 1

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2 130 S.Ct. 876 (2010). The political speech doctrine is that the highest purpose of the first amendment free speech rights is to promote the greatest possible amount of speech in the domestic political arena. Id. at 23 (Opinion), citing Buckley v. Valeo, 242 U.S. 1, 14-15. (1976) It traces it’s pedigree back to Justice Holmes Abrams dissent about the marketplace of ideas Abrams v. U.S., 250 U.S. 616, 630 (But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the ground upon which their wishes can be safely carried out”). The key question for this theory is whether the speech involves political debate. See Citizens United at 23 (Opinion of the Court). The actual source of the speech is immaterial, Id. at 24, citing First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978).

This is important because another justification for the freedom of speech is self-actualization. Bellotti, 435 U.S. at 804-05 (White, J. dissenting). This grounds the right within actual persons, and is the crucial question is whether the speech is important in a person’s important (and sometimes highly intimate) search for self. The identity of the speaker in such cases is very important, insofar as a corporation cannot engage in the search for self.
3 Citizens United, 130 S. Ct. at 898.
4 Id. at 913.
of Commerce.5

The political speech debate encounters a peculiar situation when it considers the issue when corporations are involved. This problem arises because of the structure of corporations: the owners of the corporations, the shareholders, do not control how the assets of the corporation are used. The managers do. This separation of ownership and control is known as the agency problem in corporate law.6 There is the potential for the shareholders’ agents, corporate management, to use the shareholders property, the assets of the corporation, for management’s own purposes.7 One argument made in favor of limitations on corporate expenditures is that management can use the assets of the corporations to support political causes shareholders do not agree with, thereby violating the shareholders rights of association.8 The potential violation of this right gives the government a compelling interest justifying speech limitations.9

The Citizens United opinion gives short shrift to this argument.10 There is no compelling state interest because there is corporate democracy”. Using shareholder democracy, shareholders are able to protect themselves.11 With this conflict,

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7 Id.
8 Citizens United, 130 S. Ct. at 977 (Stevens dissent); Austin, 494 U.S. at 673-78. (1990) (Brennan, J. concurring), Bellotti, 435 U.S. at 812-21 (White, J. dissenting).
9 Citizens United, 130 S.Ct. at 978 (Stevens dissent); Austin, 494 U.S. at 673-78 (Brennan, J. concurring), Bellotti, 435 U.S. at 812-21 (1978) (White, J. dissenting).
10 It addressed the issue in two paragraphs. Citizens United, 130 S.Ct. at 911 (opinion).
11 Id. citing Bellotti, 435 U.S. at 794.
Citizen’s United raises the agency problem of corporate law to a Constitutional level.

The path of this article is as follows. First, it will present the major issues involved with campaign finance reform and corporate political speech to show that the issues that take up most of the Court’s attention do not have any affect on corporate law and are not part of a larger legal scheme. I will also show that the positions taken by the justices who support greater corporate participation do not base their position within a larger framework of law; that the outcome cannot be connected to doctrines concerning *stare decisis* or judicial restraint, a robust defense of political speech rights in all its forms, or the protection of property rights. Then, the argument for guarding shareholder’s association rights as a justification for limiting a corporation’s political activities is presented. Next, the barriers to shareholder action in Delaware Corporate Law are discussed. I conclude that the current state of corporate governance law is not amenable to a robust approach to corporate democracy described by Justice Kennedy. The two approaches are incompatible: one must yield to the other. The article finishes by presenting a litigation strategy that can determine whether my conclusion is correct.

Throughout this article, I accept the following positions *arguado*. First, that limitations of corporate speech through limitations on how they may use corporate assets is a restriction based on the content of the speech. The target of the speech is
against those who have a particular approach to economic matters.\textsuperscript{12} Second, strict scrutiny is the appropriate standard for reviewing corporate speech limitations.\textsuperscript{13} Second, I accept that the justification put forward to justify campaign finance limitations, that “the unique legal and economic characteristics of corporations necessitate some regulations of their political expenditures to avoid corruption or the appearance of corruption,” is a straw man argument.\textsuperscript{14} The real purpose of these arguments is to bring about a form of “financial equity” soundly rejected by \textit{Buckley} and \textit{Bellotti}.\textsuperscript{15} This is not a rejection of the arguments that campaign finance is not content based restrictions and therefore subject to a lower standard of review.\textsuperscript{16} I argue that shareholder speech rights that conflict with corporate speech rights are equal. Government action that protects speech rights can therefore meet strict scrutiny requirements.\textsuperscript{17}

\textbf{II. The Principle Campaign Finance Issues (Not About Corporate Governance).}

This section will sketch, and only sketch, the issues that preoccupy most of the debate regarding campaign finance regulation and corporate political speech. The first part will examine the key issues as discuss in four significant cases:

\textit{Buckley v. Valeo, First National Bank v. Bellotti, Austin v. Michigan Chamber of

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\item \textsuperscript{12} \textit{Citizens United}, 130 S.Ct. at 912, \textit{Austin}, 494 U.S. at 696 (Kennedy, J. dissenting), \textit{Bellotti}, 435 U.S. at 784-85.
\item \textsuperscript{13} \textit{Citizens United}, 130 S.Ct. at 898, \textit{Bellotti}, 435 U.S. at 786-87.
\item \textsuperscript{14} \textit{Austin}, 494 U.S. at 658, accord \textit{Citizens United}, 130 S.Ct. 952-57 (Stevens, J., dissenting), \textit{McConnell}, 540 U.S. at 205,
\item \textsuperscript{15} \textit{Citizens United}, 130 S.Ct. at 904 citing \textit{Buckley}, 424 U.S. at 48,49, 53-54
\item \textsuperscript{16} \textit{E.g. McConnell v. Federal Election Com'n}, 540 U.S. , 137 (2002).
\item \textsuperscript{17} \textit{See Holder v. Humanitarian Law Project} at 34 (opinion).
\end{itemize}
Commerce, and Citizens United. The purpose here is to demonstrate an understanding of these issues and how they do not directly impact corporate governance law.

Campaign finance cases fall into two distinct periods before Citizens United. Buckley v. Valeo begins the modern era when it stated that use of money in a campaign, both in contributions and expenditures, were examined as matters of political speech. The political speech protections were extended to corporations by First National Bank of Boston v. Bellotti. These cases present the view that it is the type of speech, political speech, that is the key issue, not the manner of the speech or the identity of the speaker. Citizens United explicitly returns to this approach.

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18 424 U.S. 1, 23 (1976). Buckley involved the Federal Election Campaign Act, as amended in 1974. Id. at 6. Various individual candidates and organizations sought declaratory relief that major provisions of the act were unconstitutional. Id. at 8-9. The court held that, among other issues: 1) the Constitution permitted limitations on campaign contributions because of the compelling government interest in preventing corruption and the appearance of corruption; and 2) that limitations on campaign expenditures did not have the same level of government interest and were therefore prohibited. Id. at 143.

The decision came down as a Per Curium opinion. Unlike most per curium opinions, this decision was far from unanimous. The justices who joined the opinion in full were Stewart, Brennan, and Powell (based on the lack of dissent). The other five (Burger, White, Marshall, Blackmun, and Rehnquist) all dissented on some aspect of the decision, albeit different parts. Justice Stevens took no part in the decision. Id. at 144.

19 435 U.S. 765 (1978). Bellotti involved a Massachusetts statute which prevented banks and corporations from participating, through contributions or expenditures, in referendums that did not materially affect their property or assets, including taxation. Id. at 768. Plaintiffs, several banks and business corporations, sought injunctive relief so that they could voice their views regarding a referendum regarding establishing a graduated personal income tax. Id. at 769. The court held that First Amendment prohibits keeping a speaker from speaking on an otherwise protected matter simply based on its corporate identity, absent some compelling state interest. Id. at 795

20 Citizens United, S.Ct. at 913. Citizens United involved the Bipartisan Campaign Reform Act § 203, codified at 2 U.S.C. § 441b, which prohibited corporations from using general treasury funds for either election communication or to support or oppose a political candidate. Id. at *1. This provision had been upheld seven years earlier in McConnell. 540 US. at 209. Plaintiff, a non-profit corporation funded in part by donations from for profit corporations, wanted to aid ads concerning political film
The line of cases begun by Austin v. Michigan Chamber of Commerce represent an approach that allowed more oversight on how corporations can participate in political activities.\textsuperscript{21} McConnell v. Federal Election Com’n sought to downgrade the analysis given to speech issues when they involved corporations, from strict scrutiny to “close scrutiny”.\textsuperscript{22}

\textbf{A. First Action: Liberty versus Equality}

From this point forward, the various sides in the argument have deep disagreements. One issue cuts across multiple Constitutional arguments: whether and to what degree the focus should be about maximizing liberty versus the needs of promoting equality across the various societal divisions in our country. In Buckley v. Valeo, the \textit{per curium} decision flatly stated that equalizing voices was “wholly foreign to the First Amendment,” a position followed in First National Bank of Boston v. Belotti.\textsuperscript{23} This position was contested by dissents in those two cases.\textsuperscript{24}

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which criticized a politician in a manner that the act may have prohibited. Citizens United, 130 S.Ct. at 886-88. They sought injunctive relief. \textit{Id.} at 888.

\textsuperscript{21} Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) The case involved a Michigan statute that prohibits corporations from using corporate treasury funds for independent expenditures in support or opposition of a particular political candidate, including \textit{Id.} at 654. The Michigan Chamber of Commerce, which wanted to directly advocate for a particular candidate, received it dues from member corporations from their general treasuries, instead of segregated funds solely administered for political activities. \textit{Id.} at 656. The Chamber sought injunctive relief to prevent enforcement of the law. \textit{Id.} The court allows such restrictions because preventing the “corrosive and distorting effects of immense aggregations of wealth” which corporations can bring to bear in elections. \textit{Id.} at 660.

\textsuperscript{22} McConnell v. Federal Election Com’n, 540 U.S. 93, 137 (2003). The court relied on a series of decisions, based on Buckley, to hold that political contributions, because of the importance of preventing corruption and the appearance of corruption, should be viewed as presumptively valid. \textit{Id.} This is distinct from a question about campaign expenditures. \textit{Id.} It treated corporate and union expenditures in election communication from general treasuries in independent political ads as a means of circumventing contribution limits as opposed to expenditures. \textit{Id.} at 205.

\textsuperscript{23} Buckley, 424 U.S. at 48-49 (“It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of a candidate imposed by §
Twelve years after *Bellotti*, the pendulum swung the other way. In *Austen v. Michigan Chamber of Commerce*, the Court, despite its attempts to equate the distortion affects of large wealth with quid pro quo corruption, moved to the equality side of the issue.\(^{25}\) The dissents in this case were equally vigorous in seeing this as being contrary to *Buckley* and First amendment Jurisprudence.\(^{26}\)

608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."(internal citations omitted), *Bellotti*, 435 U.S. at 790-91 (quoting *Buckley*).

\(^{24}\) *Buckley*, 424 U.S. at 287 (Marshall opinion) (“The Court views the ancillary interests in equalizing the relative financial resources of candidates as the relevant rationale for § 608(a), and deems that interest insufficient to justify § 608(a). In my view the interest is more precisely the interest in promoting the reality and appearance of equal access to the political arena . . . the barriers to which § 608(a) is directed are formidable ones, and the interest in removing them substantial”(internal citations omitted), *Bellotti*, 435 U.S. at 809 (White, J., dissenting) (“Although *Buckley v. Valeo* provides support for the position that the desire to equalize financial resources available to candidates does not justify the limitation upon the expression of support which a restriction upon individual contributions entails, the interest of Massachusetts and many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . . The State need not permit its own creation to consume it” (internal citations omitted)).

\(^{25}\) *Austin*, 494 U.S. at 669. (“Regardless of whether this danger of “financial quid pro quo corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas. The Act does not attempt to equalize the relative influence of speakers on elections; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations” (internal citations omitted)).

I use this characterization “moved to equality side” because the Justices who oppose *Austin* and *McConnell* view the corruption argument as equality in other clothing. *Austin*, 494 U.S. at 680, 685-86 (Scalia, J. dissenting), 704 (Kennedy, J., dissenting). The gist of their arguments is that this corruption argument reaches the same result as the equality argument *Buckley* and *Bellotti* rejected. This equality description was and is sharply contested by other Justices, including Stevens, O’Connor, and Souter, who find that the provisions limiting corporate expenditures are to oppose corruption and are supported by history and Congressional findings. *Citizens United*, 130 S.Ct. at 958, (Stevens, J. dissenting), *McConnell*, 540 U.S. at 205.

\(^{26}\) *Austin*, 494 U.S. at 679 (Scalia dissent) (“Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of views of any single powerful group, your Government
*Austin* was explicitly relied on by *McConnell v. Federal Election Commission* when addressing new federal campaign restrictions.\(^{27}\)

*Citizen’s United*, overturns *Austen* returns the Court to its pro-liberty position.\(^{28}\) But this liberty versus equality debate, while affecting the ability of corporate managers to speak with a corporation’s assets, is a larger debate on conflicting views of the Constitution. The resolution of this issue would have no impact major doctrines of corporate law.

**B. The Main Action: Speech or Speaker**

The next point of contention between the two sides can be labeled the “speech or speaker” approach to campaign finance law. The Court’s first action in *Buckley*, and one that affected how it judged the rest of the case, was to dismiss the Court of Appeals decision that was based on *United States v. O’Brien*.\(^{29}\) Money, according to the lower court, introduced a nonspeech element that could be more regulated than

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\(^{27}\) *McConnell*, 540 U.S. at 205, 208, and 212. The court was examining the provisions of the Bipartisan Campaign Reform Act (BCRA), also known as McCain / Feingold, specifically the provisions of § 203, which extended the prohibition against corporations using funds from the general treasuries to “electioneering communications” or issue adds, in additions to prohibitions against express advocacy of a political candidate or policy. *Id.* at 204.

\(^{28}\) *Citizen United*, 130 S.Ct. at 913.

\(^{29}\) 391 U.S. 367 (1968).
speech itself.\textsuperscript{30} The \textit{Buckley} Court said that the spending on money was not conduct in the same way that burning a draft card was conduct.\textsuperscript{31} Key support for this position came from two cases. \textit{Mills v. Alabama} stated that “there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of government affairs.”\textsuperscript{32} \textit{Winters v. New York} held that the protections of the amendment are not limited to “the expression of an idea”\textsuperscript{33} Therefore, contributing money was simply about promoting speech.\textsuperscript{34} This was different from burning a draft card, which had consequences beyond the speech.\textsuperscript{35} As such, the Court of Appeals reliance on \textit{United States v. O'Brien} was misplace.\textsuperscript{36}

Justice White, in dissent, would have none of the argument. For him, saying that “money talks . . . proves too much”\textsuperscript{37} There are numerous instances where federal law affects and limits monies that might otherwise be available for communication, not the least of which is taxation.\textsuperscript{38} Nor is money used in political campaigns solely for communication.\textsuperscript{39} As such, the issue is whether there is a compelling interest for the state to make such limitations, and Justice White believed there was.\textsuperscript{40}

\textsuperscript{30} \textit{Buckley}, 424 U.S. at 16.
\textsuperscript{31} \textit{Buckley}, 424 U.S. at 16.
\textsuperscript{32} \textit{Id.} at 14, quoting 284 U.S. 214, 218 (1966).
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 262-63 (White, J. dissenting)
\textsuperscript{38} \textit{Id.} at 263.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 264.
The Bellotti case used the same theory of political speech importance, relying again on Mills and Winters.\textsuperscript{41} The Bellotti opinion overturning regulations based on corporate identity. It reiterated that if political speech is what is important.\textsuperscript{42} Restrictions against a particular speaker cannot stand if the speech itself would otherwise be protected by the First Amendment.\textsuperscript{43}

Justice White, again in dissent, puts a speaker’s corporate identity front and center of his argument: the “threat to the functioning of a free society [a corporation] is capable of posing reveals that it is not fungible with . . . individuals”.\textsuperscript{44} This is also the position of Justice Rehnquist, who noted the wide range of governmental organs that had placed restrictions on corporate political activities.\textsuperscript{45}

\textsuperscript{41} Bellotti, 434 U.S. at 781, 783. It also quoted the same passage about the purpose of the first amendment. \textit{Id.} at 776-77.

\textsuperscript{42} Bellotti, 435 U.S. at 776 (“The proper question therefore is not whether corporations ‘have’ First Amendment rights and , if so, whether they coextensive with those of natural persons. Instead the question must be whether § 8 abridges expression that the First Amendment was meant to protect.”)

\textsuperscript{43} \textit{Id.} at 784-85. (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protections simply because its source is a corporation.”)

\textsuperscript{44} Bellotti, 435 U.S. at 804-805 (White dissent) (“There is little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”)

\textsuperscript{45} \textit{Id.} at 822-23 (Rehnquist dissent) (“The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth
The shareholder protection argument may have an important contribution to the speech / speaker debate. If the Court must choose between the political speech rights of two groups, then the identity of the two groups must be a factor. But insofar as the question is limiting one group’s speech rights, this debate does not impact corporate governance law.46 47

III. JUSTIFICATIONS POTENTIALLY UNDERPINNING CITIZENS UNITED

of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered this matter, and have concluded that restrictions upon the political activities of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court."

Justice Rehnquist throughout his career on the court opposed the creation or extension of Constitutional rights. He was one of two dissenters in Roe v. Wade, and the basis for his dissent was the extension of the right of privacy. Roe v. Wade, 410 U.S. 113, 174-75 (1973) (Rehnquist, J., dissenting). He put a decisive ending to such searches in Washington v. Glucksburg, where he said that not “all important, intimate, and personal decisions” are afforded constitutional protection. 521 U.S. 702, 727-28 (1997)

46 There is some question whether corporations receive the same protections as person in all instances. The issue has not been directly addressed by the Supreme Court in the context of Constitutional or common law context. FCC v. AT&T, 09-1279, (March 1, 2011) at 9 (opinion). However, it is clear that a corporation is not a person insofar as it has privacy concerns under parts of the Freedom of Information Act. Id. at 11. In a first amendment, this approach would be consistent with the inquiry focusing on the speech, not who was making it.

47 One final argument addressed statutory construction issues when dealing with Constitutional validity: whether complex electoral regulation schemes can be parsed out, akin to contract language, or if they must be judged as a whole, and stand or fall together. This matter was addressed and resolved by Buckley: it dealt with sections individually, upholding of contribution limitations while striking down expenditure limitations. Buckley, 424 U.S. at 143 (In summary, we sustain the individual contribution limits, the disclosure and reporting provisions, and the public financing scheme. We conclude, however, that the limitations on campaign expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.”). However, there were justices who felt that the reforms were all of a piece and must stand or fall together. Id. at 236 (Burger opinion) (“the Court’s result does violence to the intent of Congress in this comprehensive scheme of campaign finance. By dissecting the Act bit by bit, and casting off vital parts, the Court fails to recognize the whole of this Act is greater than the sum of its parts”), 262 (White opinion) (It would make little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf”), and 290 (Blackmun opinion) (“I am not persuaded that the Court makes, or indeed is able to make, a principled distinction between the contribution limitations, on the one hand, and the expenditure limitations on the other”). This debate ultimately rests on the appropriate interpretation of the cannons of statutory construction: the matter is largely resolved, and, again, does not have an impact on corporate law.
The scope of political speech protection has been the main point of contention between the justices. An important question is whether there the *Citizens United* majority has an overarching jurisprudence which requires their position. If there is such a principle, than arguments about protecting shareholder rights and the laws affect on Delaware corporate law must address these other concerns. More importantly, such a principle can resolve the issue as a legal matter by measuring the result on a different basis.

The *Citizens United* decision cannot be said to follow an overarching jurisprudence. The decision is not based on the principles of stare decisis and judicial restraint. The majority does not have a consistent approach with all freedom of speech issues. Nor is the decision evidence of a consistent desire to protect property rights. The absence of an overarching jurisprudence means that the *Citizens United* majority approach to campaign finance reform stands on its own.48

48 An example of following your jurisprudential ideas regarding the First Amendment can be found with Justice Stevens. Throughout his time on the Supreme Court, he has been willing to differ to the legislative and executive branches that certain types of speech should be curtailed. Later in the same term of Justice Steven’s *Citizens United* dissent, he joined the justices of the *Citizen United* majority justices in from that case in *Holder v. Humanitarian Law Project*, 558 U.S. ___ (2010). That earlier case placed heavy emphasis on the extensive findings of Congress in prohibiting any material support to organizations deemed foreign terrorist organizations and the Courts obligation to defer to those findings, despite a very direct and clear attack on speech as speech. *Id.* at *29.

Stevens relies on the same deference in making one of his first arguments against the decision in *Citizens United*. *Citizens United*, at *8* (Stevens, J. dissenting). Justice Stevens support for this position can be seen going back to his dissent in *Texas v. Johnson*, when he noted that a statute prohibiting against flag burning was not one that fell afoul of the court’s usual test for violations of free speech. *Texas v. Johnson*, 491 U.S. 397, 437-38 (1989).

Any inconsistencies of conservative jurisprudence are equally present with the the liberal justices (other than Stevens.) Those other justices who dissented in both *Citizens United* and *Humanitarian Relief Project* did not put forth a underlying theory as to why Congress’ findings should be supported in one instance (*Citizens United*), but not in another (*Humanitarian Relief Project*). No better example of being focused on the desired result, instead of what the precedent’s
A. Stare Decisis and Judicial Restraint

The *Citizens United* majority very much want the opinion to be seen as following the principles of judicial restraint and *stare decisis*. The opinion presents itself as retreating from a deviation by the Court to principles that were correctly held previously.\(^49\) Chief Justice Robert’s entire concurrence seeks to explain how the decision follows these principles.\(^50\) The gist of these opinions is that the violation is so great and relied on the reasoning of a case so novel that it was really a matter of returning to the correct principle *post hoc ante*.\(^51\)

The procedural facts of *Citizen United* show the Court did not follow judicial restraint. Citizens United was a nonprofit corporation formed to advance political ideas.\(^52\) Yet the court’s decision also invalidated campaign finance law with regard to for-profit organizations, a very different type of organization.\(^53\) *Citizens United*’s appeal to the Supreme Court was based on an “as-applied” challenge to the statute.\(^54\) Yet the court determined to address the facial validity of the statute.\(^55\) Chief Justice Roberts claims that since the statute does violate the constitution by restricting the rights of corporations, “the debate over whether to consider this claim on an as-

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\(^{50}\) Id. at 917-27 (Roberts, C.J, concurring).
\(^{51}\) Id. at 912-13.
\(^{52}\) See id. at 886-87.
\(^{53}\) Id. at 913.
\(^{54}\) Id. at 931-32 (Stevens, J, dissenting) (providing the procedural history of the case, which includes *Citizens United* expressly abandoning its facial challenge).
\(^{55}\) Id. at 888.
applied or facial basis is largely beside the point.”56 This is because “any other corporation raising the same challenge would win.”57 But that result should wait until that case comes along, as the “cardinal principal of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more.”58

The *stare decisis* gaps are also great. The court purports to find that *Austin* represented “significant departure from ancient First Amendment principles”.59 It may be fair to say that *Austin* did break with *Buckley* in limiting campaign expenditure and *Bellotti* in treating corporations different from other actors in political debate. However, *Austin* was decided fourteen years after *Buckley* and twelve years after *Bellotti*. Since *Austin* was decided it has been relied upon numerous times, including in *McConnell v. F.E.C.*, when the Court first addressed the statute at issue in *Citizens United*.60 So at the time it was overruled, *Austin* was twenty years old and recent case law continued to support it’s key positions (especially difference to legislative fact finding on this issue).61 Yet the majority considers *Austin* to be a novelty despite it being nearly twenty years old and relied upon consistently until the court’s newest members, Roberts and Alito, tipped the balance the other way.

By way of comparison, consider the Court’s most important statement on

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56 *Id.* at 919 (Roberts, C.J. concurring)
57 *Id.*
59 *Citizens United*, 130 S.Ct. at 886.
60 *Id.* at 888.
61 *McConnell*, 540 U.S. at 203-09.
stare decisis, Planned Parenthood of Southeastern Pennsylvania v. Casey. That case stated “that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” Casey made that determination regarding Roe v. Wade nineteen years after it was decided. Justices Kennedy and Scalia dissented in both Austin and McConnell. Many of the opinions relied upon for the position that stare decisis does not apply in Citizens United are from opinions by Kennedy and Scalia. But it makes no sense to say that their constant opposition to the Austin result justifies ignoring stare decisis it any more than Rehnquist and White’s constant opposition to Roe justified ignoring it in Casey.

Citizen United approach to judicial restraint and stare decisis is to say it does not apply when there has been constant opposition to a particular legal result. This turns the purpose that underpins the doctrines on it’s head. The Citizen United decision cannot be said to stand on allegiance to these principles.

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62 505 U.S. 833 (1992). It should be noted that Justice Kennedy was one of the authors of the Casey opinion. Id. at 843.
63 Id. at 864.
65 Citizens United, at 886 (citing Scalia’s Wisconsin Right to Life opinion), 891 (citing Kennedy opinion in McConnell), *894 (citing Kennedy and Scalia dissents in Austin), *16 (Scalia concurrence in Wisconsin Right to Life), 897 (Kennedy McConnell opinion), 898 (Scalia McConnell opinion, Kennedy concurrence in Simon & Schuster), 900 (Scalia Wisconsin Right to Life opinion), 902 (Scalia Wisconsin Right to Life opinion, Scalia Austin dissent), 903 (Kennedy Austin dissent), 905 (Kennedy and Scalia Austin dissents), 906 (Scalia McConnell opinion), 907 (Scalia McConnell opinion), 908 (Scalia Wisconsin Right to Life opinion), 909-10 (Kennedy McConnell opinion), 910 (Kennedy McConnell opinion), 911 (Scalia Austin dissent), 912 (Scalia Wisconsin Right to Life opinion), 913 (Scalia McConnell opinion).
66 E.g. Roe, 410 U.S. at 171 (Rehnquist, J. dissenting) and 222 (White, J. dissenting) : Casey, 505 U.S. at 944 (Rehnquist, C.J., dissenting, joined by White, J.)
67 Justice Stevens dissent discusses the judicial restraint and stare decisis problems with Citizen United in greater detail. Citizens United at 936-42 (Stevens, J., dissenting).
B. Judicial Protection Of Speech Rights

Another justification for the majority opinion, one the opinion seeks to take, is a zealous determination that political speech not be impinged by state action. Such actions include both outright limitations, such as Citizens United. But indirect state action that imposed a burden on those using their own resources is as impermissible as direct limitation, a decision the court reached recently in Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett.

These decisions only allow limitations if the state can demonstrate some compelling need. Only prid pro quo corruption meets this standard. The Citizens United opinion spends a large portion of its decision arguing that there is no compelling interest to justify the governments compelling interest regarding potentially political speech. The Court views these other justifications as bring speech equality in the guise of preventing corruption. The Court views as irrelevant, or with suspicion, the extensive legislative findings on the dangers for

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68 Citizens United, 130 S.Ct. at 898.
69 Id.
70 Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett et. al, No. 10-238, 564 U.S. ____ (June 27, 2011) at *10 (opinion). The thinking that unites both cases, the prevailing argument appears to be that the First Amendment seeks to ensure that the government does not interfere in speech that would otherwise naturally occur.
71 Citizens United, 130 S.Ct. at 898, 908.
72 Id. at 901-02.
73 Id. at 903-08.
74 See Id. at 904 (“If the first amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech. If the anti distortion rationale were accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”; Austin sought to defend the antidistortion rationale as a means to prevent corporations from getting an unfair advantage in the political marketplace by using “resources amassed in the economic marketplace. But Buckley rejected the premise that the government had an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”)(internal cites omitted),
profit corporations have on election systems. The Court, then, views that the protection of political speech as necessary regardless of consequences.

But this position is belied by the decision in *Holder v. Humanitarian Law Project.* In that decision, the Court said that the United States could punish someone who gave material support to a terrorist organization. This could happen even if that support was training on how to use a country’s legal system to achieve an organizations aims in lieu of violence. The justification for this decision was not just that the issue fell within national security instead of campaign finance reform; the Chief Justice Roberts went out his way to say the Court’s had the Constitutional authority to invalidate Congress actions. However, the Court said it should defer to the findings of fact and the conclusions of the Congress and the Executive branch.

Nowhere in the decision does the Court reconcile its in *Humanitarian Rights Project* with that of *Citizens United* other than to baldly

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75 The only mention of Congressional findings justifying the BCRA exemption limitation in the opinion itself occurred in the discussion upholding disclosures, and that was to claim that the BCRA disclosure scheme itself eliminated that concern. *Citizens United,* 130 U.S. at 916 (opinion).

Justice Stevens dissent has a discussion of legislative findings and regulations regarding and free speech, including findings for the BCRA. *Id.* at 953-57 (Stevens, J., dissenting).


77 *Id.* at 2712. The law in question in *Holder* was 18 U.S.C. §2339B, which made it a crime to “knowingly provide material support or resources to a foreign terrorist organization.” *Id.* Congress gave the Secretary of State the authority to designate foreign terrorist organizations in 18 U.S.C. §1189(a)(1) and d(4). *Id.* at 3.

78 *Id.* at 2724.

79 *Id.* at 2727. (“Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant advocacy of the judicial role. We do not defer to the governments reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Governments authority and expertise in these matters do not automatically trump our own obligation to secure the protection that the Constitutions grants individuals.”)

80 *Id.* (“But when it comes to collecting evidence and drawing factual inferences in this area the lack of competence on the part of the courts is marked and respect for the Government’s conclusions is appropriate.”)(internal quotes and citations omitted).
assert that it is not political speech.\(^{81}\)

The Court’s approach to deference to the protection of political speech (and legislative deference) is not consistent. It all depends, on all sides of the political spectrum, to depend upon what type of First Amendment activity is being curtailed. As such, the *Citizens United* result is not based on the protection of content based speech regardless of the form it takes, but only “political speech”, which seems to be, like pornography, something the court recognizes when it sees it.\(^{82}\)

**C. Zealous Defense of Property Rights**

A final question is whether there is a principle that provides a clear distinction of when individual rights must be supported and when they can be safely set aside. Such a principle must be of a nature that “pre-dates” and supports the *Buckley* and *Bellotti* decisions in such a way that *Austin* is a novel decision.

There is such a principle: property rights.

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\(^{81}\) Id. at 2724. (“The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to the PKK and LTTE in the form of speech.”)

Justice Breyer’s dissent points this out, citing *Citizens United* for support that Congress overstep its authority. *Id.* at 2732 (Breyer, J., dissenting).

\(^{82}\) The court rejected that giving money organizations was not pure political speech because the defendant’s could do anything else but provide “material support which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations. *Id.* at 2723. The court seems to be saying that pure political speech is like pornography, the court will know it when it sees it.

The degree to which there should be judicial deference to legislative bodies occurs in other areas as well. In *Kelo v. City of New London, Connecticut*, the Court deferred to the conclusion of city and state governments that taking property from one private owner and giving it to another private owner was in the public interest. *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 483, 488-89 (2005). Justice Kennedy joined the opinion, and in his concurrence stressed that the trial court’s findings city and state’s desire to improve the economy of the area was part of the reason he joined the opinion. *Id.* at 491-92 (Kennedy, J., concurring). He also stressed the *stare decisis* aspects of the decision as well. *Id.* at 493. (Kennedy, J., concurring).
Property rights have a central place in the development of Western political thought. It was the protection of property, according to John Locke, that caused people to abandoned the state of nature and cede power to a sovereign. His Second Treatise on Civil Government posited that the protection of property was a reason why

men give up all their natural power to the society they enter into, and the community put their legislative power into such hands they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quite, and property will be at the same uncertainty as it was in the state of nature.

This bedrock principle of modern western political thought was incorporated into law by Blackstone:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

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83John Locke, The Second treatise of Civil Governance (1690).
84 Id.
The defense of property can be seen as part of the motivation behind *Citizens United* based on Justice Kennedy’s quoting of Justice Scalia’s opinion in *McConnell*:

“The government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’”\(^86\) If these voice cannot speak, they cannot protect their property.

However, the case of *Kelo vs City of New London, Conn*, shows that property rights in themselves are not a principle to be zealously protected at any point. Justice Kennedy joined the opinion allowing the city of New London to take private property and transfer it to another private party. His concurrence was based on both legislative deference and *stare decisis*.\(^87\) His position can be distinguished between his understanding that the correct test in *Kelo* for fifth amendment takings is the very deferential rational basis test,\(^88\) while political speech requires strict scrutiny.\(^89\) Therefore, Justice Kennedy views property rights to be different from other constitutional rights.

Justice O’Connor’s dissent in *Kelo*, in fact, presented a property rights argument for restricting the political actions of corporations:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the


\(^{87}\) *Kelo*, 545 U.S. at 491-93.

\(^{88}\) *Id.* at 490.

\(^{89}\) *Citizens United*, 130 S.Ct. at 898.
government now has license to transfer property from those with fewer resources to those with more.\(^90\)

This position is consistent with her being the co-author of the portion of the *McConnell* that sustained BCRA § 203: she is concerned in both instances that those with greater resources will use those resources to further their own position against those who have less.\(^91\)

The protection of property rights has some value to some members of the *Citizens United* majority, but not all of them. For some justices, the property right protection only keeps the legislature from acting arbitrary, but the legislature can still transfer property between private owners so long as it provides a rational basis for doing so. More importantly, there is debate within the Court whether property rights are best protected by allowing corporations greater or lessor participation in the political process. Therefore, the protection of property rights cannot be an overarching principle justifying *Citizens United*.

The *Citizens United* decision cannot be grounded either procedural principles of judicial restraint and *stare decisis*, an utmost respect for individual rights regarding political speech in a myriad of circumstances, or in the overarching principle of protecting property rights. It stands or falls solely within the realm of the campaign finance jurisprudence. The absence of an overarching jurisprudence underpinning the *Citizens United* makes the shareholder protection argument more important. It may perform the same function as these doctrines in other areas:

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\(^90\) *Kelo*, 545 U.S. at 505 (O'Connor, J. dissenting).

\(^91\) See *McConnell*, 540 U.S. at 164-166. O'Connor’s part of *McConnell* sustained § 203 of the BCRA. *Id.* at 204-09. It was explicitly overruled by *Citizens United*. *Citizens United*, 130 S.Ct. at 913.
resolve an intractable argument by introducing new paradigms.

IV. WHAT ROLE SHAREHOLDERS IN CORPORATE POLITICAL ACTIVITIES

Unlike the arguments discussed above, all sides agree that shareholders have First Amendment rights just as important as corporations, the right of association. This right manifests as the right not have their personal resources used to support positions they disagree with. Where the sides differ is if federal or state governments may act to protect shareholders or if shareholders can protect themselves through the mechanisms of shareholder democracy.

A. THE ARGUMENT MADE: PROTECTING SHAREHOLDER RIGHTS IS A COMPELLING INTEREST.

Justice White first raised protecting shareholders as a compelling government interest in his dissent in Bellotti:

There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts’ restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further

92 See Citizens United, 130 S.Ct. at 911 (opinion), Austin, 494 U.S. at 709 (Kenedy, J., dissenting), Bellotti, 435 U.S. at 795.

Justice Kenedy, in his opinion in Turner Broadcasting, Inc. v. F.C.C. stated that “At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. 512 U.S. 622,641 (1994) (Turner I).

93 Compare Citizens United, 130 S.Ct. at 911 citing Bellotti, 435 U.S. at 794 (“There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through ‘the mechanisms of corporate democracy’”), Austin 494 U.S. at 709-11 (Kennedy, J., dissenting) (Kennedy argues that protecting shareholders is not compelling interest and is not purpose of statute): Bellotti, 435 U.S. at 795 (“Assuming, arguendo, that protecting of shareholders is a compelling interest . . .”) with Citizens United, 130 S.Ct. at 977 (Stevens, J., dissenting)(“Interwoven with Austin . . . is a concern that to protect the rights of shareholders from a kind of coerced speech . . . “): Austin, 494 U.S. at 673 (Brennan, J., concurring) (“Michigan law protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders are opposed to the use of their money . . . for political campaigns”), Bellotti, 435 U.S. at 812 (White, J., dissenting) (“There is an additional overriding interest . . . : assuring that shareholders are not compelled to support and financially further beliefs with which they disagree . . . “))
beliefs with which they disagree where, as is the case here, the issue
involved does not materially affect the business property, or other
affairs of the corporation. . . . Massachusetts has chosen to forbid
corporate management from spending corporate funds in referenda
elections absent some demonstrable effect of the issue on the economic
life of the company. In short, corporate management may not use
corporate monies to promote what does not further corporate affairs
but what in the last analysis are the purely personal views of the
management, individually or as a group.94

Justice White elaborated on his position later in his opinion.

The interest which the state wishes to protect is identical to that which
the Court has previously held to be protected by the First Amendment:
the right to adhere to one’s own beliefs and to refuse to support the
dissemination of the personal and political views of others, regardless
of how large a majority they may compose.95

Justice White based his argument on two cases, *International Association of
Mechanics v. Street* and *Abood v. Detroit Board of education*.96 These cases, Justice
White acknowledged, involved state action because the union membership was
required under state and federal law.97 This is not the case with a corporations use
of shareholder’s property.98 But until the *Bellotti* decision:

States have always been free to adopt measures designed to further
rights protected by the Constitution even when not compelled to do so.
It can hardly be plausibly contended that just because Massachusetts’
regulation of corporations is less extensive than Michigan’s regulation
of labor-management relations, Massachusetts may not

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94 *Bellotti*, 435 U.S. at 812–13. (White dissent). Later in his decision, Justice White further
elaborated on this position: “.”

95 *Id.* at 815–16.


97 *Id.* at 314.

98 *Id.*
constitutionally prohibit the very evil which Michigan many not constitutionally permit.\textsuperscript{99}

Faced with a First Amendment right at the least as important as the “right to receive information” that the Court announced in \textit{Belotti}, Justice White argued that the Court’s opinion must reconcile \textit{Bellotti} with \textit{Street} and \textit{Abood}.\textsuperscript{100} Since this cannot be done, in Justice White’s view, the Massachusetts legislature should be deferred to and the regulation sustained.\textsuperscript{101}

Justice Brennan echoed and added to this argument in his \textit{Austin} concurrence:

\begin{quote}
[T]he resources of a business corporation are not an indication of the popular support for the corporation’s political ideas. Instead these resources reflect the economically motivated decisions of investors and customers. A stockholder might oppose the use of corporate funds drawn from the general treasury—which represents, after all, his money—in support of a particular political candidate.\textsuperscript{102}
\end{quote}

While the State may have no constitutional duty to protect the objecting Chamber member and corporate shareholder in the absence of state action, the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber’s political message. A’s right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.\textsuperscript{103}

\textsuperscript{99} Id. at 814-15.
\textsuperscript{100} Id. at 815.
\textsuperscript{101} Id. at 822
\textsuperscript{102} \textit{Austin}, 494 U.S. at 670.
\textsuperscript{103} Id. at 675. Justice Brennan was echoing the famous formulation from \textit{Calder v. Bull} of acts which a legislature cannot do: “a law that takes property from A and gives it to B”. \textit{Calder v. Bull}, 3 U.S. 386, 388 (1798). Justice Brennan was probably being deliberately provocative, given Justice Scalia’s
Justice Stevens continued this argument in his *Citizen’s United* dissent:

When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions.

*Austin’s* acceptance of restrictions on general treasury spending simply allows people who have invested in the business corporation for purely economic reasons—the vast majority of investors, one assumes—to avoid being taken advantage of, without sacrificing their economic objectives. 104

**B. REBUTTALS AND REPLIES:**

The Justices on the other side of this debate disagreed that these arguments allowed the governments to limit a corporation’s political speech. As stated above, there is agreement on all sides that shareholders do, at least arguable, have some dissent in the case based in part on originalism arguments. *Austin*, 494 U.S. at 692-94 (Scalia, J., dissenting).

Justice Brennan was also engaged in a particularly prickly rebuttal to Justice Kennedy’s dissent here.

Moreover, none of the alternatives proposed by Justice Kennedy would protect a captive stockholder of a business corporation that used the Chamber as a conduit. While the State may have no constitutional duty to protect the objecting Chamber member and corporate shareholder in the absence of state action, cf. *Abood v. Detroit Board of Education*, 431 U.S. 209, 232-237 (1977), the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber’s political message. “A’s right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.” Brudney, “Business Corporations and Stockholders’ Rights Under the First Amendment”, 91 YALE L.J. 235, 247 (1981). Cf. *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Machinists v. Street*, 367 U.S. 740 (1961). We have long recognized the importance of state corporate law in “protect[ing] the shareholders” of corporations chartered within the State. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69,91 (1987).

104 *Citizens United*, 130 S.Ct. at 977. (Stevens, J. dissenting).
First Amendment right. As such, the reasons for not supporting the argument lay elsewhere. Initially, the justices who favored corporate speech argued that shareholder protection could not, even implicitly, be the purpose of the statutes. The statutes were both underinclusive and overinclusive for that purpose. They also argue that there were factual differences from cases relied upon by the shareholder protection Justices that justified a different result: a lack of state compulsion. On both these points, the corporate speech Justices are not very persuasive.

The *Bellotti* found the statute underinclusive because some political activity, such as lobbying the legislature, was permitted while advocating during a referendum was not. The underinclusive arguments, if taken seriously, would

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105 *Turner I*, 512 U.S. at 641 (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal”); See *Citizen United*, 130 S.Ct. at 911, *Bellotti*, 435 U.S. at 792. (The opinions do not refute the existence of the right, but that protecting the right is not the purpose of the regulations.)

106 Justice Powell, in his *Bellotti* opinion, argued that such shareholder protections was essentially a straw man argument. The Massachusetts statute could not be actually meant to protect shareholders because it was both under and over inclusive to support that goal. *Bellotti*, 435 U.S. at 793.

The underexclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted . . . even though corporations may engage in lobbying more often than they take positions on ballot question submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

*Id.* The position was supported by Justice Scalia in his *Austin* dissent (“such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not in assistance of, or in opposition to, the nomination or election of a candidate.” *Austin*, 494 U.S. at 689 (Scalia, J. dissenting) (internal citations omitted)) and by Justice Kennedy in his *Citizens United* majority opinion (“if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting
require that all political activities of corporations be banned in order to protect corporate shareholders. Justices Brennan and Stevens argued that such an extreme approach ignores the role of nuance (and indirectly, legislative discretion) in creating an election (or any other) regulatory scheme.\textsuperscript{107} Justice Brennan noted that, if anything, the statutes are underinclusive because to sweep broader would violate past decisions of the Court.\textsuperscript{108} Justice Stevens views the argument as illogical for condemning one statute because a legislature has failed to pass all the

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\textsuperscript{107} Justice Brennan, in his \textit{Austin} concurrence, disputed the underinclusive arguments.

The Michigan law is concededly underinclusive insofar as it does not ban other types of political expenditures to which a dissenting Chamber member or corporate shareholder might object . . . . A corporation remains free, for example, to use general treasure funds to support an initiative proposal in a state referendum.

I do not find this underinclusiveness fatal, for several reasons, First, as the dissents recognize, discussion on candidate elections lie at the heart of political debate. But just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech. The State’s decision to focus on this especially sensitive context is a justifiable one. Second in light of our decisions . . . a State cannot prohibit corporations from making many other types of political expenditures. \textit{Austin}, 494 U.S. at 675-77 (Brennan, J. concurring) (internal citations omitted). Justice Stevens stated in his \textit{Citizens United} dissent:

The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which “the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech are at their zenith.”


\textsuperscript{108} \textit{Austin}, 494 U.S. at 675-77 (Brennan, J. concurring):

One purpose of the under-inclusiveness inquiry is to ensure that the proffered state interest actually underlies the law. But to the extent that the Michigan statute is underinclusive only because it does not regulate corporate expenditures in referenda or other corporate expression (besides merely commercial speech), this reflects the requirements of our decisions rather than the lack of important state interests on the part of Michigan in regulating expenditures in \textit{candidate} elections. In this sense, the Michigan law is not “underinclusive” at all.
possible regulations that could be justified.\textsuperscript{109}

The overinclusive arguments are, to be blunt, hyperbolic: the examples they use are unique (unanimous shareholder consent) or easily distinguishable situations (non-profit or single shareholder corporations).\textsuperscript{110} The hypothetical facts have never been directly responded, perhaps because these are situations that are so unique or so clearly distinguishable that they are properly subject to exceptions within a statutory scheme.\textsuperscript{111}

The next argument against the need to protect shareholders is that there is a basic difference between the union dues cases relied upon by White, Brennan, and (implicitly) Stevens. \textit{Street} and \textit{Abood} involved situations were the Court struck down state actions which compelled individuals to contribute union dues as a condition of employment.\textsuperscript{112} Such dues were then used by the union in political activities.\textsuperscript{113} These cases are distinguishable because the union members had no

\textsuperscript{109} \textit{Citizens United}, 130 S.Ct. at *978-79 (Stevens, J. dissenting) ("And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications might similarly be conditioned on voluntariness.")

\textsuperscript{110} Justice Powell’s argument that “the over-inclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure” represents a particularly unique situation in a large corporation. Id. at 793-94. Justice Kennedy’s argument from \textit{Citizen United} expands on Powell’s position: “the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.” \textit{Citizens United} at 46 (opinion).

\textsuperscript{111} See \textit{Citizens United}, 130 S.Ct. at 935-38 (Stevens, J. dissenting) (explaining that narrower grounds exist for deciding the case, including that non-profit organizations are exempt from key provisions), \textit{Austin}, 494 U.S. at 673-74 (Brennan, J. concurring) (noting that Justice Kennedy was focused on nonprofit corporations in his dissent and pointedly wondering why he could not support restrictions regarding for-profit corporations).

\textsuperscript{112} \textit{Bellotti}, 435 U.S. at 794, n. 34, cited by \textit{Austin}, 494 U.S. at 709-10 (Kennedy J., dissenting).

\textsuperscript{113} \textit{Bellotti}, 435 U.S. at 794, n. 34, cited by \textit{Austin}, 494 U.S. at 709-10 (Kennedy J., dissenting).
choice but to join the union and pay the dues as a condition of employment.\textsuperscript{114} This is quite different from the shareholder who voluntarily invests in a corporation and can choose to divest upon disagreement with any of management’s actions, including the corporation’s political activities.\textsuperscript{115}

\textsuperscript{114} Bellotti, 435 U.S. at 794, n. 34, cited by Austin, 494 U.S. at 709-10 (Kennedy J., dissenting).

\textsuperscript{115} I Bellotti, 435 U.S. at 794, n. 34, cited by Austin, 494 U.S. at 709-10 (Kennedy J., dissenting).

Justice Powell and Justice White’s dispute might be seen in this way. Justice Powell does not want the Court to go looking for problems to solve that do not exist. In Justice Powell’s view, Bellotti state action violated the First Amendment. The Court should not reach out and find a group who’s rights might also have been violated to justify the denying others their right to speak. Bellotti, 435 U.S. at 795. Justice White is also suspicious of the Court’s finding rights, especially when there is no historic support for those rights and the new right overrules legislative action. Id. at 804-05 (White, J., dissenting). However, once the Court has determined rights that should be protected, it should not back away from those protections merely because it has grown uncomfortable with the scope of the action needed to remedy it (as opposed to deciding that the legal right was wrong). Id. at 813-15.

This dispute between Powell and White in Bellotti reflects a dispute in what might strike some as an unrelated area of law: school segregation. In 1970s, an argument was raised that the landmark Brown v. Board of Education implied a distinction between those school districts that engaged in \textit{de jure} segregation, where the explicit intent was to separate schools by race, and \textit{de facto} segregation, which occurred without that intent. Keyes v. School District No. 1, 414 U.S. 189, 208 (1973) (discussing Swann v. Charlotte-Mecklenburg Bd. of Ed., 401, U.S. 1, 17-18 (1971). Until Keyes, it was widely held that the courts could not act to remedy \textit{de facto} segregation. Keyes, 414 U.S. at 193. But Justice Brennan, writing for the Court, asserted that because the districts were practicing \textit{de jure} segregation at the time of the Brown decision, they had an affirmative duty to dismantle such a system, not just let it stand. Id. at 203. He then shifted the burden to school districts to show they were no discrimination in order to not let past \textit{de jure} segregation become \textit{de facto} segregation from the passage of time. Id. at 209-09.

Justice Powell, was at first a supporter of the result from Keynes. Id. at 217 (Powell, J., concurring in part and dissenting in part). His dissent was based on usage of the \textit{de jure} / \textit{de facto} distinction. Id. at 219-20 (Powell, J., concurring in part and dissenting in part). However, by 1979, he had become alarmed by the scope of the remedies required to fix long established segregation and viewed the cure to be worse than the disease. Columbus Board of Education v. Polnick, 443 U.S. 449, 480 (1979) (Powell, J., dissenting) (Justice Powell was also dissenting from Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) that was decided on the same day). He believed that the courts were doing too much trying to fix society’s ills. Id. at 487. His belief came from the fact that the remedy for segregation was not just confined to a particular district that had segregated, but was involving multiple district to include vast geographic areas. Id.

The author of both the Polnick and Brinkman decisions was Justice White. In Brinkman, Justice White followed Keynes in asserting that it was not enough that a school board does not intend to segregate in the present, it must act to correct the wrongs of the past. Dayton, 443 U.S. at 555. If the harm of segregation was found to be statewide, the remedy must be equally far reaching. Id. at 537-38.

Of course, the particular facts and law of Belotti and Brinkman are too different for the positions of the two justices to be identical across both cases. But, this comparison does show Justice
The shareholder protection justices have several responses to these counter arguments. First, there are substantial economic costs to divest from a corporation. Furthermore, many shareholders invest indirectly, often as part of retirement savings plans, and therefore do not have the ability to monitor and divest from individual corporations. Finally, the free market should concern itself with the allocation of resources, not political ideology. It is also not helpful to the functioning of a capitalist society to consider non-economic issues such as the political disposition of a company as part of investing.

Powell and Justice White were acting consistently across the spectrum of constitutional rights: Justice Powell’s concern for finding new rights for the courts to protect and Justice White’s determination that a constitutional right, once found, cannot be ignored simply because the consequence has unfortunate results.

116 Bellotti, 435 U.S. at 818 (White, J. dissenting) (“It is no answer to respond, as the Court does, that the dissenting shareholder is free to withdraw his investment at any time and for any reason. The employees in Street and Abood were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in Abood that First Amendment rights could not be so burdened.” (internal citations omitted)), Austin, 494 U.S. at 674 (Brennan, J. concurring) (“[A] stockholder could divest from a business corporation that used the Chamber as a conduit, but these options would impose a financial sacrifice on those objecting to political expenditures.” (internal citations omitted))., Citizens United at *88 (Stevens, J. dissenting) (“[shareholders] may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like.”).

117 Citizens United, 130 S.Ct. at 978 (Stevens, J. dissenting) (“Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings (internal citations omitted).

118 Bellotti, 434 U.S. at 818-19 (White, J. dissenting)

The State has an interest not only in enabling individuals to exercise freedom of conscience without penalty but also in eliminating the danger that investment decisions will be significantly influenced by the ideological views of corporations. While the latter concern may not be of the same constitutional magnitude as the former, it is far from trivial. Corporations, as previously noted, are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society’s resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities.

119 Id.
V. Protecting the Shareholder and Delaware Corporate Governance Law

The argument so far between the Justices on shareholder protection results in the same stalemate of the other areas: the justices agree on the facts are, but disagree about the legal consequences of the facts. However, the next argument of the corporate speech justices creates a conflict between two important principles: the ability of corporations engage in political speech with the ability of corporate management to lead corporations without excessive input from non-management shareholders.

The corporate political speech Justices argued that protecting shareholder rights do not reach the level a compelling needed to justify state action. Shareholders have the means to protect themselves. “There is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”120 “Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders are normally presumed competent to protect their own interests.”121

The Justices who favor greater restrictions on corporate political speech have never accepted shareholder democracy as justification for ignoring a state’s compelling interest.122 Furthermore, the dissenting Justices in Citizens United are

120 Citizens United, 130 S.Ct. at 911, citing Bellotti, 435 U.S. at 794;
121 Bellotti, 435 U.S. at 794.
122 Bellotti, 435 U.S. at 815 (White, J. dissenting) ([The Court] proposes that the aggrieved shareholder assert his interest in preventing expenditures of funds for nonbusiness causes he finds unconscionable through the channels of “corporate democracy” . . . It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional
skeptical that corporate democracy can be used to stop corporate management interfering with shareholders’ first amendment rights:

By “corporate democracy,” presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that “these rights are so limited as to be almost nonexistent,” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.123

This argument resents two shifts in the corporate speech debate. First, the concern with shareholder protection is not whether limitations on one speaker would diminish or enhance the right of information. Rather, it is a conflict between two sets of rights holders: those who have a right of information against those who have a right not to have their assets used to promote ideas they do not believe. Second, it presents a clear fact issue. The basis for not finding a compelling government interest, according to the *Citizens United* majority, is that corporate democracy is as robust as civil democracy and that suitable judicial remedies are equally available to dissident shareholders as to the litigants in *Bellotti*, and *Citizens United*.124 The dissenting justices do not. Which party is correct is where attention now turns.

*Citizens United* clearly states its vision of shareholder democracy. The Court upheld the disclosure requirements in BCRA because those disclosure provisions

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123 *Citizens United*, 130 S.Ct. at 978 (Stevens, J. dissenting) (internal citations omitted).
124 *Id.* at 911 (opinion), citing *Bellotti*, 435 U.S. at 794.
are necessary for corporate democracy to be effective. This information allows shareholders to see a corporation’s political activities. Advances in technology that give shareholders more information in a timely manner are one reason for overturning the McConnell decision regarding BCRA § 203. If the shareholders are displeased with a corporation’s political activities, they can organize to either prevent the corporation from engaging in any political activities or replace directors who do not support the shareholders’ viewpoint.

The fact question presented is whether current corporate governance law allows the kind of robust corporate democracy required by this approach; can shareholders change corporate policy through shareholder democracy practices. If that answer is no, the additional fact questions have to be addressed: 1) what changes in corporate law required to create a robust system; and 2) what would the impact of such changes be.

125 Citizens United, 130 S.Ct. at 916 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”).
126 Id.
127 Id. (“Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative . . . . With the advent of the Internet, 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.”)
128 It seems clear that should shareholders take these actions and still find corporate directors and officers engaging in political activities, they could sue the directors in court for breach of fiduciary duty. The specific duty is the duty of loyalty because management would be putting their own political agendas ahead of the shareholders. Guth v. Loft, 5 A.2d 503, 510 (1939) (“Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests . . . .”).

The other major fiduciary duty is the duty of care, whereby directors and other officers “have informed themselves, ‘prior to making a business decision, of all material information reasonably available to them.’” E.g. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del 1985) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1983). While Van Gorkom is best known as being overruled by statute regarding the personal liability of directors for breaches of duty of care, the case still stands for the existence of the duty of care, as well as very narrow situations in which this duty is actually breached. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 925 (Del. 2003).

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**A. INFORMATION FAILURE**

Unfortunately, *Citizens United*’s corporate democracy approach cannot meet this first step. The decision envisions corporations forthrightly indicating what they contribute to.\(^{129}\) However, PAC’s do not work that way. If a corporation wishes to keep it’s contributions anonymous, it can set up a shell corporation or foundation, make donations to other PACs through it, thereby causing any disclosures to be in the name of that shell corporation.\(^{130}\)

But that is only one way shareholders could find out about a corporations political expenditures. Shareholders have a right to investigate the records of a corporation.\(^{131}\) Could concerned shareholders find out if their corporation had supported specific political causes through shell PACs through such a mechanism?

The answer: only if corporate management lets that information be known, and it doesn’t have to. In *City of Westland v. Axcelis Technologies, Inc*, the defendants refused an extension of time for a third party to conduct due diligence.

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\(^{129}\) *Citizens United*, 130 S.Ct. at 916 (With the advent of the Internet, 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.” The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.)(internal citations omitted).

\(^{130}\) This type of concealment has already occurred with regard to individual donations. A company, W Spann LLC formed and then made a $1 million dollar donation to a PAC that indirectly supports Mitt Romney’s presidential candidacy. W Spann LLC was then dissolved. So while the donors list to the PAC listed W Spann, there was nothing that indicated where W Spann got the money for its donation. Ultimately, Edward Conard, an executive at a investment group co-founded by Romney, voluntarily came forward as the person behindW Spann. Jack Gillum, “Mysterious donor to pro-Romney PAC identified” August 8, 2011 (available at [http://www.salon.com/politics/war_room/2011/08/08/us_pro_romney_pac](http://www.salon.com/politics/war_room/2011/08/08/us_pro_romney_pac)).

\(^{131}\) CITE
regarding a possible takeover.\textsuperscript{132} Plaintiffs requested that the board produce the records regarding that refusal to determine if the board’s actions were improper entrenchment.\textsuperscript{133} The Delaware court held that the defendant’s denial of this information was proper\textsuperscript{134}. The record request was not for a “proper purpose”.\textsuperscript{135} Such a request had to be based on more than just general allegations of mismanagement and the “record provides no credible basis” to infer the Board’s actions “were other than good faith business decisions”.\textsuperscript{136}

The question, of course, is how is a shareholder plaintiff supposed to provide a credible basis unless it has access to information. It is not enough that shareholders suspect that a corporation is engaged in political activities; they must provide specific examples of that activities that breaches a fiduciary duty before they can gain access to information that will confirm or disprove their concerns

**B. INABILITY OF CHARTER AND BY-LAWS TO LIMIT MANAGEMENT ACTION:**

But what if management did provide information that did on a corporation’s political activities? It is possible that management would disclose its political activities as part of it’s ordinary business practices. There is almost no question that some shareholders would object. It is equally likely that such objections would

\textsuperscript{132} City of Westmoreland v. Acelis Tech, Inc. 1 A.2d 281, 284. (Del. 2010). This case resulted from failed takeover talks between Acelis and Sumitomo Heavy Industries (SHI). During the course of the talks, the offer was as high as $6 a share and the stock reach a price high of $5.45 a share on March 17, 2008. \textit{Id.} at 283. However, the board resisted, or at least hindered the takeover. SHI broke off talks in September, at which time Acelis stock was selling at $1.43 a share. \textit{Id.} at 284. After Acelis failed to make required payments on its notes, the company was sold to SHI with all proceeds going to pay off the notes. \textit{Id.} at 285.

\textsuperscript{133} \textit{Id.} at 285.

\textsuperscript{134} \textit{Id.} at 288.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}
not change management’s actions.

Current corporate governance law has barriers in place that hinder shareholder actions in a corporation’s activities. First, corporate management has a fairly free hand in deciding how corporate assets will be used. Furthermore, boards of directors are elected not as individuals in contested elections, but as a slate proposed by corporate management.

One possible route for shareholders would be to advocate for protective provisions of the charter or by-laws. Corporate charters often include a list of matters that must be brought to a vote of shareholders. This is probably the component of a charter that Justice Powell was addressing in his *Bellotti* opinion. But the *Bellotti* opinion ignores that shareholders cannot vote for a charter

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137 *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991) illustrates this point. The Occidental Petroleum Corporation, at the instigation of it founder and CEO Armand Hammer, agreed to construct an art museum to house Hammer’s extensive art collection. *Id.* at 52-54. Shareholders sued and a settlement provided that Occidental could spend up to $50 million to construct the building. *Id.* at 55-57.

Objectors to the settlement argued that the expenditures violated the duty of loyalty (that is, Hammer was causing the directors to use corporate assets for his personal benefit) and duty of care (in not being aware of the harm to corporate assets beyond the $50 million expenditure) were not protected by the business judgement rule. *See id.* at 59-60. The sheer amount of the donation and it’s tax consequences amounted to corporate waste. *Id.* *Id.* at 61.

The Chancery Court determined that the Delaware code did not have place any limitations upon the amount of charitable giving a corporation may engage in and that, given the net value of Occidental, the amount was reasonable. *Id.* The Chancery Court said that the business judgement rule would apply and the Delaware Supreme Court affirmed. *Id.*


These boards also often have a “classified” structure, meaning that only a certain number are elected at a particular annual meeting, so that it can take two proxy seasons for a new majority to be installed. *E.g. Westland Police & Fire v. Axcelis Tech.,* 1 A.3d 281, 283 (Del 2010), *Benihana of Tokyo, Inc. v. Benihana, Inc*, 891 A.2d 150, 156 (Del. Ch. 2005). But there is nothing “undemocratic” in having a system designed to see to it that the passions of the moment don’t adversely affect long term projects. *E.g.* Constitution, Article 1, Section 2 for the structure and election of the Senate.

139 *Bellotti*, 435 U.S. at 794.
amendment unless the board approves it. \textsuperscript{140} This means that a board must agree to a shareholders changes, including amendments that the corporation must not engage in political actions. This means that shareholders must negotiate with a board who is acting in a way that they disagree with. As a result, when shareholder activists do change a corporations charter, changes take the form of new procedures management must follow, not required business decisions. \textsuperscript{141} This seems a very shows that amending a corporate charter cannot protect a right on which our political system rests. \textsuperscript{142}

C. The Poison Pill Barrier to Shareholder Action

If management resists shareholder demands to stop a corporation’s political activities, changing that activity means changing management. And management has a very powerful defense against shareholder interference: the poison pill. The


\textsuperscript{141} The Intel Corporations agreed to create a board committee on sustainability in April, 2010. This was done in the face of shareholder activism to create such a committee. \url{http://www.socialfunds.com/news/article.cgi/2921.html} (last visited on January 11, 2012).

\textsuperscript{142} Turner I, 512 U.S. at 641.

It is true that management must allow shareholder proposals to be voted on using proxy contests, including charges to management. Shareholders might then seek to have a resolution put to a vote at the annual meeting seeking to stop the company from engaging in political activities. But, as mentioned above, management is not required to act upon such proxy resolutions and frequently does not. \textit{See} Del Code tit. 8 § 141(a) (The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.) The Delaware Chancellory Courts at least tacitly accept that this general grant of authority means that shareholders cannot directly order management to perform specific actions; they can only control the processes under which decisions are made. \textit{HollingerInter., Inc. v. Black}, 844 A.2d 1022, 1079 (Del. Ch. 2004).

\textit{See} Randal S. Thomas & James Cotter, “Shareholder Proposals In the New Millennium: Shareholder Support, Board Response, And Market Reaction,” 13 J. Corp. Fin. 368, 378 (2007), reprinted in Melvin Aron Eisenberg and James D. Cox, Corporations and Other Business Organizations: Cases and Materials, 384. (“Board reaction to majority vote shareholder proposals varies substantially . . . Of the 333 corporate governance proposals that received more than 50% of shareholder votes, companies announced that 103 were fully implemented by the board. . . .”
poison pill is employed as a defense against hostile takeovers. Commonly called a “shareholder rights plan”, a pill dilutes the shares a potentially acquiring party has by either directly issuing shares of stock to all other current shareholders or by offering new shares at huge discounts. Pills are “triggered” when a threatening shareholder acquires a designated percentage of a corporation’s outstanding shares. The effect of the pill both reduces the percentage of votes the acquiring party might have and reducing the value of the stock to cause a loss should it be immediately sold.

The current approach to pills makes them effective deterrents to shareholders who seek to change a corporation’s political activities. First, the combined stock holdings of groups of shareholders acting together against corporate management used to determine regarding a pill’s “trigger”. Furthermore, depending on the consequences of a change of control, the triggering threshold could be very low. Two cases from 2010 illustrate this.

In Yucaipa v. Riggio, the Delaware court dealt addressed whether a pill could be triggered when groups of shareholders act. The case involved an ongoing conflict between the head of the Yucaipa American Alliance Fund, Ronald Burkle,

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144 See Versata, 5 A.3d at 594, Yucaipa., 1 A.3d at 313.
145 Versata, 5 A.3d at 590 (Acquiring party stock ownership share diluted from 6.7% to 3.3% when rights plan triggered). Poison pills are also useful anti-takeover devices because they do not devalue corporate assets the way that other measures, such as buy backs (Unocal) or share option agreements (Paramount) do. Moran, 500 A.2d at 1354.
146 Yucaipa, 1 A.3d at 343.
147 Versata, 5 A.3d at 607.
and Barnes & Noble founder and chairman Leonard Riggio.\textsuperscript{148} Throughout this litigation, Riggio and his allies controlled one-third of Barnes & Noble outstanding shares.\textsuperscript{149} Burkle had acquired Barnes & Noble shares and was badgering Riggio with suggestions.\textsuperscript{150} Riggio rejected Burkle’s advice and pursued strategies that Burkle disagreed with.\textsuperscript{151} Burkle then doubled his stake in a short period of time to 18% and began taking steps to engage in a leveraged buyout.\textsuperscript{152} At the same time, Burkle’s partner in a potential proxy contest, Aletheia Research and Management, increased its holdings to 17.44%.\textsuperscript{153}

Barnes & Noble adopted a pill that would be trigger if “any person or group acquires beneficial ownership of more than 20% of Barnes & Noble common stock.”\textsuperscript{154} The board viewed Yucaipa and Aletheia as coordinating their efforts and indicated they would group their combined shares to determine if the pill had been triggered\textsuperscript{155}. Yucaipa then filed suit.\textsuperscript{156} Part of its argument was that the pill could only be triggered if the various parties explicitly stated they would be working together because otherwise they could not engage in even preliminary discussions with other potential parties.\textsuperscript{157}

\textsuperscript{148} Yucaipa, 1 A.3d at 312.
\textsuperscript{149} Id. at 314.
\textsuperscript{150} Id. at 316-17.
\textsuperscript{151} Id. at 317-18.
\textsuperscript{152} Id. at 318-19.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 320-21. The pill initially would be triggered if any group acquired 20% beneficial ownership. Id. at 320.
\textsuperscript{155} Id. at 323-25.
\textsuperscript{156} Id. at 325.
\textsuperscript{157} Id. at 329.
The court held that the board was justified in adopting the pill were justified. The court applied the *Unocal* test that a defensive measure such as a poison pill must adopted in the face of a reasonable threat, be neither coercive or preclusive, and be within a “range of reasonableness” It then examined the boards actions. First, the court found that the board acted with good faith and loyalty to the shareholders as a whole. Second, it found that the company did face a legitimate threat, in that Yucaipa was capable of seizing control of the company thorough a proxy contest without paying a “control premium” Third, it was reasonable for the board to threaten to trigger the pill when the two block shareholders appear to be collaborating on taking over the company. It does not matter if the dissenting shareholder says it is not interested in taking over the company; if it is reasonable for a company’s management to see the dissenting shareholders as a threat, the boards actions will be upheld.

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158 *Id.* at 360. The court followed the *Unocal* test for determining if a board had acted according to it’s fiduciary duties: that the board faced a legitimate threat and that the response was in proporting to that threat. *Id.* at 345, refering to *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

159 *Id.* at 336.

160 *Id.* at 346. This holding was in spite of the court’s own awareness that the controlling shareholder, Riggio, was present at key board meetings. *Id.* Indeed, the court seems to be saying that since Riggio is already in control and always was, he does not owe the shareholders any premium to maintain that control. *Id.* at 352.

161 *Id.* at 351.

162 *Id.* at 359-60. The justification used by the court was that even if the pill kept the plaintiff from gaining a matching stake against the management block, it could still win the upcoming proxy contests. *Id.* at 356-59.

163 *Id.* at 349-51.

Ultimately, Burkle acquired up to 19% of the company and did put forward a slate of candidates. Riggio won the contest, being re-elected to the board with 53% of the vote out of a turnout of 83% of outstanding shares being voted. Thus, if Burkle had been allowed to buy outright up to the 30% he wanted to, he probably would have won the contest. Matt Townsend, “Barns & Nobel Investors Side With Riggio Over Burkle”, Bloomberg News Service, September 28, 2010 (available at
Versata Enterprises v. Selectica, Inc., presents a case where circumstances allowed a company to all but guarantee that its board could not be replaced. Selectica was a failed company, whose share price has gone from a high of $23 to $1. Various Selectica investors had resolved to cut losses and sell the company’s assets. Selectica had three things of value: it’s patent portfolio, it’s cash reserves, and net operating loss carry forwards (NOLs). The last asset is subject to a severe decline in value if there is a “change in control” under the tax code. Selectica management determined to protect the NOLs, it needed to enact a poison pill that has had a threshold of 4.99%. This threshold was in place in order to assure that a new owner could not reach the 5% threshold that could threaten the NOLs.

Selectica adopted the pill because of the actions of Trilogy, Inc, the owner of Versata. Trilogy refused to participate in a process Selectica had in place to


164 Versata, 5 A.3d at 590
165 Id. at 591.
166 Id. at 590.

NOLs are a tax benefit whereby operating losses of a company can be discounted from a company’s overall income for tax purposes. Id. at 589 A company with NOLs could be bought by another company, which could then use the NOLs to reduce it’s overall tax burden. Id. at 589. Thus, a company could see a net gain if it paid less than the overall value of the NOLs. Id.

167 Id. at 589.

The very rough gist of how this works is that any NOL that was generated prior to an “ownership change” are diminished. Such a change of control occurs if 50% or more of the shares change hands within a three year period. But only those who have a 5% or more of shares are examined. Thus, if carefully managed, a company can be sold with its NOLs intact.

168 Id. at 595.

169 Id. at 593-94. The previous 5% owners were grandfathered in so as to not trigger the pill.
170 Id. at 590.
purchase the company. Instead, Trilogy purchased Selectica stock in the open market. After Trilogy had bought through the pill trigger, (which probably reduced the value of the NOLs), it demanded that Selectica buy-back stock and accelerated debt repayments in exchange for stopping the hostile actions.

The court upheld that the low threshold was appropriate. The court applied the Unocal test. The court said that the threshold was proper because of the potential harm that might if a new shareholder gains 5% of the companies shares and that Trilogy presented such a threat to company assets. The particularly low threshold is reasonable, given that the principle purpose of the pill was not to entrench management, but to protect a valuable asset of the company. The plan was not preclusive because it was still possible for a hostile takeover of the company to be successful. The action itself was within a range of reason because Trilogy was not actually interested in acquiring the company, but to damage a long standing competitor.

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171 Id. at 593.
172 Id.
173 Id. at 595-96. This represents the only time that a poison pill has been triggered.
174 Id. at 607.
175 Id. at 599, 601.
176 Id. at 600-01.
177 Id. at 602.
178 Id. at 602. The court continues to refuse to speculate on the results of a particular proxy battle and simply notes that hostile takeovers have been successful when the main actor had less than 10% of the shares. Id.
179 Id. at 606-07.
180 It is important to note that corporate entrenchment does not have to be the result of an outside force such as the United States Tax Code. The can also be created by the company itself. For
The reasoning behind the courts’ decisions are really quite clear: protect the vast majority of shareholders from parties who seek to use the mechanisms of corporate governance for their own gain. In *Yucaipa*, Burke had a very good chance of seizing control of a successful business without paying appropriate “control premium” to the rest of the shareholders.\(^{181}\) *Versata* involved a plaintiff who was using the mechanics of corporate governance to do serious financial harm a competitor.\(^{182}\) *City of Westmoreland* had a shareholder (and its lawyers) trying to force a company to go through the costs of providing extensive records simply because one plausible interpretation of events indicates a possible breach of fiduciary duties.\(^{183}\) The court’s operating theory is that most investors would prefer to keep the management in place at the time shares were purchased.\(^{184}\)

D. A POLITICAL EXCEPTION

example, in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, the board of Amylin entered into an agreement which would allow the holders of debt notes to redeem those notes at face value in the event of a “change of control” not approved of by “continuing directors. *San Antonio Fire & Police Pension Fund v. Amylin Pharma., Inc.*, 983 A.2d 304, 309 (Del Ch. 2009) aff’d 981 A.2d 1173 (Del 2009) (without decision). The court said that such actions did not violate the duty of care because the board exercised appropriate procedures in adopting the instrument. *Id.* at 318. Thus, the board had inadvertently entrenched itself because of the severe economic consequences of a hostile takeover.

\(^{181}\) *Yucaipa*, 1 A.3d at 351

\(^{182}\) *Versata*, 5 A.3d at 606.

\(^{183}\) See *City of Westmoreland*, 1. A.3d at 287.

\(^{184}\) This approach to Delaware corporate governance law has a long been supported within the academy by scholars known as contractarians.

The contractarians, following law and economics theory, hold that fiduciary duties are best regarded as a default rule in the "contract" formed between a operation and its shareholders. That is, there is "nothing special" about them. In this model, to reduce transaction costs, investors can "opt out" of monitoring duties simply by purchasing stock in a corporation with none. Further, contractarians hold that courts should refrain from interfering and let each party in the fiduciary relationship determine what mix of benefits and costs is appropriate.

As it currently stands, corporate democracy that shareholders is not robust enough for shareholders to protect themselves. This lack of democracy is appropriate given the almost pure *laissez faire* approach that many private equity firms, such as Yucaipa and Trilogy, practice. These firms represent very real threats to shareholder value. The Delaware courts are justifiably cautious at giving them to many weapons.

Testing this argument means shareholder activism and litigation. Using disclosure requirements, for-profit corporations making political contributions can be found.\(^{185}\) Once these donors are found, shareholders can demand that corporations stop doing so. If the corporations does stop, then *Citizens United*'s faith in corporate democracy will be justified.

But some corporations will refuse, or a majority of shareholders votes to allow the corporations political actions. Suit can be brought, perhaps because of a breach of the duty of loyalty: the managers have appropriate the assets of the corporation for their own political activities. The Delaware courts might decide to take Justice Kennedy’s statement about the importance of shareholder democracy seriously. There could be a “political question” exception. After all, the crux of corporate governance law is the business judgment rule, and the crux of that rule is that corporate management, not judges, are in the best position to determine what is in

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\(^{185}\) If it is not possible to find these corporations, then suit can be brought in Delaware seeking the records of campaign contributions from the corporations themselves. If Delaware courts grant the request, the first part of *Citizens United* corporate democracy will be shown to work. If not, it is one reason to urge *Citizens United* be overturned.
the best business interests of a company. But whether something falls into the realm of politics is an entirely different matter. Judges are well versed in, not least because speech of a political nature has the highest amount of constitutional protection. If the Delaware courts grant the shareholders this relief, Citizens United and corporate democracy would be vindicated.

Delaware corporate governance law, though, would be upended. The outlines of a political exception are easy to see: if a shareholders seeks a proxy contest because of a political positions taken by management then the various defense mechanisms employed by management should be removed. The consequences of such an exception would be considerable. For example, in Yucaipa, there was one board member, Michael Del Giudice, who, in the words of the court “has had a high profile career as a key staffer in New York politics.” Barnes & Noble chairman Leonard Riggio regularly made contributions to Democratic candidates that Del Giudice recommended. Suppose that Burkle is a Republican (or can find a republican willing to front for him). He goes to the Delaware courts and says that, among other things, he wants to change the control of the board of directors because Barnes & Noble, as a corporation, supports Democratic causes and he does not want them to do so. He asks that the court to stay the Barnes & Noble poison pill because the political exception should allow his to explicitly ask other like-minded

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187 Citizens United, 130 S.Ct. at 898 (opinion) (“First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office”), Turner Broadcasting, Inc. v. F.C.C., 512 U.S. 622, 641 (1994) .
188 Yucaipa, 1 A.3d at 314.
189 Id.
shareholders to follow him. In addition, he asks that the court suspend the poison pill so that he can use his money to purchase the shares needed to ensure that the company acts in a manner that consistent with his political beliefs. After all, shareholder democracy is not about majority rule of the individual shareholders, but majority rule of the majority of shares. So Burkle gets his 30% share of all Barnes & Noble stock and wins the proxy contest by 57% of the vote (if all other shares vote the same way in the proxy contest). As a result, he takes over the company without paying the control premium to the other shareholders.

But Riggio, in light of the announced political exception, could seek to out maneuver Burkle. He could have the Barnes & Noble board write into its bylaws that it will not engage in any activity which might be seen as having political overtones and removes Del Giudice from the board. This means that Burkle is denied access to the political question. But it also means that in the political marketplace “valuable expertise . . . able to point out errors and fallacies in . . . the speech of candidates and elected officials.” Much more than if Barnes & Noble had to follow the restriction of BCRA. And the Banes & Nobel board will be denied the insights that a connected political player can bring to the business world. This seems a steep price to pay.

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190 It may be that most shareholders who sell to Burkle already agree with him. But there would be shareholders who sell because Burkle offers a high price. The point is that the political exception can change the results of a close proxy contest.

191 *Citizens United*, 130 S.Ct. at 912.

192 The political exception could impact a company’s ability to advocate in areas that are part of its business. It is not far fetched to see environmental organizations purchasing stock in oil companies. The organizations could then sue to stop the company from using funds to advocate for oil drilling in environmentally sensitive areas. The courts could say that a person should not invest in an oil
But Delaware judges could require that the political exception have extensive facts to support its application: that the political issue be the sole reason for a plaintiff’s motion, and that there is no other possible reason for the request. And if the Delaware courts’ choose such an approach, their past decisions indicate that the exception might simply exist on paper. In *Yucaipa*, Chancellor Strine found that the members of the board who responded to Burkle’s actions were independent and acted in good faith despite noting that Riggio was often present at their deliberations and that the director leading the deliberations was the independent in name only Michael Del Giudice.193 Furthermore, the burden of proof for plaintiffs could be that the political exception applies only when political motivation is the sole basis for the action. Such deference to corporate management would prove Justice Stevens assertion that shareholder “rights are so limited as to be almost nonexistent.”194

Should shareholder suits fail in Delaware, either immediately or over time, an appeal can be taken to the Supreme Court. The basis for the breach of loyalty is based on shareholder association rights as interpreted by *Citizens United*: corporate democracy is the vehicle to vindicate those rights.195 The court would be faced with a choice, forcefully interject itself into Delaware corporation law or revisit the company to disrupt its business and prevent the action. But the courts could also say that a group has a right to invest in a company to change the way it does business, in much the same way as other private equity funds do.

193 *Yucaipa*, 1 A.3d at 346. Del Giudice, in addition to being a political operator, received a substantial part of his personal income running an investment group that Riggio invested in. *Id.* at 314-15.

194 *Citizens United*, 130 S.Ct. at 978 (Stevens, J. dissenting).

195 *Citizens United* at 911, 916 (Opinion).
corporate democracy premise. The former course would upend Delaware law for the reasons stated above. The latter course would likely involve an analysis similar to the Court’s actions in *Turner Broadcasting, Inc. v. F.C.C.*196 Where there are two competing right at issue, the Courts should defer to Congress even with issues that involve the first amendment.197 This would involve examining legislative history and events that occurred since both the enactment of BCRA and the *Citizens United* decision. Such analysis would show that Delaware corporation law cannot be a means for shareholders to vindicate their rights. As such, BCRA § 203 or its future incarnation would need to be upheld as a matter of constitutional law.198

196 *Turner Broadcast System, Inc v. F.C.C.*, 512 U.S. 622 (1994) (*Turner I*), *Turner Broadcast System, Inc v. F.C.C.*, 520 U.S. 180 (1997) (*Turner II*). This case involved a conflict between rights similar to those involved with corporate speech. The plaintiffs were cable broadcasters who claimed that laws requiring they carry local broadcasters violated their rights of association. *Turner I*, 520 U.S. at 625. The court ultimately found that there was a competing right to the broadcasters rights, a freedom of information. *Turner II*, 520 U.S. at 189-90. In deciding which right must prevail, the court found that it should be highly deferential to the findings of Congress, provided that Congress has drawn reasonable inferences based on substantial evidence. *Id.* at 195.

197 *Turner II*, 520 U.S. at 196.

*Turner II* focused on the extensive legislative record developed to support the legislation at issue. The Court ruled that when there were competing rights, Congress must show that it “has drawn reasonable inferences based on substantial evidence.” *Id.* at 195, citing *Turner I*, 512 U.S at 666. The legislative history of BCRA focused on the way corporate political activities corrupted the elective process. This is not surprising given that the *Austin* and its progeny were the guidelines that Congress should follow. The court may bring back BCRA § 203 directly because of this lack of history. The very least it should do is signal Congress that if it does re-enact § 203 based upon the evidence, such as this proposed legislation, that Delaware corporate law does not allow shareholders to protect themselves, it will sustain that law.

198 The above scenario addresses the association rights issue assumes that a majority of shares could be reasonably within the reach of the dissenting shareholders. But the idea of a rights scheme is to protect minority interests.200 The result of *Street* and *Abood* are based on the idea that monies cannot be spent “against the expressed wishes of [dissenters].” *Street*, 367 U.S. at 770. Thus, potential problems (and perpetual litigation) exist as the courts address situations that involve the rights of a minority of shareholders when a majority supports a corporations political activities. Problems may get even worse if the majority of shares that support an action only represent a small number of individual shareholders and the minority of shares represents a majority of individuals: which should matter when considering a corporations actions in the political sphere of the nation?

Both *Street* and *Abood* stress that the appropriate remedy in such circumstances is to balance the rights of disserter and the rights of those who wish to engage in advocacy. *Abood*, 431
VI: CONCLUSION

These potential scenarios show the weakness of *Citizens United*. If the political exception occurs, it will disrupt decades of Delaware corporate governance jurisprudence. The exception could allow “fishing expeditions” within a corporation’s records locating other potential fiduciary violations. The exception could be a corporate governance weapon used by those who wish the corporations (and its long-term investors) harm. The political exception may also cause corporations to leave the political debates for fear of shareholder suits.

If there is no political exception in Delaware corporate law, then there is no means to protect shareholders outside of state action. The proponents of corporate political speech must then choose between a legal schylla and charibdis. Either they acknowledge that there is a compelling state interest in protecting shareholder rights and no other means available to protect other than state action.\(^{199}\) Or they state that a corporation’s political speech is more important than shareholder’s political speech (as resides in their right of association). This amounts to favoring one speaker over another, undercutting the doctrine that it is the speech, not the

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\(^{199}\) The solution used to protect shareholder rights, BCRA § 203, would be found to be a narrow remedy. As *McConnell* noted when it initially upheld § 203, corporations would still be allowed to form PACs, solicit donations, and engage in political speech through the PAC. *McConnell*, 540 U.S. at 204-05.

Concerns about media companies being limited can be addressed by limitations for the act as applied, in the same manner as the application of BRCA § 203 would be limited by the Citizens United dissenters with regard to Citizens United itself as a non-profit corporation. Citizens United at 14-16 (Stevens, J. dissenting). It’s arguments regarding underinclusive and overinclusive nature and therefore not being a legitimate purpose of the legislation are essentially window dressing arguments for the reasons discussed above. Section IV.B., infra.
speaker that matters: the speaker’s identity, not the speech, becomes the key question. Either positions is fatal to *Citizens United*.