CORPORATE SPEECH & THE RIGHTS OF OTHERS

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I. INTRODUCTION

How might the role of money in electoral politics change if corporations had no First Amendment rights? In short, "not much." Insofar as the Supreme Court has protected business corporations[1] under the Constitution, that protection has never expressly relied on the notion that a corporation *per se* has constitutional rights. To the contrary, a central strategy of the Court's corporate constitutional jurisprudence has been to *avoid* deciding whether corporations are the holders of constitutional rights. Critics of corporate constitutional jurisprudence must recognize that it is based not on the rights of the corporation but on the rights of others. Recognizing this fact reveals the real weakness of the Court's reasoning: it depends on a mischaracterization of corporate governance as a participatory democracy.

This Essay makes two main arguments. First, the jurisprudence extending constitutional protection to corporations focuses not on the rights of corporations themselves, but on the rights of others. Criticizing the Court for focusing on corporate constitutional "personhood" misses the point of the case law. In fact, the jurisprudence has avoided simplistically equating the corporate legal "person" with the human individual to whom the

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1. This Essay focuses on for-profit business corporations. The constitutional case law, however, tends to conflate business and nonprofit corporations. *Citizens United v. FEC*, for example, involved a nonprofit corporation, but the opinion refers simply to "corporations." The opinion is clearly intended to apply to business corporations, since it discusses the interests of shareholders, which nonprofits do not have. *See* 558 U.S. 310, 362 (2010).

Constitution guarantees rights. The Court has done so by carefully reframing corporate constitutional law issues to focus on the interests of individuals. The Court has done this in two ways: First, it sometimes treats a corporation as an "aggregate" of individual natural persons. Second, in the free speech context, it focuses on the rights of human listeners rather than those of corporate speakers. For example, the Court has justified corporate speech protection on the basis of individuals' interest in hearing diverse viewpoints.

My second point focuses on the real weakness of the corporate constitutional jurisprudence: its reliance on the common misconception that the actions of a corporation reliably reflect the will of its constituent individuals. Using this flawed assumption, the Supreme Court has held that corporate regulations infringe on the due process and Fourth Amendment rights of natural persons. The Court has made a related error in the free speech context—the central concern of this Essay. Although listeners may have an interest in hearing corporate messages, that may conflict with the interests of the corporation's shareholders (or its other constituents, such as employees) if they disagree with those messages. But the Court has dismissed this concern on the ground that shareholders control a corporation's messages through "the procedures of corporate democracy."[2]

However, corporate law does not, and is not intended to, run corporations in a democratic way. Rather, in the interests of money-making efficiency, the law concentrates power in professional managers.[3] They enjoy nearly unreviewable discretion to control the resources of the corporation with negligible input from shareholders. As intended, this arrangement is likely to benefit shareholders financially. But it does not protect them (or other corporate constituents) from corporate political spending or other speech acts they disagree with. This fact undermines the Court's listeners' rights argument against corporate campaign finance regulation. It is also consistent with the proposed "Democracy for All Amendment," which would

2. First Nat'l Bank of Boston v. Bellotti, 435 U.S.765, 794 (1978); *Citizens United*, 558 U.S. at 362.

3. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance*, 79 WASH. U. L.Q. 1, 78 (2001) ("[C]orporate governance can be centralized and efficient, or it can be participatory and expressive, but it cannot be both.").

expressly permit campaign finance law to regulate corporations and natural persons differently.[4]

Another proposed constitutional amendment, the "People's Rights Amendment," would amend the Constitution to exclude corporations from the categories of "people, person, or citizen as used in this Constitution."[5] The amendment aims to deny corporations the rights the Constitution gives to human individuals. Because corporate First Amendment law does not depend on corporate rights *per se*, however, the People's Rights Amendment would have no immediate determinative effect on corporate campaign finance regulation or other corporate speech laws. (It could nonetheless be useful in informing the Court of the public's impatience with corporate constitutional protection, whatever its doctrinal basis.)

The remainder of this Essay proceeds as follows. Part II describes the two ways in which the Supreme Court bases its corporate constitutional law jurisprudence on the rights of others: the aggregate theory and the listeners' rights doctrine. Part III explains how these theories depend on the misperception that corporate decisions are made through "procedures of corporate democracy." The Court does not indulge in a nonsensical equation of corporations with human beings. The real failing of the jurisprudence is its mischaracterization of corporate law and governance. Corporate constitutional doctrine is thus based on a fundamental misunderstanding about how corporations work.

II. THE RIGHTS OF OTHERS

Constitutional doctrine avoids the question of whether corporations are constitutional "persons" and focuses instead on the rights of others in two ways. First, the Court sometimes treats a corporation as no more, and no less, than an "aggregate" of human individuals.[6] The Court then focuses on the rights of those individuals. In the First Amendment free speech context, the

4. *See* S.J. Res. 19 & H.J. Res. 119, 113th Cong. (2d. Sess. 2014). The proposed amendment would authorize "reasonable limits on the raising and spending of money by candidates and others to influence elections" and permit Congress and the states to "distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections."

5. *See* S.J. Res. 18 & H.J. Res. 21, 113th Cong. (1st Sess. 2013). Free Speech for People, a co-sponsor of this Symposium, supports both amendments. *See* FREE SPEECH FOR PEOPLE, www.freespeechforpeople.org (last visited Feb. 25, 2015). I should disclose that I am a member of Free Speech for People's Legal Advisory Committee.

6. *See, e.g.*, David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 213–14 (1990).

Court allows corporations to invoke individuals' rights in a second way. The so-called "listeners' rights" theory of the First Amendment protects the public's right to *hear* messages, and thus requires neither a corporate nor an individual "right" to speak.

The troublesome "corporate" aspects of the cases are thus made to disappear, and the Court employs existing notions of natural persons' constitutional rights. While avoiding the fallacy of anthropomorphizing the corporation, this reductionist approach has fallacies of its own, because it depends on misunderstandings about the law and practice of corporate governance. Corporate governance is designed to optimize business performance by concentrating power in the hands of professional management. This is inconsistent with the aggregate theory's notion that a corporation's acts reflect the consensus of its members. It is also in tension with the listeners' rights theory. Even if listeners have an interest in hearing political messages, it may be inappropriate for management to unilaterally decide to pay for such messages with corporate funds.

It may be argued that it is excessively formalistic to distinguish between constitutional protection based on corporate "personhood" and protection derived from rights of others.[7] Whatever lawyerly rhetoric is deployed, corporations are in effect protected like individuals. While there is truth to this description of the end result, it is dangerous to be dismissive of the Court's method of reaching that result. Advocating for reform requires an understanding of what is really at stake, but also the ability to challenge legal arguments on their own terms. These specific formal and rhetorical strategies are particularly well-suited to our neo-formalist and (nominally) libertarian era. The Court has carefully chosen to evade the (still-unanswered) question of corporate speech "rights" and reframe the issue in terms that are consistent with both existing constitutional law doctrine and various politically powerful notions: property rights, free markets, freedom of information, and limited government.

7. *See, e.g.*, Jeff Clements, *We never said corporations are people*, CORPORATIONS ARE NOT PEOPLE, Jan. 12, 2012, http://corporationsarenotpeople.com/2012/01/23/we-never-said-corporations-are-people-we-said-they-are-voices-speakers-speech-makers-a-class-of-persons-thats-different/ ("No matter how the Court couches it, First Amendment rights or any other rights that are demanded and received by a corporate entity results in recognition – implicit, if nothing else – of a corporate Constitutional person."); Melissa Block, *What is the Basis for Corporate Personhood?*, Nat'l Public Radio, Oct. 24, 2011, http://www.npr.org/2011/10/24/141663195/what-is-the-basis-for-corporate-personhood ("[T]he Occupy Wall Street protesters have distorted the details, but they really have it right in spirit.").

A. CORPORATION AS AGGREGATE

In some contexts, the Court has treated corporations' constitutional claims as vindicating the rights of its constituent individuals. The Court first expressed this view in late nineteenth-century cases invalidating state regulations for infringing on property rights in violation of the Fourteenth Amendment's Due Process clause. In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, an 1888 case, the Court stated that "the designation of person" in the Fourteenth Amendment includes corporations because they are "merely associations of individuals united for a special purpose."[8] The Court did not hold that a corporation is itself a "person" in some metaphysical sense. Rather, the Court held that corporation is a *group* of individuals, and thus that its legal treatment affects the constitutional rights of individual persons. In a 1906 case, *Hale v. Henkel*,[9] the Court invoked the aggregate theory to justify protecting a corporation's papers from unreasonable searches under the Fourth Amendment. While the Fourth Amendment guarantees this right to "the people," the Court did not state that corporations themselves are "people," but again focused on the individuals behind the corporation: "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity."

More recently, in *Hobby Lobby*, the Court applied the aggregate theory to non-constitutional free exercise rights. Hobby Lobby and its co-petitioners were corporations that objected to the Affordable Care Act's mandate that employers provide

8. 125 U.S. 181, 188 (U.S. 1888). There is a persistent myth that the Court granted corporations constitutional "personhood" two years earlier, in Santa Clara County. v. Southern Pacific Railroad Co., 118 U.S. 394 (1886). *See, e.g.*, Dustin Volz, *The Surprising and Complicated History of the 'Corporations Are People' Doctrine,* NAT'L JOURNAL, July 1, 2014, http://www.nationaljournal.com/domesticpolicy/the-surprising-and-complicated-history-of-the-corporations-are-people-doctrine-20140701; Thomas Storck, *Corporate Personhood and 14th Amendment Rights,* CRISIS MAGAZINE, May 30, 2012, http://www.crisismagazine.com/2012/corporate-personhood-and-14th-amendment-rights. At oral argument in *Santa Clara*, Chief Justice Waite announced that the Fourteenth Amendment's Equal Protection Clause applies to corporations. He did not state why, however, and did not state that corporations are "persons." In any event, although this unusual statement appears in the headnotes of the case, *see id.* at 394, it was not part of the opinion, which was decided on state-law grounds and did not even address the Fourteenth Amendment. Furthermore, the lower court opinion, prefiguring *Pembina*, applied the Fourteenth Amendment using the aggregate theory. *See* Charles R. O'Kelley, *The Constitutional Rights of Corporations Revisited*, 67 GEO. L. J. 1347, 1353–56 (1979).

9. 201 U.S. 43 (1906).

contraception coverage for their employees.[10] Each corporation was entirely owned and controlled by the members of a single family whose members unanimously opposed the mandate on religious grounds.[11] The case was based not on the First Amendment's Free Exercise Clause, but on the Religious Freedom Restoration Act (RFRA). According to RFRA, the government may not "substantially burden a *person's* exercise of religion" unless the burden furthers a compelling governmental interest by the least restrictive means available.[12] The word "person" in a federal statute includes corporations "unless the context indicates otherwise."[13] In language reminiscent of *Pembina* and *Hale*, the Court insisted that protecting the petitioner corporations was necessary in order to protect individuals:

> Congress provided protection for people . . . by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends . . . . [P]rotecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.

The First Amendment's Free Exercise Clause has not (yet) been applied to business corporations, but *Hobby Lobby*'s reasoning would seem to apply. The Clause forbids Congress from "prohibiting the free exercise" of religion. *Hobby Lobby*'s aggregate reasoning suggests that, at least in a small, privately owned corporation,[14] corporate regulations can interfere with the religious exercise of its owner-managers.

10. The corporations specifically objected to the requirement that they cover contraceptives that act after conception. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2764 (2014).

11. *Id.* at 2764–65 (describing Conestoga Wood Specialties, owned by the Hahn family); *see also id.* at 2765–66 (describing Hobby Lobby and Mardel, owned by the Green family).

12. 42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added).

13. 1 U.S.C. § 1.

14. The Court limited its decision to "closely held" business corporations like the petitioners (that is, corporations owned by a small number of shareholders), and expressly declined to decide whether it would apply to a publicly traded corporation with large numbers of shareholders. 134 S.Ct. at 2774.

B. CORPORATIONS AND LISTENERS' RIGHTS

In corporate free speech cases under the First Amendment, the Court has invoked the rights of others in a different way. The aggregate theory suggests that corporate speech acts (including the political spending at issue in *Citizens United*) might be characterized as the protected speech of the corporation's constituent individuals. The Court has not taken this approach, however. Instead, it has invoked the so-called "listeners' rights" doctrine, under which a government regulation violates the Free Speech Clause if it interferes with the public's interest in receiving messages.[15] The Court originally developed that doctrine outside the corporate context to protect unpopular speech without having to defend the rights of unpopular speakers such as communists,[16] pornographers,[17] and prison inmates.[18] When the issue of corporate speech came before the Court, focusing on listeners' rights allowed the Court to invalidate regulations on First Amendment grounds while once again avoiding the issue of "corporate rights." Although the listeners' rights theory focuses primarily on the audience and not the speaker, the Court's application of the doctrine to corporate speech depends on an understanding of the corporation similar to that found in the aggregate theory, as will be explained below.

The Court relied on listeners' rights doctrine when it first protected corporate political spending in *First National Bank of Boston v. Bellotti*[19] and invoked the same argument in *Citizens United*. In *Bellotti*, a Massachusetts state statute prohibited business corporations from spending money to influence a voter referendum unless it "materially affect[ed] the property, business, or assets of the corporation."[20] A group of corporations challenged the statute. In striking it down, the Court specifically stated that "we need not . . . address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."[21] Instead, the Court used the

15. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 576 (1980) ("[A] strict standard of review applies . . . where the purpose of the restraint is to influence behavior by depriving citizens of information."). Although commentators and lower courts refer to this doctrine as "listeners' rights," the Court itself does not.

16. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965).

17. *See* Stanley v. Ga., 394 U.S. 557, 564 (1969).

18. *See* Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (overruled in part on other grounds by Thornburgh v. Abbott, 490 U.S. 401, 407–14 (1989)).

19. 435 U.S. 765 (1978).

20. *Id.* at 774.

21. *Id.* at 777.

listeners' rights doctrine: "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[22]

Although the decision focused on the interests of listeners, the analysis depended in part on the notion that a corporation's shareholders control its speech, and was in this respect reminiscent of the aggregate theory. Even assuming that listeners have a right to hear the political messages of corporations, the state of Massachusetts argued that it had a countervailing interest in "preventing the use of corporate resources in furtherance of views with which some shareholders may disagree."[23] The Court rejected this justification on the ground that "shareholders normally are presumed competent to protect their own interests."[24] The Court went so far as to declaim, "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[25] The Court did not expressly state that corporate speech constitutes shareholder expression. Rather it seemed to make the related, but slightly more modest, claim that management decisions to fund political speech do not constitute unauthorized use of shareholder property. In any event, as with the aggregate theory, the listeners' rights justification for protecting corporate speech assumes that shareholders control the corporation.

In *Citizens United*, the Court again relied on listeners' rights. It also cited *Bellotti*'s aggregate-based notion that shareholders control corporate speech. As in *Bellotti*, the Court did not directly address a corporation's right to expression and focused instead on individuals' interest in receiving information: "voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[26] Like Massachusetts in *Bellotti,* the federal government in *Citizens* argued that the corporate regulations in question served the government's compelling interest in "protecting dissenting shareholders from being compelled to fund corporate political speech."[27] The Court, quoting *Bellotti*, dismissed this argument on the ground that there

22. *Id.* at 783.
23. *Id.* at 792–93.
24. *Id.*
25. *Id.*
26. Citizens United v. FEC, 558 U.S. 310, 341 (2010).
27. *Id.* at 362.

was "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" [28]

Although the opinions sometimes use the terminology of rights,[29] "listeners' rights" decisions often turn on the public policy concern of information availability and not on individual "rights" in the technical sense. As *Bellotti* and *Citizens United* demonstrate, the plaintiff can be the speaker, and need not be an actual listener who can prove she has been harmed. Indeed, the doctrine does not require any such person to be identified at all: the listener and her harm can be mere hypothetical constructs. It has been argued that because listeners' rights doctrine is based on instrumental policy interests rather than categorical individual rights, listeners' rights arguments have less power than challenges based on expressive rights.[30] As the state argued in *Bellotti*, the domination of political speech by corporate money may "drown out other points of view."[31] Both the speech and the regulation potentially serve the same interest: providing voters with a diversity of political views. Thus it has been argued that such regulations should be subject to "intermediate" or even "rational basis" review, and not to the strict scrutiny normally applied to speech regulation.[32] The Court clearly rejected this distinction in *Bellotti*, however: the Court applied strict scrutiny based on information availability alone, having expressly stated that it was irrelevant whether the corporate plaintiff had expressive rights.[33] The danger of corporate voices "drowning out" others was insufficiently compelling to survive this scrutiny. Applying the same level of scrutiny in both the expressive and the listeners' rights contexts is consistent with the wording of the Free Speech Clause ("Congress shall make no law abridging the freedom of speech"), which mentions neither "persons" nor expressive rights.

A few years after *Bellotti*, the Court seemed to reverse course and treat corporate speech differently from that of individuals. In *Austin v. Michigan State Chamber of Commerce*, the Court held that a state's corporate campaign finance regulation was

28. *Id.*

29. *See, e.g.*, Stanley v. Ga., 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas.").

30. *See* Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1247 (1991).

31. 435 U.S. 765, 789 (1978)

32. *See* Dan-Cohen, *supra* note 30.

33. 435 U.S. at 786.

justifiably aimed at counteracting the "distorting effects of immense aggregations of wealth."[34] The Court appeared to accept the "drowning out" argument it had rejected in *Bellotti,* although it did not purport to overrule *Bellotti*. Two decades later, however, *Citizens United* expressly overruled this aspect of *Austin* and reaffirmed *Bellotti*.[35]

While it is convenient to describe the Free Speech Clause in terms of the rights or interests of speakers or listeners, it is arguably not based on individual interests at all. Many commentators argue that it should be seen as "negative rather than affirmative,"[36] that is, as a restriction on government power rather than a conferral of individual rights.[37] The Clause is of course phrased in just that way: as a prohibition on speech regulation by Congress.[38] The Court implied the "negative" theory in *Citizens United*: "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."[39] Soon afterwards, the Court offered further support for the "negative" theory of free speech. In 2012, *United States v. Alvarez* subjected a speech regulation to strict scrutiny even though the Court identified neither an expressive *nor* a listeners' right. The Court struck down the Stolen Valor Act, a federal statute that imposed a criminal penalty on anyone falsely claiming to have received a U.S. military decoration.[40] The Court did not assert that the petitioner prosecuted under the statute had a right to tell his "intended, undoubted lie,"[41] nor that listeners have an interest in hearing such lies.

Bellotti and *Citizens United* were premised on the notion that protecting political messages protects the voting public. But *Alvarez* went further, giving constitutional protection to false factual assertions that provide no public benefit. Indeed, the speech was concededly harmful, such that government had an interest in protecting the public from it. But that interest was insufficiently compelling, the Court found, because the public can

34. 494 U.S. 652, 660 (1990).
35. Citizens United v. FEC, 558 U.S. 310, 365 (2010).
36. *See* Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 156–57 (2010).
37. *See id.*; *see also* ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS 3 (2010).
38. Concurring in *Citizens United*, Justice Scalia noted that the Free Speech Clause is "written in terms of 'speech,' not speakers." 558 U.S. at 392.
39. *Id.* at 340.
40. United States v Alvarez, 132 S.Ct. 2537, 2545 (2012).
41. *Id.* at 2542.

supposedly protect itself from such harm without the government's help. The law was unconstitutional not because it violated anyone's rights, but simply because the Court found it unnecessary (despite the government's assertion to the contrary). The Court quoted Justice Holmes' famous dictum: "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[42] and offered its own, more explicitly antigovernment version: "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth."[43]

Cases like *Bellotti* make clear that *either* expressive or listeners' rights can be *sufficient* to invalidate speech regulation. But *Alvarez* suggests that *neither* speakers' nor listeners' rights are *necessary* for this purpose: consistent with the "negative" theory, the Court simply applied an extremely strong presumption against any governmental regulation of communication. In any case, under either listeners' rights or a negative theory, corporations' free speech arguments are independent of constitutional "personhood" or speech "rights." Thus excluding corporations from the category of "person," as the People's Rights Amendment proposes, would have no apparent effect on corporate free speech doctrine.[44]

The listeners' rights doctrine has allowed the Court to protect corporate political activity and other speech while avoiding the thorny question of whether corporations have the same expressive rights as individuals. The negative theory further supports these results and suggests the Court might go even further, invalidating almost all regulations on corporate communication and political spending on the ground that the "marketplace of ideas" is self-regulating. In challenging the constitutional protection of corporate political spending, it seems unrealistic to expect reform of fundamental First Amendment notions such as listeners' rights and the negative theory. The jurisprudence can be challenged on narrower grounds, however, by focusing on its erroneous view of corporate law.

42. *Id.* at 2550 (*quoting* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting)).

43. *Id.* at 2550–51.

44. Furthermore, the aggregate theory notwithstanding, the People's Rights Amendment might be used to deny Due Process protection to corporations, which could have drastic consequences for property rights.

III. THE MYTH OF "CORPORATE DEMOCRACY"

A. THE CENTRALIZATION OF CORPORATE AUTHORITY

In both *Bellotti* and *Citizens United*, the government warned of a danger that management may use corporate resources to fund speech that conflicts with shareholders' views. Thus, the government may have a compelling interest in regulating corporate speech in order to protect shareholder property.[45] The Court rejected this argument on the ground that shareholders protect themselves from such harm through "the procedures of corporate democracy."[46] Like the aggregate theory, this argument is based on the idea that the acts of a corporation reflect the shared will of its constituent individuals. This notion is mistaken, however. Corporate governance is not, and is not intended to be, a participatory democracy that reflects the ideas and values of a corporation's constituents. Rather, it purposefully restricts the governance roles of shareholders and other constituents in favor of professional managers who are charged with making money for the corporation. Thus, *Bellotti* and *Citizens United* were wrong to casually assume that shareholders run the corporation. In fact, corporate governance has no mechanisms to insure that corporate speech that serves the rights of others (that is, listeners) does not infringe upon the rights of still others—namely shareholders or other corporate constituents who may disagree when management uses corporate resources for political purposes. Shareholders do not participate directly in decisionmaking, nor do shareholders have significant input into the selection of managers. Their primary recourse when they disagree with management is simply to sell their shares and move on.[47]

In his *Citizens United* dissent, Justice Stevens specifically questioned the Court's faith in "corporate democracy":

> I fail to understand why the Court is so confident in these mechanisms . . . . In practice . . . many corporate lawyers will tell you that [shareholders' rights to vote and to sue directors for breach of fiduciary duty] are so limited as to be almost nonexistent, given the internal authority wielded by boards and

45. This Essay takes no normative stance with respect to the listeners' rights doctrine. As a descriptive matter, however, it is a fundamental aspect of free speech jurisprudence. As a strategic matter of legal reform, I see less potential in questioning that theory than in pointing out demonstrable errors in the Court's reading of corporate law and governance.

46. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978); Citizens United v. FEC, 558 U.S. 310, 362 (2010).

47. *See* Joo, *supra* note 3, at 44–45, 57–58.

managers and the expansive protections afforded by the business judgment rule.[48]

Justice Stevens correctly characterized corporate governance as management-centered rather than shareholder-directed. The "internal authority wielded by boards and managers" is a fundamental characteristic of corporate governance. Corporate law, by design, does not empower shareholders. Rather, it consciously grants control to professional management.[49] Delaware's corporate code, for example, states that: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."[50] This means not only that the law gives directors day-to-day control, but that it specifically denies control to shareholders.[51] Directors' control of corporate governance is not a usurpation of shareholders' legal rights. Rather, it is the explicit design of corporate law, in which collective ownership creates governance problems. Some corporations, like Hobby Lobby Stores, Inc., are owned by small, harmonious groups of shareholders who run the corporation because they also serve as the directors and officers. Most large corporations, however, have huge numbers of shareholders who cannot operate by consensus and do not (and may not want to) serve as directors or officers. Centralized control by professional managers thus arose as "a highly efficient solution to the decisionmaking problems faced by larger corporations."[52] Efficiency and democracy, however, are two very different principles.

Unfortunately, it is not surprising that the Court gets corporate law so wrong. The Court has little interest in business law *per se*.[53] In the constitutional context, it makes inaccurate,

48. 558 U.S. at 477 (Stevens, J., dissenting) (internal quotations and citations omitted).

49. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the [Delaware Code] is that directors, rather than shareholders, manage the business and affairs of the corporation.")

50. DEL. CODE ANN. tit. 8 § 141(a); *cf.* MODEL BUS. CORP. ACT § 8.01(b).

51. *See Aronson*, 473 A.2d at 811; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 573–74 (2002) ("Shareholders exercise virtually no control over either day-to-day operations or long-term policy"). In practice, boards delegate much of their management power to executive officers they appoint, such as the CEO.

52. Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L L. 45, 59 (2002).

53. *See* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1573 (2004) (arguing that the Court suffered from a "loss of interest" in securities regulation and antitrust law following the 1987 retirement of Justice Lewis Powell, a former corporate

unsupported generalizations about corporate law that seem more normative than descriptive.[54] Since most of the non-corporate legal community (like the Court) has only limited interest in and understanding of corporate law, the superficiality of its corporate-governance analysis tends to go unnoticed. Indeed, even though his *Citizens United* dissent criticized the Court's flawed assumptions about corporate governance, Justice Stevens seemed to be similarly uninterested in the details of corporate law. He did not refute the "corporate democracy" assertion in detail, and devoted only two of the eighty-six pages of his dissent to the issue.

In *Bellotti*, the Court cited three specific examples of "procedures of corporate democracy": "the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes," shareholders' ability "to insist upon protective provisions in the corporation's charter," and shareholders' "power to elect the board of directors."[55] The Court did not describe these mechanisms in any detail. In *Citizens United*, the Court simply repeated *Bellotti*'s general assertion about "procedures of corporate democracy" (and even asserted that they had been enhanced by advances in information technology[56]) without elaboration. In fact, the three governance devices cited in *Bellotti* are far more limited than the Court casually assumed. In general, corporate governance is not intended to be a democracy, but rather a management-centered technocracy.[57] The remainder of this Part shows that these three devices are not examples of democratic governance. This Part goes into considerable doctrinal detail to correct the gross, inaccurate generalizations that have distorted the First Amendment analysis of corporate campaign finance law.

lawyer); *cf.* A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 845 (2003) (explaining that Justice "Powell felt a special responsibility to guide his colleagues when they faced securities law questions" due to their relative lack of experience with securities law).

54. *Cf.* Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403 (1997). Despite lip service to the notion that corporate law was reserved to the states, Mark argues that the Court had, by the early nineteenth century, "casually adopted a single, universal understanding of what constituted a corporation, rather than allowing the states to define the entity." *Id.* at 422. Indeed, Mark argues that it was the Court, and not the states, that "define[d] the role of the corporation in the political economy and the role of managers within the corporation." *Id.* at 435 (summarizing the case law).

55. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).

56. Citizens United v. FEC, 558 U.S. 310, 370 (2010) (citing *Bellotti*, 435 U.S. at 794).

57. *See, e.g.*, Joo, *supra* note 3, at 39–79; *see also* Thomas W. Joo, *A Trip through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 744–63 (2003).

B. LIMITS ON SHAREHOLDER LITIGATION: THE BUSINESS JUDGMENT RULE

The "business judgment rule" ("BJR"), a judicially created state law doctrine, reflects how corporate governance concentrates authority in the board of directors. *Bellotti* asserted that shareholders may use litigation to "challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management," but ignored the BJR's limits on this ability. Justice Stevens referred to the BJR only in passing in his *Citizens United* dissent, but it is of central importance in circumscribing the role of shareholders and enlarging the discretion of directors. The BJR insulates directors from shareholder lawsuits challenging the substance of their decisions, and political spending decisions appear to be included.

Corporate directors have few enumerated legal duties. While it is often asserted that directors have a "duty" to enrich shareholders or to act in their best interests, this is simply not true. In fact, it is legally irrelevant whether a decision of the board actually benefited shareholders.[58] The relevant inquiry pertains to the process and motivation behind the decision, not its result. This inquiry is a highly deferential one: the BJR operates on the "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company . . . . Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption."[59]

Case law demonstrates that rebutting the presumption is extremely difficult, and that the category of "business decision" to which it applies is very broadly defined. For example, in *Kahn v. Sullivan*, the Delaware Supreme Court applied the BJR when shareholders challenged a corporation's charitable contribution.[60] The Occidental Petroleum Corporation's board had approved an $85 million corporate donation to establish the Armand Hammer Museum and Cultural Center, which had been proposed by and

58. *See, e.g.*, Shlensky v. Wrigley, 95 Ill. App. 2d 173, 181 (1968) ("[W]e do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability. We are merely saying that the decision is one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in their making of that decision").

59. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

60. 594 A.2d 48 (Del. 1991).

named after Occidental's chairman and CEO in order to display his personal art collection. Although the decision obviously benefited Hammer, and the other directors had obvious reasons to cater to him, the court deferred to the board's decision because the shareholders had failed to overcome the BJR's presumptions. The court noted that the directors responsible had no personal financial interest in the outcome and were not "dominated" by Hammer.[61] In keeping with the BJR's focus on procedure and not substance, the court made no inquiry into whether the contribution actually generated any benefit to the corporation or its shareholders. Note that the court applied the *business* judgment rule to this decision of the board even though it had no readily apparent connection to the corporation's petroleum business.

A California case, *Marsili v. Pacific Gas & Electric Co.*,[62] applied the BJR to corporate political expenditures in similar fashion. A municipal ballot measure in San Francisco proposed a voter approval requirement on the construction of tall buildings. Shareholders challenged a utility company's contributions to a group opposing the measure, which had no obvious connection to the company's business. The court stated that the board was not required to show that the expenditures would benefit the corporation.[63] Indeed, the court held that it was required to defer to the board's decision unless it found, "*as a matter of law*, that the contribution *could not be construed* as incidental or expedient for the attainment of corporate purposes."[64]

Under the BJR, shareholders would have great difficulty suing directors for expending corporate funds for political purposes. Merely disagreeing with the expenditure on political grounds would state no claim. The BJR would impose an extremely strong presumption that the expenditure was proper. Arguing that the expenditure had no clear benefit to the corporation or showing that it served the directors' personal interests would not upset that presumption. Shareholders would face a very high burden of proving the directors' bad faith or complete failure to inform themselves.

61. *Id.* at 59–60.
62. 51 Cal. App. 3d 313 (1975).
63. *Id.* at 324–35.
64. *Id.* at 324.

C. LIMITS ON SHAREHOLDER VOTING POWER

1. Policy and Charter Amendments

The *Bellotti* Court also inaccurately stated that shareholders control corporate actions through voting and the corporate charter. Similarly, Justice Scalia has asserted that management must act "in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal."[65] But shareholder approval of management decisions is *not* the deal. As noted above, the corporation "*shall*" be managed by its board of directors. Thus the vast majority of the board's actions are not subject to a shareholder vote. (Furthermore, as explained in the foregoing discussion, the BJR requires no proof that a board decision was "designed to make a profit.")

State corporation codes give shareholders explicit approval power over only a tiny subset of management actions classified (somewhat arbitrarily) as "fundamental changes."[66] These are typically limited to amendments to the corporate charter, a merger with another corporation, the dissolution of the corporation, and the sale of all (or substantially all) of the corporation's assets.[67] A corporation undergoes these "fundamental" changes infrequently, if ever. Among these changes, only charter amendments are potentially relevant to political spending. According to the *Bellotti* Court, shareholders can "insist upon protective provisions in the corporation's charter." But while a charter amendment could conceivably limit the board's power over a corporation's political spending, shareholders in most states may only *approve* (or disapprove) amendments proposed by the board of directors; they may not initiate charter amendments on their own.[68] The assertions of *Bellotti* notwithstanding, shareholders in most corporations can only request that directors initiate a charter amendment; they have no legal power to "insist" on one.

65. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting). *Austin* upheld a corporate campaign finance regulation using reasoning inconsistent with *Bellotti*; Justice Scalia made this argument in dissent. Twenty years later, *Citizens United* expressly overruled *Austin* and reaffirmed *Bellotti*.

66. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW § 3.1.3(a), at 195 (2d ed. 2010).

67. *See id.*; *see also* DEL. CODE ANN. tit. 8 §§ 242(b) (charter amendment), 251(c) (merger), 271 (sale of assets), 275(b) (dissolution).

68. *See* GEVURTZ, *supra* note 66, § 3.1.3(a), at 196; *see also* DEL. CODE ANN. tit. 8, § 242(b); MODEL BUS. CORP. ACT § 10.03(a).

In large corporations, elections take place at an annual shareholder meeting, but the vast majority of shareholders, who are spread out around the country or even the world, do not attend. Thus the corporation (and occasionally, some other party) solicits shareholders' proxies: that is, it asks them for permission to cast their votes in a certain way. The board, at the corporation's expense, produces and distributes to shareholders a set of "proxy materials" that include a description of the issues to be voted on, as well as the corporation's proxy solicitation. Federal securities law regulates the proxy process. A shareholder may make a proposal for shareholders to vote on, but the law expressly permits the corporation (that is, its board of directors) to exclude certain shareholder proposals from the corporation's proxy materials.[69] If the corporation properly excludes a proposal from the corporation's proxy materials, the proponent must pay for the separate production and dissemination of her own proxy materials. This can be difficult and costly, as the materials must conform to federal securities regulations. Lacking the official imprimatur of the corporation, independent proxy materials risk being perceived as junk mail by shareholders who receive them.

Federal law provides a number of grounds on which a corporation may exclude a shareholder proposal from the proxy materials. For example, a proposal that is not "a proper subject for action by shareholders" may be excluded.[70] According to the SEC, some shareholder proposals, "depending on the subject matter," would violate state law if they were binding on the corporation.[71] This is apparently a reference to the rule that directors and not shareholders manage the corporation.[72] To avoid exclusion on this ground, shareholder proposals are typically worded in nonbinding form.[73]

2. Director Elections

Shareholders have the power to vote for directors, but this power is of limited consequence in the vast majority of elections.

69. 17 C.F.R. § 240.14a-8 (2011).

70. *Id.*

71. *Id.*

72. *See, e.g.*, 8 Del. Code § 141(a), discussed *supra.* In fact, the extent to which state law prohibits binding shareholder proposals is less than clear. *See also* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 511–14 (4th ed. 2006). But the SEC's guidance is influential, since it will decide in the first instance whether a corporation may exclude a particular proposal, and its decision will be subject to the standard judicial deference accorded to agency determinations. *See id.* at 513–14.

73. *See* GEVURTZ, *supra* note 66, § 3.2.3(a) at 270.

In fact, "shareholders in public corporations do not in any realistic sense elect boards. Rather, boards elect themselves."[74] Director elections are rarely contested; incumbent directors or their nominees typically run unopposed.[75] Voting for directors thus gives shareholders no significant influence on boards' political spending.

Because default state law rules allow directors to be elected by a plurality of votes cast, unopposed directors can be elected even if they receive more negative than positive votes.[76] Many companies have voluntarily instituted rules under which directors must submit their resignations if they do not receive a majority of positive votes in an uncontested election. (These policies are sometimes referred to as "plurality plus" or "Pfizer-style" policies.)[77] But even in such situations, the board may reject the resignations and allow the directors to continue to serve.[78]

Federal securities law deliberately impedes corporate democracy in a fundamental way: proxy regulations actively discourage shareholders from contesting the election of directors.[79] Indeed, even when an election is contested, the corporation is not required to list the challengers' names in the corporation's proxy materials. The challengers must fund their own separate proxy solicitation.[80] Although state law does not prohibit shareholders from nominating directors, federal securities law expressly permits the corporation to exclude a shareholder's proposal to nominate a specific director candidate.[81] In fact, federal law also permits the exclusion of any shareholder

74. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 311 (1999).

75. *See* GEVURTZ, *supra* note 66, § 3.1.2(a), at 187.

76. *See The Election of Corporate Directors: What Happens When Shareowners Withhold a Majority of Votes from Director Nominees?* GMI RATINGS (Aug. 2012) at 6, http://www3.gmiratings.com/wp-content/uploads/2012/08/GMIRatings_IRRC_082012.pdf.

77. *See* City of Westland Police & Fire Ret. Sys. v. Axcelis Technologies, Inc., 1 A.3d 281, 284 n.4 (Del. 2009) (en banc). Pfizer, Inc. was one of the first major corporations to adopt such a rule. *Id.*

78. *See* GMI RATINGS, *supra* note 76. This occurred in *City of Westland*, discussed *infra* note 86.

79. In fact, prior to a rule change in 2010, the SEC specifically stated on numerous occasions that proposals to reform director election procedures could be excluded on the ground that they "would establish a procedure that may result in contested elections of directors." *See* Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 762, & nn. 125–26. Although the current rule (described in the text) has been narrowed somewhat, the rule still significantly limits the contestation of elections.

80. *See* LOSS & SELIGMAN, *supra* 72, at 408.

81. 17 C.F.R. 240.14a-8(i)(8)(iv).

proposal that "otherwise could affect the outcome of the upcoming election of directors," such as an objection to one of the board's nominees or an immediate change to election procedures.[82] Corporate law thus facilitates the board's control of elections, allowing it nearly exclusive use of corporate resources in corporate election campaigns.

3. Informed Voting: Law vs. Technology

In *Citizens United*, the Court opined that "corporate democracy" has become more effective since *Bellotti* because technology has made shareholders more informed.[83] This shows remarkable naïveté about the interaction between technology and law. While public-domain information is more easily accessible in the internet era, much corporate information is proprietary and protected from shareholder inquiries. Shareholders have no general right to inform themselves about management conduct through corporate records. The corporation must grant a shareholder's request to view corporate records only if the shareholder can demonstrate that the request has a "proper purpose."[84] Although this requirement sounds innocuous, "it can produce fairly extensive court proceedings."[85] Under Delaware case law, for example, seeking evidence of wrongdoing or mismanagement is a "proper purpose." However, a shareholder may not inspect corporate records for that purpose unless she *first* presents independently obtained evidence forming a "credible basis" for suspicion.[86] Shareholders thus have very limited ability to monitor corporate political activity using the corporation's own information.

82. 17 C.F.R. 240.14a-8(i)(8)(v). This includes, but is not limited to, proposals that would disqualify a nominee, remove a sitting director, or question "the competence, business judgment, or character" of a nominee or director. *See* 17 C.F.R. 240.14a-8(i)(8)(i)–(iii). In 2010, the SEC adopted a so-called "proxy access" rule that would have required the corporation to include a director nomination made by a large shareholder or bloc (representing at least three percent of a corporation's voting power) under certain circumstances. But the D.C. Circuit struck down the rule in 2011, finding that the SEC had been "arbitrary and capricious" in adopting it. *See* Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

83. Citizens United v. FEC, 558 U.S. 310, 370 (2010)..

84. *See* DEL. CODE ANN. tit. 8, § 220(b) (2010); City of Westland Police & Fire Ret. Sys. v. Axcelis Technologies, Inc., 1 A.3d 281, 287 (Del. 2010). *Cf.* MODEL BUS. CORP. ACT § 16.02(d)(1).

85. GEVURTZ, *supra* note 66, § 3.1.3(c), at 217.

86. *See* City of Westland Police & Fire Ret. Sys. v. Axcelis Technologies, Inc., 1 A.3d 281, 287 (Del. 2009) (en banc).

A 2010 Delaware Supreme Court opinion demonstrates the strictness of the rule. The court rejected a shareholder request to view records regarding two major governance issues: a potential sale of the company and a board election. In 2008, the board of Axcelis Technologies, Inc. rejected another company's offers to buy out Axcelis's shareholders at $5.20 and later $6 per share.[87] (These were generous offers: the market price of the shares was $4.18 at the time of the first offer.[88]) A few months later, three directors ran for re-election unopposed, but failed to receive a majority vote. Because Axcelis had a "Pfizer-style" policy, they tendered their resignations. The board, however, refused to accept the resignations. About a year later, after further acquisition negotiations failed, Axcelis defaulted on a debt obligation and its stock price fell to 41 cents.[89]

The City of Westland Police & Fire Retirement System (an Axcelis shareholder) asked to see Axcelis's records regarding the board's refusal to accept the director resignations and its rejection of the acquisition offers. The court rejected both requests on the ground that the plaintiffs had not presented any evidence of wrongdoing by the board. The requested records themselves were of course the most likely source of such evidence. In short, shareholders have no general right to inform themselves via corporate records, which further limits their already limited voting power.

D. "SHAREHOLDER VOTING" IS INHERENTLY UNDEMOCRATIC

Of course, an individual's voting power is also limited in our political system. But that merely suggests the shortcomings of our nominally democratic politics; it does not attest to the democratic character of corporate governance. Indeed, corporate voting power is based on economic and not democratic principles: it is not equal among individuals, but weighted on the basis of financial interest.

The term "shareholder voting" is somewhat misleading, as votes are allocated not per shareholder but per *share*[90]—that is, on

87. *Id.* at 283.
88. *Id.*
89. *Id.* at 285.
90. *See, e.g.*, DEL. CODE ANN. tit. 8, § 212(a); Model Bus. Corp. Act § 7.21(a). This has not always been the case. *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354–55 (2006) (explaining that each shareholder had one vote in many nineteenth-century corporations).

the basis of wealth. The rare shareholders that can successfully influence corporate management are individuals and institutions that control huge numbers of votes—i.e., those wealthy enough to own huge numbers of shares. Furthermore, not all shares receive an equal vote, or any vote at all. While a corporation must have a class of voting stock, not every class must have voting rights, and not every voting class must have equal voting rights.[91] Some corporations have classes of shares with super-voting power that are expressly designed to concentrate voting power in a controlling shareholder or group. Facebook, for example, allocates about four percent of its total shareholder votes to its publicly held shares and the remainder to a separate class of stock that is not for sale to the public.[92] This capital structure gives the majority of Facebook's shareholder voting power to its CEO, Mark Zuckerberg.[93]

Moreover, voting power is allocated *only* to shareholders, as are the other (limited) governance rights discussed in this Essay: fiduciary duty suits, the approval of charter amendments, and access to corporate records. The Court has insisted over and over that corporate constitutional "rights" actually protect the rights of the individuals behind the corporation. It has, however, been vague as to just who those individuals are. In *Pembina,* for instance, the Court stated only that corporations are "associations of individuals united for a special purpose." In an 1883 circuit court opinion that strongly influenced the Court's aggregate theory,[94] Justice Field argued that Fourteenth Amendment protection of corporate property protects "the corporators also."[95] It is unclear to whom Field was referring. The archaic term

91. *See, e.g.*, DEL. CODE ANN. tit. 8 § 212(a); Model Bus. Corp. Act § 7.21(a) (stating that the default allocation of one vote per share may be altered by the corporation's charter).

92. At the time of its initial public offering of Class A common stock in 2012, Facebook explained that stock would receive one vote per share, while its Class B stock, which is not sold to the public, would receive ten. It further explained: "The holders of our outstanding shares of Class B common stock will hold approximately 95.9% of the voting power of our outstanding capital stock following this offering, and our founder, Chairman, and CEO, Mark Zuckerberg, will hold or have the ability to control approximately 55.8% of the voting power of our outstanding capital stock following this offering." Facebook, Inc., Amendment No. 8, to Registration Statement Under Securities Act of 1933, (Form S-1) (May 16, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1326801/00011 9312512235588/d287954ds1a.htm.

93. *See id.*

94. *See* Charles R. O'Kelley, *The Constitutional Rights of Corporations Revisited*, 67 GEO. L. J. 1347, 1353–56 (1979).

95. Santa Clara County v. S. Pac. R.R., 18 F. 385, 404 (C.C.D. 1883). Justice Field wrote this opinion for the Circuit in his capacity as Circuit Justice.

"corporator" was sometimes used to refer to the managers who exercise the corporate powers, as *distinct from* the shareholders, who do not.[96] Today, shareholders are often assumed to be the primary corporate constituents, as indicated by the discussion (however brief and dismissive) of shareholder interests in *Bellotti* and *Citizens*. The *Hobby Lobby* Court, however, stated that corporate constitutional protection protects a broader set of people, "including shareholders, officers and employees."[97]

In fact, corporate constitutional claims are even less representative of employee interests than shareholder interests. Employees and other non-shareholder corporate constituents (such as creditors) have no voting power and are owed no fiduciary duties. But corporate policies, such as wages and benefits, layoffs, and taking on additional debt often have a more immediate and dramatic effect on them than on shareholders.[98] Executives and large creditors can use economic leverage to protect their interests (and executives control policymaking in any event). Rank-and-file employees and smaller creditors and clients, however, lack economic leverage (with the exception of some unionized employees). Shareholder advocates have had some success advancing reforms (such as the Pfizer rule) intended to increase management responsiveness to shareholders. This is an admirable goal, but it does nothing for corporations' other constituents, whose economic and political interests differ from those of shareholders. Such reforms may increase shareholders' control over their investments, but they should not be mistaken for "democratic" reform.

The Supreme Court either fails to understand corporate governance or deliberately misrepresents it, misleadingly describing it as "democratic." The Court invokes "corporate democracy" as part of its "listeners' rights" argument, which is based on the unrestricted flow of information, even though corporate law expressly limits shareholder access to information. The Court insists that "corporate democracy" justifies the role of corporations in financing our political elections, despite the anti-

96. *See* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982).

97. 134 S. Ct. 2751, 2768 (2014). The Court nonetheless ignored the dissent's argument that legal exemptions for corporations based on the religious views of their owners might burden the religious exercise of their employees. *See id.* at 2795–96 (Ginsburg, J., dissenting).

98. *See* Thomas W. Joo, *Corporate Governance and the "D-Word,"* 63 WASH. & LEE L. REV. 1579, 1587–88 (2006).

competitive and wealth-based aspects of conducting and financing corporate elections.

Corporate law assigns voting power according to the size and nature of one's economic interest in the corporation. Such an allocation may be justifiable on economic grounds. Indeed, it is generally beneficial to shareholders in their capacity as financial investors, and most shareholders seem to be satisfied with it. But it does not constitute corporate "democracy," and cannot justify the role of corporations in our electoral system. A democratic allocation of voting power is not dependent on economic interests. Suffrage may not be conditioned on wealth, property ownership or the ability to pay a fee,[99] nor on one's economic role.[100] In a democracy, each voter's vote is counted once, and only once.[101] Shareholders and other corporate constituents might arguably be seen as having agreed to the wealth-based allocation of voting power as a condition of their investment or other relationship to the corporation. But even if voluntary and bargained for, vote selling is, like wealth-based qualifications, inconsistent with a democratic process, and is prohibited in the political context.[102] The more the law allows corporate participation in the electoral process, the more corporate governance becomes an element of political governance. While the non-democratic nature of corporate governance may serve valid economic goals, it justifies limiting the role of business corporations in our politics.

IV. CONCLUSION

A constitutional amendment denying constitutional "personhood" to corporations would not have a determinative effect on corporate campaign finance doctrine. But it could help communicate public attitudes and thus have some effect on the

99. *See, e.g.*, U.S. CONST. amend. XXIV (outlawing poll taxes); Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that "a state violates the Equal Protection Clause . . . of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard").

100. *See* Gray v. Sanders, 372 U.S. 368, 380 (1963) (holding that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State").

101. *See id.* at 380–81 ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators . . . irrespective of population and the use of the electoral college in the choice of a President . . . [O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.").

102. *See, e.g.*, 18 U.S.C. § 597 (1996) (prohibiting paying any person "to vote or withhold his vote, or to vote for or against any candidate").

Court's future decisions. The "Democracy for All Amendment" is more directly responsive to the current jurisprudence, in that it expressly permits distinctions between individual and corporate campaign finance regulation. As this Essay has argued, however, simply correcting the Court's assumptions about corporate governance law could reform the case law without a constitutional amendment. Because "corporate democracy" does not protect shareholders (and other corporate constituents) from management's misuse of corporate resources for political purposes, the Court could recognize a compelling governmental interest in providing such protection.

This would require neither a constitutional amendment, nor even any fundamental changes to First Amendment doctrine. It could be accomplished through the relatively modest step of reversing (explicitly or implicitly) *Bellotti* and that part of *Citizens United* that echoed *Bellotti.* Indeed, the Court has arguably provided an opening for the arguments presented here. When it cited *Bellotti* in *Citizens*, the Court stated, "There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" The analysis here suggests that shareholders might lead the way in challenging the legal regime permitting corporate political spending by pointing out how corporate governance in fact gives them no mechanism to "correct" abuses. *Hobby Lobby* can also be viewed as consistent with an appreciation of shareholders' limited control of large corporations. The Court held that corporate policy implicated the religious exercise of individuals, but limited its holding to closely held corporations. Unlike large, publicly traded corporations, the plaintiff corporations were owned and run by families with unanimous religious views and not by professional managers independent of the shareholders.

Doctrine always changes, sometimes rapidly, as Court personnel or political and economic conditions change. Corporate constitutional rights have been no exception. The Court initially refused to extend the Fourteenth Amendment to economic and corporate rights in the Reconstruction era. In the next decades, however, it completely reversed itself, ushering in the *Lochner* era. Lochnerism eventually gave way during the New Deal. Yet the contemporary First Amendment protection of corporate and

commercial messages has been called the revival of Lochnerism.[103] The pendulum will eventually swing again. Whether courts reverse doctrine or apply existing doctrine to reach different results, public attitudes and political pressure can surely make a difference. The recent dramatic changes in same-sex marriage law attest to this.

In fact, although current campaign finance jurisprudence is strongly pro-corporate, that is a recent development. By relying on listeners' rights, *Bellotti* seemed to prohibit treating corporate political contributions differently from those of individuals. But the Court seemed to reverse itself in *Austin* twelve years later, citing the "unfair advantage" enjoyed by corporations. After another twenty years, *Citizens United* overruled *Austin* and reaffirmed *Bellotti.* Such dramatic reversals could occur again. The tension between skepticism of speech regulation and revulsion at the influence of money is likely a constant that fuels an ongoing cycle of doctrinal revision.

103. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y., 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting); *see also* Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661 (1999).