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Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations

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Making Corporate Law More Communitarian

A PROPOSED RESPONSE TO THE ROBERTS COURT'S PERSONIFICATION OF CORPORATIONS

Robert M. Ackerman & Lance Cole†

"[A] corporation . . . has no soul to be damned and no body to be kicked."¹

"Corporations are people."²

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¹ Edward, First Baron Thurlow, English jurist and Lord Chancellor (1731-1803). The quote was given wide publicity by Professor John C. Coffee, Jr.'s influential article, "*No Soul to Damn: No Body to Kick*": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

² Mitt Romney, 2012 Republican Party Nominee for President of the United States, Remarks at Iowa State Fair (Aug. 11, 2011).

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INTRODUCTION

In both *Citizens United v. FEC*³ and *Burwell v. Hobby Lobby Stores, Inc.*,⁴ the U.S. Supreme Court advanced the personification of the business corporation in a manner that should be disturbing to both corporate legal scholars and communitarians. The *Citizens United* decision has been roundly criticized and occasionally lauded for asserting an expansive view of corporate First Amendment rights in the context of federal (and, by extension, state) election campaigns.⁵ *Citizens United* held that a federal statute⁶ restricting corporate and labor union use of general treasury funds to defeat a candidate for office could not withstand First Amendment scrutiny.⁷ While applauded by an unusual coalition of First Amendment advocates and conservative politicians,⁸ the decision has been derided by election

³ *Citizens United v. FEC*, 558 U.S. 310 (2010); see also *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (extending *Citizens United*'s holding to Montana campaign spending law).

⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁵ Compare Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 739-40 (2011) (praising, albeit marginally, the Court's logical progression in defining corporate "personhood"), and Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 1-2, 17-46 (2011) (discussing the "silver lining" of the case, as it opens the door for the increased rights of labor unions), with Alex Osterlind, *Giving a Voice to the Inanimate: The Right of a Corporation to Political Free Speech*, 76 MO. L. REV. 259, 281 (2011) (claiming that political action committees (PACs) already provide corporations with a sufficient avenue to engage politically), and Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203, 207-10 (2012) (explaining how the *Citizens United* decision opened the door for political corruption at the will of the immense wealth of large corporations).

⁶ Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b (2012).

⁷ *Citizens United*, 558 U.S. at 365 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

⁸ See, e.g., Brief for Senator Mitch McConnell as Amicus Curiae Supporting Petitioners at 1-5, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (No. 11-1179), 2012 WL 1513830 (urging the Court to refuse to overrule its decision in *Citizens United*, which was "rooted in long-established First Amendment principles," and emphasizing that the "doomsday scenario[s]" posed by critics of the opinion had not materialized); see also Laura W. Murphy, "Fixing" *Citizens United Will Break the Constitution*, AM. CIV. LIBERTIES UNION (June 28, 2012, 7:21 PM), <https://www.aclu.org/blog/fixing-citizens-united-will-break-constitution> [http://perma.cc/2584-QQ8L] (arguing that a constitutional amendment to undo the effects of *Citizens United* would "break" the

reform advocates and liberal critics, including the President of the United States.⁹ Only limited attention, however, has been paid to *Citizens United*'s implications for corporate law.¹⁰ By declaring that corporations have First Amendment political participation rights comparable to those of other citizens and ascribing "personhood" to corporations, the Court has disturbed long-held assumptions that narrowly restrict the scope of corporate conduct to the maximization of shareholder profits. The *Citizens United* decision may have thereby provided encouragement to communitarians who, given the belief that rights imply responsibilities, will urge that there now remains little excuse for corporations to deny accountability to any constituencies other than their shareholders. Unfortunately, it may have also given license to corporate officers who view the corporate fisc as a means of financing their own political beliefs and aspirations, regardless of its effect on other corporate constituencies.¹¹ And it eroded, in the name of civil liberties, a statute that was carefully constructed to bring balance to political discourse.

Constitution by paving the way for more radical restrictions on speech, such as amendments banning the burning of the American flag during political protests).

⁹ See President Barack Obama, 2010 State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> [<http://perma.cc/PS45-JY84>] ("I don't think American elections should be bankrolled by America's most powerful interests They should be decided by the American people.").

¹⁰ But see Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013) (claiming an ongoing "silent" discussion regarding corporate theory in political finance cases such as *Citizens United*); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 520-21 (2010) ("Applying a corporate law perspective to the *Citizens United* debate, five points for discussion emerge: (1) the economic motivation of corporate speech, (2) the lack of a single corporate voice, (3) the threat of compelled speech, (4) the prevalence of existing regulation of corporate speech, and (5) the applicability of the equalization rationale to corporate speech."); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1247 (2011) [hereinafter Yosifon, *The Public Choice Problem*] ("Corporate law's task . . . , after *Citizens United*, can no longer rely exclusively on external regulatory institutions to safeguard their interests, but must instead look to the corporation—an association in which, our best corporate theory informs us, they are already essential participants.").

¹¹ See John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL L. STUD. 657 (2012). Coates found that corporate political activity increased significantly after *Citizens United*, particularly in firms acting in industries that are not heavily regulated or dependent upon the government for business. Corporate political activity was also higher among firms with managers who obtained political employment or appointments upon leaving the firm, which amounted to 11% of the 298 CEOs who left corporate office during the periods analyzed in the study. Coates's data suggests that this increase does not bode well for shareholders. Increased corporate political activity is negatively associated with measures of shareholder value. *Id.* at 682. Moreover, politically active corporations are statistically more likely to engage in behavior that is harmful to shareholders, such as permitting CEOs to use the corporate jet for personal travel. *Id.* at 678.

Four years after the *Citizens United* decision, the Supreme Court issued its opinion in *Burwell v. Hobby Lobby Stores, Inc.*¹² In *Hobby Lobby* and its companion cases, three privately held corporations were allowed to invoke the Religious Freedom Restoration Act (RFRA)¹³ to prevail on a religious objection to a regulation promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA).¹⁴ *Hobby Lobby* has also been subject to intense criticism (and defense),¹⁵ in no small part because of its implications for the controversial ACA and the equally controversial abortion issue. To date, however, the Court's statements in that case about the nature of corporations have been largely overlooked. While the full implications of *Hobby Lobby* are by no means clear (its holding would appear to be limited to closely held corporations and to claims under RFRA, not the First Amendment), at the very least *Hobby Lobby* stands for the principle that a closely held corporation may be the conduit for an owner's personal religious beliefs and practices. The case would appear to attach additional rights and human qualities to corporations without due consideration for traditional corporate law. From a communitarian perspective—which seeks to balance rights with responsibilities—*Hobby Lobby* raises the specter of corporate owners being allowed to obtain the protections afforded to the corporate form (such as limited liability), while also being permitted to assert what previously had been considered an individual right. In other words, it provides for new rights without commensurate responsibilities, and it regards the rights

¹² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹³ Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

¹⁴ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

¹⁵ A roundtable organized by Vanderbilt University Law School produced excellent commentary both in support of and in opposition to the *Hobby Lobby* decision. See, e.g., Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 41 (2014) (arguing federal law requires a religious exemption for corporations such as Hobby Lobby whose owners' religious beliefs are not limited to "what happens in [their] mind[s], home[s], or house[s] of worship" but rather are deeply intertwined in their public lives); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014) (asserting that a religious exemption for Hobby Lobby allows the corporation to force its employees, specifically its female employees, to "foot the bill for [its] religious beliefs"); Gregory P. Magarian, *Hobby Lobby in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67 (2014) (prophesizing that once granted the ability to bring viable religious exemption claims, all corporate entities—regardless of their size or power—could use religion as a rationalization for ignoring legal duties).

of corporate owners as synonymous with those of the corporation without regard to employees and other corporate constituencies.

In this article, we analyze the Roberts Court's personification of the business corporation and the effects of *Citizens United* and *Hobby Lobby* on corporate powers, rights, and responsibilities. The article examines whether the Court's analysis is consistent with generally accepted principles of corporate law and whether these cases advance or hinder communitarian principles. Finally, we consider whether these cases' expansion of corporate rights should bring with it a commensurate expansion of corporate responsibilities and whether state legislatures should take measures (such as mandatory constituency statutes and enhanced disclosure rules) in support of these responsibilities.

Why the connection between corporate law, First Amendment/RFRA cases, and communitarianism? Communitarians value "intermediate communities," like civic associations and charitable organizations, that create social capital; consistent with this view, corporations and unions may be seen as vehicles through which individuals band together to promote common purposes. At the same time, there are legitimate concerns, often articulated by communitarians, regarding the assertion of rights (by either individuals or entities) that challenge carefully tailored measures to promote the common good. Cases such as *Citizens United* and *Hobby Lobby*, while thwarting communitarian objectives such as the regulation of political contributions or the provision of affordable health care, may have the effect of expanding the realm of permissible corporate activity—thereby enhancing the ability of individuals to promote common objectives. But the expansion of corporate "rights" is of additional concern to communitarians if those rights come into existence without concomitant responsibilities.

We begin, in Part I, by briefly describing the evolution of corporate "personhood." We then examine the Roberts Court's expansion of corporate personification, focusing on *Citizens United* and *Hobby Lobby*.¹⁶ Part II provides an in-depth corporate law analysis of the *Citizens United* and *Hobby Lobby* majority opinions. In particular, we consider whether these cases conflict with long-held assumptions that narrowly restrict the scope of corporate conduct to the maximization of shareholder profits. In Part III we describe the philosophy of communitarianism and discuss how it might apply to corporations' activities. We then

¹⁶ Our chief area of inquiry will be for-profit corporations, although some of our analysis will also apply to not-for-profit corporations and trade unions.

consider the implications of *Citizens United* and *Hobby Lobby* for communitarianism. We conclude, in Part IV, by suggesting modest reforms at the state level that are consistent with communitarian principles that promote notions of corporate responsibility commensurate with corporations' newfound rights.

I. THE EVOLUTION OF CORPORATE PERSONIFICATION

A. *The Pre-Roberts Court's Conception of Corporate Personification*

Corporate law scholars quickly recognized that the Roberts Court's *Citizens United* decision marked a significant development in the Supreme Court's evolving jurisprudence on corporate personhood.¹⁷ That the Roberts Court was taking a fresh look at corporate personhood was confirmed by the Court's decision four years later in *Hobby Lobby*, which reflects an even more expansive view of this concept. Before examining *Citizens United* and *Hobby Lobby*, it is useful to review briefly the evolution of corporate personhood in the United States¹⁸ from the nineteenth century until the early twenty-first century.

¹⁷ See, e.g., Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 785-86 (2013) (summarizing the "historical evolution of the corporate form" and noting that *Citizens United* "re-opened a debate that has occupied legal scholars for at least two centuries about the meaning of 'personhood' status under the law"); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1629-30 (2011) (focusing on "corporations as rights holders—the doctrine of corporate personhood," and arguing "that corporate personhood should be understood as merely recognizing the corporation's ability to hold rights in order to protect the people involved"); Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 999-1000 (2010) (describing *Citizens United* as "interesting as another step in the evolution of our legal views of the corporation").

¹⁸ An in-depth review of the historical origins of the corporate form is beyond the scope of this article and has been amply explored by other corporate scholars. For example, Blair provides an exceptionally clear and succinct history of the early evolution of the corporate form, beginning with royal and papal charters granted to institutions like churches and universities in Europe in the Middle Ages, to charters issued to trading companies in England and on the Continent in the seventeenth century, to the proliferation of private business corporations in the United States in the late nineteenth century. Blair, *supra* note 17, at 789-95; see also Charles R.T. O'Kelley, *The Evolution of the Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001, 1008-22 (2013) (analyzing the corporate form's evolution in America prior to the Great Depression and noting that in the pre-World War I period, America eclipsed Great Britain as a world economic power because "America had developed a uniquely efficient new business form—the modern corporation").

1. Nineteenth-Century Concepts of Corporate Personhood

Professor Reuven S. Avi-Yonah has summarized the historical development of the modern business corporation as undergoing “four major transformations.” First, in the fourteenth century, commentators began recognizing the corporation as a separate legal person from its owners. The second transformation occurred in the late eighteenth and early nineteenth centuries, when corporations in the United States and England changed from not-for-profit membership corporations to for-profit businesses. Third came the late nineteenth and early twentieth-century rise of the publicly traded corporation. The final major transformation began after World War II when corporations evolved from conducting business in one country to becoming multinational enterprises.¹⁹

Professor Avi-Yonah’s second and third transformations are most relevant to the focus of this article because it is during those periods that the modern conception of “corporate personhood” evolved. Two Supreme Court decisions were especially instrumental in shaping the modern conception of corporate personhood. In 1819, in *Dartmouth College v. Woodward*,²⁰ Chief Justice John Marshall created the template for the modern conception of the corporation²¹ with his widely cited proclamation that “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”²² For purposes of our analysis, it is also worthwhile to quote in full what immediately followed:

Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.²³

¹⁹ Avi-Yonah, *supra* note 17, at 1000-01.

²⁰ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).

²¹ As a matter of analytical precision, it should be noted that *Dartmouth College* did not involve a business corporation, but “commentators have noted its primary significance is with regard to business corporations.” See Pollman, *supra* note 17, at 1635 n.34 (collecting authorities).

²² *Dartmouth Coll.*, 17 U.S. (4 Wheat) at 636.

²³ *Id.*

These sentences have inspired scholarly debate and academic theorizing²⁴ for almost two centuries, but as the controversy surrounding *Citizens United* and *Hobby Lobby* demonstrates, U.S. law has yet to resolve the vexing question of corporate personhood.²⁵

While a single coherent and universally accepted theory of corporate personhood remains an elusive goal even today, the *Dartmouth College* case nonetheless was a landmark decision. Despite the fact that the U.S. Constitution makes no mention of corporations,²⁶ Chief Justice Marshall's opinion established that even though private corporations are artificial entities existing only by operation of law, they nonetheless are entitled to the protections of the Contract Clause.²⁷ *Dartmouth College* thus laid the foundation for explosive growth of the corporate form in the United States by (1) recognizing the legitimacy of a private corporation as a separate legal entity in the eyes of the law and (2) establishing that the contracts entered into by such

²⁴ Professor Avi-Yonah, for example, asserts that throughout the past two centuries of transformational change in the legal conception of the corporate form, "the same three theories of the corporation can be discerned"—the aggregate theory, the artificial entity theory, and the real entity theory. Avi-Yonah, *supra* note 17, at 1001; see also Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1466-69 (2006) [hereinafter Harris, *Transplantation*] (asserting that Chief Justice Marshall's description of corporations in the *Dartmouth College* case was the clearest articulation of the "grant theory" of corporate personality that dominated mid-nineteenth-century American law before the proliferation of general incorporation statutes in many states from 1840 to 1870 eroded the grant theory and eventually led to the "contract theory" of corporate personality). Professor Harris has astutely observed that the contract theory of corporate personality "could not be squared with the limited liability attribute of business corporations" because when corporations are equated with their shareholders, there is no justification for limiting corporate creditors' access to the assets of the corporation's individual shareholders. Harris, *Transplantation*, *supra*, at 1470. The modern conception of the contract theory of corporate law is discussed in Part III, *infra*.

²⁵ See, e.g., Robert E. Mutch, *Before and After Belotti: The Corporate Political Contributions Cases*, 5 ELECTION L.J. 293, 294 (2006) ("Legal opinion is deeply divided over what political rights corporations should have, and it is possible that we cannot reach consensus on this issue. . . . [T]he debate does matter for [a] practical reason: Corporation treasuries are where the money is, so parties and other political organizations pay very close attention to the wording and interpretation of statutes to know how much of what kind of money can go where and by what routes. As is often the case with disputes that are not supposed to be about the money, it's about the money.").

²⁶ See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577, 579 & n.8 (1990) (noting that "[t]he Constitution does not mention corporations" and observing that "[t]he Framers certainly were aware of corporations" even though "[i]n that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies").

²⁷ *Dartmouth Coll.*, 17 U.S. (4 Wheat) at 650 ("The opinion of the Court, after mature deliberation, is, that this [Charter of Dartmouth College] is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States.").

corporations were entitled to the same constitutional protections as contracts entered into by natural persons.²⁸

The second seminal case that defined the concept of corporate personhood in modern American law was *Santa Clara v. Southern Pacific Railroad Co.*, decided by the Supreme Court in 1886.²⁹ In *Santa Clara*, the Court for the first time accepted the argument that the Equal Protection Clause of the Fourteenth Amendment applied to business corporations.³⁰ As Professor Blair has noted, *Santa Clara* “was the first time the Court had ever ruled that corporations had constitutional rights as ‘persons,’” and it “[laid] the foundation for later recognition by the courts of a wide array of constitutional rights and protections for corporations, including First Amendment rights to freedom of speech.”³¹

The *Dartmouth College* and *Santa Clara* cases are the nineteenth-century constitutional cornerstones upon which the legal foundation of corporate personhood in modern American law rests. While numerous other cases contribute to that foundation,³²

²⁸ Cf. Pollman, *supra* note 17, at 1636 (citing *Dartmouth Coll.*, 17 U.S. (4 Wheat) at 518) (“The decision thus recognized the corporation itself as ‘an artificial being’ having constitutional rights to protect the property interests of its individual donors.”). The Court later declined, however, to bestow upon corporations the rights granted by the Constitution’s Privileges and Immunities Clause. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839); see also Pollman, *supra* note 17, at 1636-38 (observing that after the *Dartmouth College* and *Bank of Augusta* cases, “a corporation was not a ‘citizen’ within the meaning of the Article IV Privileges and Immunities Clause, but the corporate charter was protected by the Contracts Clause, the corporation was recognized as having properties of ‘individuality,’ and the corporation was conceived of as a ‘person, for certain purposes in contemplation of law’”).

²⁹ *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886). See generally Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (analyzing the impact of the *Santa Clara* decision).

³⁰ The case actually was decided on different grounds, but Chief Justice Waite’s pre-argument statement has been treated as dispositive of the Equal Protection Clause issue.

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

S. Pac. R.R. Co., 118 U.S. at 396. For an in-depth analysis of the odd procedural context and subsequent interpretation of the *Santa Clara* case, see Pollman, *supra* note 17, at 1642-46. See also Blair, *supra* note 17, at 803-05.

³¹ Blair, *supra* note 17, at 803; see also Horwitz, *supra* note 29, at 173 (“In our own time, in *First National Bank v. Bellotti*, a five-to-four majority of the Supreme Court treated the *Santa Clara* case as if it in effect had already decided that corporations, like individuals, were entitled to the protection of the first amendment.” (footnote omitted)); Mayer, *supra* note 26, at 581 (“The personification of the corporation occurred in 1886 [when *Santa Clara* was decided]; the popular literature marks this as the year that the corporation ‘stole’ the fourteenth amendment.”).

³² A notable example is the Supreme Court’s holding, less than a decade after *Santa Clara* gave corporations Fourteenth Amendment due process protection, that corporations can invoke the Fifth Amendment’s Due Process Clause in disputes with the

the Supreme Court's pronouncements on the constitutional rights of corporations in the contexts of the First and Fifth Amendments merit a brief analysis here.

2. Corporate Personhood and the Fifth Amendment Privilege Against Self-Incrimination

The Supreme Court first considered the application of the Fourth and Fifth³³ Amendments to business records in the “now-discredited”³⁴ case of *Boyd v. United States*.³⁵ Decided the same year as *Santa Clara*, *Boyd* espoused an extremely broad concept of the application of Fourth and Fifth Amendment protections to business records. *Boyd* held that compulsory production of “private books and papers” compels the owner to be a witness against himself within the meaning of the Fifth Amendment and is equivalent to an unreasonable search and seizure under the Fourth Amendment.³⁶ This holding, while perhaps in keeping with the spirit of the Court's opinion in *Santa Clara* giving corporations Fourteenth Amendment equal protection rights without analysis or precedential support, proved too broad to stand.³⁷

federal government. See *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1893) (allowing a railroad corporation to invoke the Fifth Amendment Due Process Clause in a dispute with the Department of the Interior over a railroad right-of-way). As Professor Mayer has pointed out, however, *Noble* involved a dispute over traditional property rights, not an intangible Bill of Rights protection. See Mayer, *supra* note 26, at 591.

³³ As one of the authors of this paper has previously discussed, the Fifth Amendment privilege against self-incrimination had little practical effect for most of the nineteenth century because under the nineteenth-century common law “party witness” rule of evidence, a criminal defendant was not permitted to testify at his own trial, even if he wished to do so. See Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 131-39 (2002) [hereinafter Cole, *New Protection*]; see also Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 891 n.153 (1995) (“Defendants were not allowed to testify under oath at trial in America until the midnineteenth century.”).

³⁴ *In re Three Grand Jury Subpoena Duces Tecum Dated Jan. 29, 1999*, 191 F.3d 173, 177 (2d Cir. 1999) (summarizing the development of the “collective entity” doctrine).

³⁵ *Boyd v. United States*, 116 U.S. 616 (1886).

³⁶ *Id.* at 634-35. The Court did not focus on the fact that the document at issue, an invoice for 29 cases of plate glass, was a business record, instead characterizing the record as “private” in nature. *Id.* at 619, 634-35.

³⁷ See generally Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 13-21 (2005) [hereinafter Cole, *Reexamining the Collective Entity Doctrine*] (describing the breadth of the *Boyd* holding and the Court's subsequent retreat from that broad holding). See also Peter J. Henning, *Finding What Was Lost: Sorting Out the Custodian's Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 NEB. L. REV. 34, 45 (1998) (“Taken at face value, *Boyd's* broad interpretation of the constitutional privacy right

In 1906, the Court decided *Hale v. Henkel*³⁸ and concluded that natural persons and corporations should be treated differently under the Self-Incrimination Clause of the Fifth Amendment; because a corporation is “a creature of the State,” it cannot assert the Fifth Amendment privilege against self-incrimination.³⁹ At the same time, the Court preserved the portion of *Boyd* that permitted corporations to assert a Fourth Amendment right to be free from unreasonable searches and seizures.⁴⁰ Under this so-called collective entity doctrine, a corporation has no Fifth Amendment privilege against self-incrimination. Because it is not a “natural person” entitled to those protections, and the constitutional rights of individual corporate shareholders are subordinated to the government’s interest in effective and efficient law enforcement investigations, shareholders waive their Fifth Amendment rights when they choose to incorporate. This result is difficult to reconcile with either the language of the Fourth⁴¹ or Fifth Amendments⁴² or the view of corporate personhood reflected in *Santa Clara* and its progeny. Although *Hale*’s distinction between corporate rights under the Fourth and Fifth Amendments is difficult to explain,⁴³

would make it virtually impossible to force any person to surrender records in a government investigation.”).

³⁸ *Hale v. Henkel*, 201 U.S. 43 (1906).

³⁹ *Id.* at 74.

⁴⁰ *Id.* at 76.

⁴¹ The Fourth Amendment decision in *Hale* is, in the context of the times in which the case was decided, particularly difficult to understand. As Professor Mayer has astutely recognized,

For corporations to assert fourth amendment rights against warrantless regulatory inspections requires according corporate persons the very intangible right of privacy. In return, this requires a double constitutional leap. First, the Court must decide that corporations are persons. Second, the Court must decide that a privacy right of a corporate person has been violated. Even assuming that the Court employs the natural entity theory to hold that corporations are persons, the second prong of this analysis presents difficulties; how a corporation enjoys a privacy interest in its premises remains unclear.

Mayer, *supra* note 26, at 644.

⁴² See *Hale*, 201 U.S. at 84-85 (Brewer, J., dissenting) (comparing the language of the Fourth and Fifth Amendments and finding no reason to construe the term “people” in the Fourth Amendment as broader in coverage than the term “person” in the Fifth Amendment, particularly when the word “person” as used in the Fourteenth Amendment had been construed to include corporations).

⁴³ Professor Mayer has commented upon the “two-faced” inconsistency of the *Hale* holding:

The reasons for *Hale*’s two-faced view of the corporation remain mysterious. The opinion may have reflected the growing debate in the legal literature over corporate personality. It may be that although the Court viewed the fourth amendment protection of papers to be akin to the protection of

the Court has never reexamined the Fifth Amendment holding; to the contrary, the Court has steadfastly clung to the distinction even as it jettisoned one rationale after another for doing so.

Five years after *Hale*, the collective entity doctrine was expanded in *Wilson v. United States*,⁴⁴ which held that a corporate officer could not refuse to produce to a grand jury corporate documents under that officer's control, even if the target of the grand jury investigation was the officer and not the corporation.⁴⁵ *Wilson* reaffirmed *Hale's* holding that a corporation cannot assert a Fifth Amendment privilege against self-incrimination⁴⁶ and added that allowing a corporate officer to assert an individual privilege against self-incrimination to avoid producing corporate records and documents would be "an unjustifiable extension" of individual rights.⁴⁷ This holding, like the subsequent collective entity doctrine cases summarized below, stands in stark contrast to the *Citizens United* and *Hobby Lobby* conception of corporate personhood.

Two final steps in the Supreme Court's Fifth Amendment collective entity jurisprudence must be briefly examined in order to fully explore the inherent conflict between this constitutional law doctrine and the new approach to corporate personhood the Court took in *Citizens United* and *Hobby Lobby*. In *Bellis v. United States*,⁴⁸ the collective entity doctrine was expanded well beyond its original concept of the corporation as a creature of the state retaining visitatorial powers.⁴⁹ *Bellis* held that a former partner in a dissolved three-person law partnership could not assert the Fifth Amendment privilege against self-incrimination for partnership documents in his possession in a criminal tax

property, the very personal, intangible privilege against self-incrimination is more difficult to grant a corporate entity.

Mayer, *supra* note 26, at 622.

⁴⁴ *Wilson v. United States*, 221 U.S. 361 (1911).

⁴⁵ *Id.* at 384-85.

⁴⁶ *Id.* at 383-84.

⁴⁷ *Id.* at 385.

⁴⁸ *Bellis v. United States*, 417 U.S. 85 (1974). For further analysis of *Bellis* and the partnership law aspects of the case, see Cole, *Reexamining the Collective Entity Doctrine*, *supra* note 37, at 35, 40 nn.117-18, 140 (noting that Justice Douglas's dissent stressed that the criminal investigation was focused on *Bellis* personally and not the dissolved law partnership, and that while the Pennsylvania law partnership had dissolved almost four years earlier, it was still in the process of "winding up" and therefore had not been terminated under Pennsylvania law).

⁴⁹ Because a corporation is created by state law, and in early times by a special act of a state legislature, the state retained a "visitatorial" power to intervene in and obtain information about the corporation's activities and internal affairs. See *infra* note 288 and accompanying text.

investigation in which he was the target.⁵⁰ Justice Marshall's majority opinion reasoned that a partnership is not a natural person,⁵¹ and a partner in a partnership has no expectation of personal privacy in the records of the partnership.⁵² "Justice Marshall's opinion . . . [also] mark[ed] the first time, post-*Boyd*, that the Court [had] relied explicitly upon personal privacy or confidentiality as a policy interest protected by [the Self-Incrimination Clause]."⁵³ The *Bellis* Court's refusal to permit the owners of a business entity, particularly an "aggregate" entity⁵⁴ like the Pennsylvania general partnership in that case, to exercise any of their individual rights through the business entity should have brought pause to the Roberts Court as it approached the *Citizens United* and *Hobby Lobby* cases.

In a case that is the final step in our summary analysis of pre-*Citizens United* Fifth Amendment self-incrimination cases, *Braswell v. United States*,⁵⁵ the Court stretched the collective entity doctrine to its logical limit—and arguably beyond that limit.⁵⁶ Braswell was the owner and sole shareholder of two corporations that received federal grand jury subpoenas for the corporations' books and records.⁵⁷ Braswell opposed the subpoenas by arguing that his compelled production of the subpoenaed corporate records would incriminate him individually.⁵⁸ Chief

⁵⁰ *Bellis*, 417 U.S. at 90-91.

⁵¹ At the time *Bellis* was decided (and at the time of this writing), under Pennsylvania law, a general partnership is not treated as a separate entity but rather as an "aggregate" consisting of its individual partners. See generally Pennsylvania Uniform Partnership Act, 15 PA. CONS. STAT. §§ 8301-8365 (2015). Under the Revised Uniform Partnership Act (RUPA), now adopted in a majority of states but at the time of this writing not adopted in Pennsylvania, a general partnership is a legal entity separate from its individual partners, much as a corporation is a legal entity separate from its shareholders. *Partnership Act (1997) (Last Amended 2013)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Partnership%20Act%20\(1997\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Partnership%20Act%20(1997)%20(Last%20Amended%202013)) [<http://perma.cc/CA9V-NLGZ>] (last visited June 7, 2016). For an explanation of the differences between the UPA and RUPA, including aggregate theory versus entity theory, see *id.*

⁵² *Bellis*, 417 U.S. at 89-91.

⁵³ See Cole, *Reexamining the Collective Entity Doctrine*, *supra* note 37, at 36 (noting that the *Bellis* majority opinion even cites the Court's most controversial privacy opinion, *Griswold v. Connecticut*, as supporting recognition of a privacy rationale for application of the Fifth Amendment privilege against self-incrimination).

⁵⁴ See *supra* note 51 and accompanying text.

⁵⁵ *Braswell v. United States*, 487 U.S. 99 (1988).

⁵⁶ See Cole, *Reexamining the Collective Entity Doctrine*, *supra* note 37, at 41-45 (criticizing the 5-4 majority opinion in *Braswell* as the ultimate expansion of the collective entity doctrine and a missed opportunity to rationalize Fifth Amendment self-incrimination law).

⁵⁷ See *Braswell*, 487 U.S. at 100-01.

⁵⁸ *Id.* at 102-03. In *Fisher v. United States*, 425 U.S. 391 (1976), the Supreme Court adopted a new, more "textualist" interpretation of the Fifth Amendment and focused on whether a communication was testimonial and compelled, as opposed to focusing on

Justice Rehnquist's majority opinion embraced the collective entity doctrine, notwithstanding that Braswell was the sole shareholder of the corporations, and relied primarily on a policy argument that any retreat from the doctrine "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities."⁵⁹ Most notably, for purposes of our analysis, the opinion also acknowledged that had Braswell chosen to conduct his business as a sole proprietorship, rather than incorporating, the collective entity doctrine would not have applied and Braswell would have been able to assert the privilege against self-incrimination in response to the subpoenas for his business records.⁶⁰ Thus, the Court acknowledged that, as a practical matter, Braswell had effectively waived his Fifth Amendment privilege against self-incrimination with respect to all his business records when he incorporated his businesses, whether or not he had any intent—or even knew that the effect of incorporating would be—to do so.⁶¹

The holding in *Braswell*, and particularly the *Braswell* Court's acknowledgement that, under the collective entity doctrine, incorporation can deprive the incorporator(s) of their

whether the contents of a communication were incriminating. See generally Cole, *New Protection*, *supra* note 33, at 142-47 (analyzing the impact of the *Fisher* holding). Under *Fisher*'s new approach to Fifth Amendment privilege against self-incrimination analysis, voluntarily created private papers were subject to Fifth Amendment protection only if the "act of production" of such papers (or other records of voluntarily produced communications) had a sufficient communicative aspect to make it "testimonial" and therefore protected by the privilege. See *id.* at 146-47. After *Fisher*, Braswell's claim of individual self-incrimination based upon the preexisting corporate records would have to satisfy the "act of production" doctrine discussed in note 61, *infra*, and subsequently developed in the *Hubbell* case. See *United States v. Hubbell*, 530 U.S. 27 (2000).

⁵⁹ *Braswell*, 487 U.S. at 115.

⁶⁰ As noted above, because the *Fisher* rule concerning preexisting documents would preclude any self-incrimination claim based upon the contents of the corporate records, Braswell would have been required to satisfy the act of production doctrine by showing that his individual action in producing the corporate records would have some testimonial aspect that would have incriminated him. *Id.* at 104. See generally Cole, *New Protection*, *supra* note 33 (analyzing the act of production doctrine).

⁶¹ See Cole, *Reexamining the Collective Entity Doctrine*, *supra* note 37, at 42-43 (criticizing this "implied waiver" aspect of *Braswell*). Compare Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 647 (2011) (discussing the "doctrine of unconstitutional conditions" and asserting that a state could not condition a corporation's limited liability grant on the company's willingness to waive protection against searches and seizures or its free speech rights). Professor Epstein also observes that "[i]t seems beyond reason to say that the choice of a business form—association versus corporation—that is made for liability or tax reasons should have a significant effect on the wholly unrelated issue of political participation." *Id.* at 647-48. The *Braswell* majority obviously did not have the same concern when it deprived Mr. Braswell of his privilege against self-incrimination solely because he chose to adopt the corporate form, presumably for liability or tax reasons, in operating his business.

constitutional rights under the Self-Incrimination Clause of the Fifth Amendment, stands in stark contrast⁶² to the view of corporate personhood that the Court accepted 20-plus years later in *Citizens United* and *Hobby Lobby*. Under those cases, corporations are entitled to the same First Amendment and statutory political and religious expression rights as natural persons. But because the Court equates the controlling shareholders' political and religious preferences with those of the corporation, minority shareholders and employees who oppose the political activities or religious policies that corporate managers pursue are left with no effective recourse;⁶³ by buying stock in the corporation or accepting employment, they effectively waive their own First Amendment rights.⁶⁴ The collective entity doctrine and the *Citizens United/Hobby Lobby* line of cases may share a common disregard for the interests of employees and minority shareholders.⁶⁵ But in

⁶² As Professor Mayer has observed, "Since *Hale*, the privilege against self-incrimination remains the only Bill of Rights safeguard unavailable to corporations; its reasoning survives as a relic of a bygone era of corporate theory. Paradoxically, in modern times, corporations receive other fifth amendment protections: due process liberty rights and double jeopardy safeguards." Mayer, *supra* note 26, at 624 (footnote omitted).

⁶³ See Part II, *infra*, criticizing the corporate governance assumptions underlying *Citizens United*.

⁶⁴ The contention that shareholders and employees may "vote" by selling their stock or quitting their jobs is effectively refuted by Justice Stevens's dissent in *Citizens United* and the majority opinion in *Harris v. Quinn*, 134 S. Ct. 2618 (2014). Justice Stevens noted that "[i]f and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred." *Citizens United v. FEC*, 558 U.S. 310, 477 (Stevens, J., dissenting). Likewise, in *Harris*, the Court held the First Amendment prohibits collection of union dues from personal assistants in state-funded programs who choose not to join or support the union. The Court sympathized with the burdens faced by objecting nonmembers, noting that even if an employee suspected that the union had used funds improperly, "[t]he onus is on the employee to come up with the resources to mount the legal challenge in a timely fashion," and litigating such cases is expensive." *Harris*, 134 S. Ct. at 2633 (citation omitted) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2294 (2012)); see also Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 370 (2015) (discussing the difference between stock ownership and even the remotest control over corporate decisionmaking).

⁶⁵ Cf. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1024-25 (2013) ("When the Supreme Court held in *Citizens United v. FEC* that corporations have a First Amendment right to make unlimited, independent campaign expenditures, it dismissed in a few sentences the idea that the corporate leadership's use of corporate resources on politics might infringe the rights of dissenting shareholders. . . . Collectively, these recent cases have given organizations a newly robust First Amendment right to use the entity's resources and money in ways that stakeholders within the organization may find anathema and to discriminate against employees and members in order to advance the expressive interests of the entity."); see also Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 238 (1981) ("A government concerned with

one instance—the collective entity cases—corporations are denied Bill of Rights protections, while in the other instance—*Citizens United* and *Hobby Lobby*—corporations’ political participation and religious expression rights are in important respects elevated to parity with those of natural persons.

Before analyzing this fundamental inconsistency further, it is necessary to review briefly the First Amendment treatment of corporations’ political participation rights prior to *Citizens United*.

3. Corporate Personhood and the First Amendment Prior to *Citizens United*

Although most commentators⁶⁶ begin analysis of the First Amendment political participation rights of corporations with the Supreme Court’s landmark 1978 case, *First National Bank of Boston v. Bellotti*,⁶⁷ the Court had extended First Amendment protections to some corporations and other entities prior to *Bellotti*.⁶⁸ For example, in *Grosjean v. American Press Co.*,⁶⁹

protecting First Amendment values could reasonably believe it important to free those citizens [stockholders who disagree with management’s political expenditures using corporate funds] from bondage to management’s political views, even if the bonds are seen as no more than restrictions on their investment opportunities.”). The issue of stockholder disagreement with corporate management’s expenditures of corporate funds for political purposes is discussed in Part II, *infra*.

⁶⁶ See, e.g., Yosifon, *The Public Choice Problem*, *supra* note 10, at 1214 (“The modern jurisprudence on corporate political speech begins in *First National Bank of Boston v. Bellotti* . . .”); Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL’Y 311, 314-15 (2010) (“It was during Justice Lewis F. Powell Jr.’s years at the Court that the entire foundation for First Amendment protection of corporate political media spending was developed. . . . He authored *First National Bank of Boston v. Bellotti*, the 1978 landmark opinion that was the first case to provide constitutional protection to corporate political media spending, as well as three other majority opinions while participating in the series of formative related cases decided over the course of the following decade.” (footnotes omitted)); see also Pollman, *supra* note 17, at 1656-58 (“Broadly speaking, both commercial and political speech protections date back to the 1970s for corporations.”).

⁶⁷ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978). *Bellotti*, of course, built upon the analytical framework established by *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Court first ruled on the constitutionality of the 1974 amendments to the Federal Election Campaign Act of 1971. Federal Election Campaign Act of 1971, 2 U.S.C. § 431 (1972).

⁶⁸ See Mayer, *supra* note 26, at 627 (“Although corporations first received first amendment safeguards in 1978, by that time the Court had considered the first amendment protections of unincorporated associations, newspaper corporations, labor unions, and other organizations.” (footnote omitted)). For a summary of pre-*Bellotti* corporate First Amendment cases in both the federal and state courts, see Mutch, *supra* note 25, at 315 (observing that the legal challenges to restrictions of corporate political activities in *Bellotti* were “qualitatively different from previous ones” because the corporations in *Bellotti* “claimed First Amendment rights of political speech not as a defense against prosecution, but by suing the state to prevent prosecution”).

decided in 1936, American Press Company and eight other newspaper publishers challenged a Louisiana state license tax imposed on newspapers and other publications with circulation of 20,000 or more copies a week.⁷⁰ The publishers relied upon the Equal Protection and Due Process Clauses of the Fourteenth Amendment to assert a First Amendment freedom of press claim, which the Court viewed as “present[ing] a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests.”⁷¹ The *Grosjean* Court first confirmed that a corporation is a “person” within the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and it then went on to hold the Louisiana tax “unconstitutional under the due process of law clause because it abridges the freedom of the press.”⁷² By 1964, when the Court decided *New York Times v. Sullivan*⁷³ (providing a zone of protection to corporate publishers in defamation cases), the application of First Amendment rights to corporate speakers was so well-established that it required no explanation.

Despite these and other corporate First Amendment precedents,⁷⁴ it was the 1970s Federal Election Campaign Act cases, particularly *Buckley v. Valeo*⁷⁵ and *Bellotti*, that defined the First Amendment political participation rights of corporations⁷⁶ and laid the groundwork for the Court’s controversial ruling in *Citizens United*. *Buckley* “equated political spending with political speech and therefore established political spending as deserving a high level of First Amendment protection.”⁷⁷ *Bellotti* then applied

⁶⁹ *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

⁷⁰ *Id.* at 240.

⁷¹ *Id.* at 243. Use of the phrase “united for the common good” calls to mind the communitarian aspects of the corporate form. See *infra* text accompanying notes 412-18.

⁷² *Id.* at 244, 251.

⁷³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷⁴ Both *Grosjean*, 297 U.S. 233, and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), were among the relevant precedents cited by the majority opinion in *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978). See *Bellotti*, 435 U.S. at 779-80.

⁷⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷⁶ Professor Kerr has noted that “corporate speech” is not an accurate term to describe corporations’ political activities and suggests that “corporate political media spending” is the better descriptive term. Kerr, *supra* note 66, at 314 n.28.

⁷⁷ Jessica A. Levinson, *The Original Sin of Campaign Finance Law: Why Buckley v. Valeo Is Wrong*, 47 U. RICH. L. REV. 881, 891 (2013) (also stating that “[t]he Court’s 1976 decision in *Buckley v. Valeo*, in which it reviewed the constitutionality of the FECA, remains the bedrock of campaign finance law” (footnote omitted)); see also Kerr, *supra* note 66, at 317 (“*Buckley* did not address First Amendment questions regarding the use of corporate funds in election campaigns, but it made such challenges inevitable by establishing that ‘political spending and political speech are inextricably

this “spending is speech” rationale⁷⁸ to invalidate state law restrictions on corporate political contributions and expenditures.⁷⁹

As commentators have noted, the cases decided prior to *Bellotti* “have little precedential value for profit-making corporations,”⁸⁰ and “[i]t is a measure of the breadth of the *Bellotti* ruling that it could be used to uphold corporate political spending in cases that did not involve elections.”⁸¹ Why has *Bellotti* been so influential? The answer lies in the way Justice Powell applied *Buckley*’s First Amendment interpretation—treating political expenditures like political speech—to political spending by banks and corporations. If the late California politician Jesse M. Unruh was correct when he said, “Money is the mother’s milk of politics,”⁸² then it is not surprising that a judicial interpretation of the First Amendment that protects political spending by banks and corporations would prove both influential and enduring.

Justice Powell’s majority opinion in *Bellotti* began by declining to focus its analysis on what First Amendment rights corporations have or do not have, as the Massachusetts courts below had done, and instead focused on whether the Massachusetts law “abridges expression that the First Amendment was meant to protect.”⁸³ Justice Powell had little difficulty concluding both that, because of its importance to the people of Massachusetts, “[t]he speech proposed by the [banks and corporations] is at the heart of the First Amendment’s protections,”⁸⁴ and that the speech did not lose its First

interrelated and that the former cannot be restricted without adversely affecting the latter.” (quoting ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER 14-15 (1986)).

⁷⁸ See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1005 (1976) (“The [*Buckley*] Court told us, in effect, that money is speech.”).

⁷⁹ The criticism of *Citizens United* that it commodified constitutional rights by equating money with speech is therefore untimely. That train had left the station some time ago.

⁸⁰ Mayer, *supra* note 26, at 627.

⁸¹ Mutch, *supra* note 25, at 313.

⁸² Mark A. Uhlig, *Jesse Unruh, A California Political Power, Dies*, N.Y. TIMES (Aug. 6, 1987), <http://www.nytimes.com/1987/08/06/obituaries/jesse-unruh-a-california-political-power-dies.html> [<http://perma.cc/Z3NB-HK4W>]; see also Wright, *supra* note 78, at 1004 (“Money does facilitate communication of political preferences and prejudices. It is also clear that money influences the outcome of elections. Generally speaking, the more money spent [o]n behalf of a candidate, the better the candidate’s chances of winning. Indeed, a veteran of political campaigns has declared that money is the mother’s milk of politics.” (citing TIME, Jan. 5, 1968, at 44 (statement of Jesse Unruh, former Speaker of the California Assembly))).

⁸³ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

⁸⁴ *Id.*

Amendment protection because the speakers were banks and corporations rather than natural persons.⁸⁵

The *Bellotti* majority opinion, in addition to treating corporate expenditures as constitutionally protected speech, summarily dismissed⁸⁶ the now more obviously prescient concerns raised in the dissent by Justices White, Brennan, and Marshall that corporate political expenditures pose special risks in our democratic system of government:

The governmental interest in regulating corporate political communications, especially those relating to electoral matters, . . . raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.⁸⁷

For our purposes, it is the *Bellotti* majority opinion's response to these concerns that merits the most detailed analysis because analytical flaws that Justice Powell introduced in *Bellotti* were subsequently relied upon in *Citizens United* to dismiss the same concerns regarding the greater corporate role in electoral politics.⁸⁸ Justice Powell dismissed the *Bellotti* dissenters'

⁸⁵ See *id.* at 784.

⁸⁶ See *id.* at 793-95 & n.34 (dismissing dissenting opinion's concern that some shareholders may be coerced to support political positions with which they disagree because "no shareholder has been 'compelled' to contribute anything" and shareholders are free to sell their shares and withdraw their investment in a corporation at any time).

⁸⁷ *Id.* at 809. Justice Rehnquist also dissented in *Bellotti*, arguing that because corporations are artificial entities created by the states, the states can impose restrictions on corporate political expenditures. See *id.* at 823 (citing *Trs. of Dartmouth Coll. v. Woodward* 17 U.S. (4 Wheat) 518 (1819)). But see Epstein, *supra* note 61, at 653-61 (asserting that corporations are unlikely to make large political expenditures in general elections because of the risk of consumer backlash that could damage brands or harm corporate reputations).

⁸⁸ Similarly, because the focus of this paper is the "corporate personhood" issue presented by *Citizens United* and *Hobby Lobby*, and not campaign finance law generally, we are not describing here the evolution of the Court's entire campaign finance jurisprudence, whether involving political action committees (see, for example, *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), and *FEC v. Colorado Republican Federal Campaign Commission*, 533 U.S. 431 (2001)), or "independent expenditures" by noncandidates (see, for example, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *Austin v.*

concerns regarding corporate economic power and corporate shareholder rights based on three assumptions, each of which is fundamentally flawed. First, Justice Powell asserted that “[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”⁸⁹ This idealized confidence in the efficacy of “the procedures of corporate democracy” was not warranted in 1978 and, as subsequent legal developments and scholarly analysis demonstrate,⁹⁰ is certainly not warranted today.

Second, in response to concerns about shareholder disagreement with management’s use of corporate funds for political purposes, Justice Powell responded that a “shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.”⁹¹ As explained in Part II, *infra*, this is simply not true in the case of most corporations (those in which there is no public market for the company’s shares), and in the real world is an unacceptable alternative in almost all cases. Shareholders in a profitable corporation are unlikely to give up their investment because they disagree with a particular management action, such as a political expenditure, especially when the expenditure is almost certainly not material to the overall financial condition and business prospects of the company.⁹² Finally, as Delaware Chief Justice Leo E. Strine and Nicholas Walter have recently stated, the “practical realities of stock market ownership” (i.e., the intervention of brokers, mutual funds, pension plans, and the like) render the notion of shareholder control of corporate speech

Michigan Chamber of Commerce, 494 U.S. 652 (1990) (overruled by *Citizens United*)), or the constitutionality of the Bipartisan Campaign Reform Act of 2002 (the McCain-Feingold Act) (see, for example, *McConnell v. FEC*, 540 U.S. 93 (2003) (overruled by *Citizens United*), *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)). Nor do we attempt to analyze the various theoretical rationales, such as the anticorruption rationale (see, for example, Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) (“The government interest in the prevention of corruption, or at least the appearance thereof, is the singular basis for restriction of campaign finance spending, as all students of campaign finance law well know.”)), or the now-abandoned antidistortion rationale (see, for example, *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (referring to “Austin’s antidistortion rationale”)), that scholars and courts have utilized to categorize and explain the holdings in those cases. For an insightful analysis of the pre-*Citizens United* “doctrinal incoherence” in the Court’s campaign finance cases, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

⁸⁹ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 794 (1978).

⁹⁰ See *infra* notes 160-67 and accompanying text.

⁹¹ *Bellotti*, 435 U.S. at 794 & n.34.

⁹² Cf. Jay B. Kesten, *Towards a Moral Agency Theory of the Shareholder Bylaw Power*, 85 TEMP. L. REV. 485, 505 (2013) (observing that with respect to corporate political spending, “a dissenting shareholder cannot avoid the impact of these activities simply by exiting the firm”).

a myth.⁹³ Before further exploring these analytical flaws, however, it is useful to consider in some detail their eventual consequence—the Court’s *Citizens United* decision.

B. Citizens United and Corporate Personification

The U.S. Supreme Court’s January 21, 2010, decision in *Citizens United v. FEC*⁹⁴ ignited a firestorm of commentary and criticism. Some of this commentary was quite scholarly and incisive,⁹⁵ but some (including depictions in the popular press) was rather overblown and ill-informed.⁹⁶ So it is appropriate to at least briefly explain what the *Citizens United* opinions (including the concurring and dissenting opinions) did and did not say.

When the case arose, Citizens United was a nonprofit corporation that obtained most of its funds from individual donations, with a smaller portion of its funds coming from for-profit corporations.⁹⁷ In January 2008 (in the thick of presidential primary season), Citizens United released a film entitled *Hillary: The Movie*, which by any standard was a harsh critique of then-Senator Hillary Clinton, who was running for President. Citizens

⁹³ Strine & Walter, *supra* note 64, at 370; see also *infra* Parts II, III (discussing corporate law flaws in the Supreme Court’s *Citizens United* and *Hobby Lobby* decisions).

⁹⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010). For more thorough descriptions and analyses of the case, see Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935 (2011); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217 (2010); Jason S. Campbell, Note, *Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?*, 45 LOY. L.A. L. REV. 171 (2011); Joanna M. Meyer, Note, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171 (2012); Ellis, *supra* note 5; Osterlind, *supra* note 5; Imtanes, *supra* note 5; Garden, *supra* note 5; Padfield, *supra* note 10; Matthew J. Allman, Note, *Swift Boat Captains of Industry for Truth: Citizens United and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387 (2011); Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133 (2011); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863 (2011).

⁹⁵ E.g., Winter, *supra* note 94; Chemerinsky, *supra* note 94.

⁹⁶ See Keith Olbermann, *U.S. Government For Sale*, MSNBC NEWS (Jan. 21, 2010, 9:29 PM), http://www.nbcnews.com/id/34981476/ns/msnbc-countdown_with_keith_olbermann/t/olbermann-us-government-sale/#.VXsWGvVhXQ [<http://perma.cc/LRT8-VSTU>] (describing *Citizens United* as “a decision that might actually have more dire implications than ‘*Dred Scott v Sandford*’” and warning that after *Citizens United*, “any restrictions on how these corporate-beings spend their money on political advertising, are unconstitutional”). For overblown praise of *Citizens United* from conservative media outlets, see Ken Klukowski, *Founding Fathers Smiling After Supreme Court Campaign Finance Ruling*, FOX NEWS (Jan. 22, 2010), <http://www.foxnews.com/opinion/2010/01/22/ken-klukowski-supreme-court-amendment-mccain-feingold.html> [<http://perma.cc/JNH5-QPLD>] (“Rather than drown out the little guy, this option allows groups, be they Citizens United, the National Rifle Association, or the Family Research Council, to be a megaphone for the little guy, informing the voters of what’s at stake.”).

⁹⁷ *Citizens United*, 558 U.S. at 319.

United wished to increase viewership for *Hillary* by releasing it through video-on-demand, and to promote the film through 10-second and 30-second advertisements on broadcast and cable television. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), corporations and unions were prohibited from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocated for the election or defeat of a candidate;⁹⁸ an amendment prohibited any “electioneering communication” as well.⁹⁹ The BCRA (more commonly referred to as “McCain-Feingold,” after its two principal sponsors) defines an electioneering communication as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election.¹⁰⁰ While corporations and unions were barred from using general treasury funds for these express advocacy or electioneering communications, they were allowed to use a “separate segregated fund” (i.e., a PAC) for such purposes. Concerned that both the film *Hillary* and the ads promoting it fell within the BCRA’s prohibitions, Citizens United sought declaratory and injunctive relief, claiming that section 441b was unconstitutional as applied to *Hillary*.

A 5-4 majority of the Court rejected Citizens United’s as-applied claims¹⁰¹ but found the BCRA’s restrictions on corporate independent expenditures to be facially unconstitutional. Citing

⁹⁸ 2 U.S.C. § 441b (2000).

⁹⁹ *Id.* § 441b(b)(2) (2006).

¹⁰⁰ *Id.* § 434(f)(3)(A) (2012).

¹⁰¹ The procedural history of the case is unusual. After briefing and argument, and after draft opinions had been circulated, the Court, at its own initiative, scheduled the case for reargument and asked the parties to file supplemental briefs addressing whether the Court’s recent precedents on corporate contributions should be overruled. *Citizens United*, 558 U.S. at 322; see also Yosifon, *supra* note 10, at 1217 (“In June the Court shocked the legal world by requesting additional briefing and a new oral argument on whether the Court should address the broader question of the facial constitutional legitimacy of the statute.”); Jeffrey Toobin, *Money Unlimited*, NEW YORKER (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited?currentPage=all> [<http://perma.cc/J7T4-WUZZ>] (reporting that Chief Justice Roberts had the case reargued because Justice Souter had initially written a dissent accusing the Chief Justice of violating the Court’s internal procedures after Roberts withdrew his own initial majority opinion and assigned the case to Justice Kennedy, who had written a concurring opinion that would strike down the corporate contributions limits). *But see* Kang, *The End of Campaign Finance Law*, *supra* note 88, at 10 (suggesting that the decision to hold the case over for reargument and direct the parties to file supplemental briefs on the constitutionality of the statute’s prohibition of corporate independent expenditures was prompted by the government’s concession during the 2009 oral argument that the statute would permit the prohibition of corporate-sponsored books containing express campaign speech—“what might be understood as statutory support for book banning”).

precedent applying the First Amendment to corporations,¹⁰² Justice Kennedy, writing for the majority, stated, “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers,”¹⁰³ notwithstanding that corporations are not “natural persons.”¹⁰⁴

Stating that the only justification for restrictions on political speech was the potential for “quid pro quo” corruption (permitting a distinction between direct campaign contributions and independent expenditures),¹⁰⁵ the majority, overruling *Austin v. Michigan Chamber of Commerce*,¹⁰⁶ repudiated the Court’s previous finding of a compelling governmental interest in preventing “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.”¹⁰⁷

A concurring opinion by Chief Justice Roberts described the challenged BCRA provision as “a direct prohibition on political speech” and roundly criticized *Austin* as an “aberration.”¹⁰⁸ Justice Scalia’s concurring opinion took issue with the dissent’s characterization of corporations as enjoying something less than full First Amendment protection.¹⁰⁹

Justice Stevens’s dissent indeed devoted a fair amount of attention to the distinctions between corporate and human speakers, describing at length the history of corporate charters in America and the special status of corporations with respect to First Amendment activity. Said Justice Stevens,

Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard

¹⁰² Much of this precedent was in the form of actions for defamation or invasion of privacy against media corporations, such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), *Time, Inc., v. Firestone*, 424 U.S. 448 (1976), and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

¹⁰³ *Citizens United*, 558 U.S. at 341.

¹⁰⁴ *Id.* at 343.

¹⁰⁵ *Id.* at 345 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)).

¹⁰⁶ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (2010).

¹⁰⁷ *Citizens United*, 558 U.S. at 348 (quoting *Austin*, 494 U.S. at 660).

¹⁰⁸ *Id.* at 372, 379 (Roberts, C.J., concurring).

¹⁰⁹ *Id.* at 385-93 (Scalia, J., concurring).

against the potentially deleterious effects of corporate spending in local and national races.¹¹⁰

Justice Stevens was equally concerned about the majority's activism in jumping to a facial challenge to the BCRA provision, when an as-applied challenge may have been more suitable in light of *Citizens United*'s circumstances as an organization "funded overwhelmingly by individuals."¹¹¹ And, he pointed out, the majority all but neglected to consider that the BCRA allowed corporations and unions to make political expenditures through PACs they could establish without compromising the First Amendment rights of dissenting shareholders and members.¹¹²

Justice Kennedy's opinion (in this instance joined by all of the other Justices save Thomas) preserved the BCRA's disclaimer and disclosure requirements as "a less restrictive alternative to more comprehensive regulations of speech."¹¹³ Justice Thomas, dissenting to only this portion of the majority opinion, expressed concern regarding the chilling effect of the disclaimer and disclosure requirements, citing "death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters"¹¹⁴ as the price advocates of California's Proposition

¹¹⁰ *Id.* at 394 (Stevens, J., dissenting). Justice Stevens's concern about nonresidents has been taken up by FEC Commissioner Ellen L. Weintraub. In a recent opinion piece, she acknowledged the *Citizens United* rationale that "the rights that citizens hold are not lost when they gather in corporate form." Ellen L. Weintraub, *Taking On Citizens United*, N.Y. TIMES, Mar. 30, 2016, at A21. But she goes on to reason that the bar on election spending by individual foreigners should likewise extend to corporations in which they play a significant ownership role.

Arguably . . . for a corporation to make political contributions or expenditures legally, it may not have any shareholders who are foreigners or federal contractors. Corporations with easily identifiable shareholders could meet this standard, but most publicly traded corporations probably could not.

This may sound like an extreme result, but it underscores how urgently policy makers need to examine these issues with an eye toward drawing acceptable lines. Perhaps we could require corporations that spend in federal elections to verify that the share of their foreign ownership is less than 20 percent, or some other threshold.

Id. Commissioner Weintraub closes with a plea that "federal and state policy makers and authorities . . . ensure that corporations are not being used as a front to allow foreign money to seep into our elections." *Id.*

¹¹¹ *Id.* at 397 (Stevens, J., dissenting). Somewhat caustically, Justice Stevens proclaimed, "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law." *Id.* at 398. At the very least, the majority demonstrated that liberals have no monopoly on judicial activism.

¹¹² *Id.* at 393 (Stevens, J., dissenting).

¹¹³ *Id.* at 369 (Roberts, C.J., concurring).

¹¹⁴ *Id.* at 485 (Thomas, J., dissenting in part).

8 and other political causes have had to pay for engaging in protected speech.

Lest there be any doubt about *Citizens United*'s applicability to state legislation controlling corporate expenditures on political issues, the U.S. Supreme Court ever-so-briefly considered that issue in *American Tradition Partnership, Inc. v. Bullock*.¹¹⁵ In a per curiam opinion, the Court, reversing the Montana Supreme Court, declared unconstitutional a Montana statute that prohibited corporations from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."¹¹⁶ The majority felt "[t]here can be no serious doubt" that the holding of *Citizens United* applies to Montana state law.¹¹⁷ Justice Breyer, dissenting (joined by Justices Ginsburg, Sotomayor, and Kagan), suggested that even were one to accept *Citizens United*, "this Court's legal conclusion should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."¹¹⁸ Never mind: the findings of Congress, a state legislature, or a state supreme court are irrelevant in the face of First Amendment absolutism and the ascendancy of corporate "rights."¹¹⁹

C. *The Hobby Lobby Case, or How a Corporation Can "Get Religion"*

Four years after the *Citizens United* decision, at the close of the term on June 30, 2014, the U.S. Supreme Court decided *Burwell v. Hobby Lobby Stores*.¹²⁰ The decision was greatly anticipated and hotly debated, as it dealt with both an expansion of the religious exemption from the controversial Affordable Care Act¹²¹ and the equally controversial issue of payment for birth control, including types of birth control considered by some to be a form of abortion.

¹¹⁵ *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012); *see also* Riddle v. Hickenlooper, 742 F.3d 922 (10th Cir. 2014) (striking down Colorado political contributions statute as unconstitutional under *Citizens United*).

¹¹⁶ MONT. CODE ANN. § 13-35-227(1) (2011).

¹¹⁷ *Am. Tradition P'ship*, 132 S. Ct. at 2491.

¹¹⁸ *Id.*

¹¹⁹ With regard to corporate ascendancy, *see* John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT 223 (2015).

¹²⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹²¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), popularly (or unpopularly) known as "Obamacare."

Hobby Lobby Stores, Inc. (along with an affiliated business, Mardel) and Conestoga Wood Specialties Corporation are closely held corporations whose owners oppose abortion due to their deeply held religious beliefs. The Affordable Care Act mandates that employers include coverage for “preventive care and screenings” for women without “any cost sharing requirements.”¹²² Pursuant to that statutory provision, the Department of Health and Human Services (HHS) promulgated regulations mandating coverage for all contraceptive methods approved by the Food and Drug Administration;¹²³ of the 20 methods listed, including the intrauterine device, four may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus, and therefore are considered a form of abortion by Hobby Lobby’s and Conestoga’s owners.¹²⁴ HHS regulations exempted “religious employers,” including churches and other nonprofit religious organizations, from what the Court called the “contraceptive mandate,” but the exemption did not apply to for-profit, closely held corporations such as Hobby Lobby¹²⁵ and Conestoga. These corporations sued under the Religious Freedom Restoration Act,¹²⁶ claiming that the ACA’s contraceptive mandate “substantially burden[s] a person’s exercise of religion”¹²⁷ and requesting an exemption from the rule.

By a 5-4 majority, the Supreme Court agreed. Justice Alito’s majority opinion rejected the notion “that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships.”¹²⁸ Instead, Justice Alito asserted, “The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.”¹²⁹

¹²² 42 U.S.C. § 300gg-13(a)(4) (2012).

¹²³ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

¹²⁴ See *Hobby Lobby*, 134 S. Ct. at 2764-66.

¹²⁵ Whether Hobby Lobby is in fact a closely held corporation as described in Justice Alito’s majority opinion is not altogether clear. See *infra* notes 251-52 and accompanying text.

¹²⁶ 42 U.S.C. § 2000bb (2012).

¹²⁷ *Id.* § 2000bb-1(b).

¹²⁸ *Hobby Lobby*, 134 S. Ct. at 2759. As discussed in more detail in Part II, *infra*, it is difficult to reconcile this position with the Court’s Fifth Amendment privilege precedent, *Braswell v. United States*, 487 U.S. 99 (1988), which held that corporate formation by a sole proprietor forfeits the individual’s Fifth Amendment privilege against self-incrimination. See *supra* notes 55-62 and accompanying text.

¹²⁹ *Hobby Lobby*, 134 S. Ct. at 2759.

Justice Ginsburg's dissent (joined by Justice Sotomayor) took issue with "the Court's expansive notion of corporate personhood."¹³⁰ Said Ginsburg, "[T]he exercise of religion is characteristic of natural persons, not artificial legal entities," referring to Chief Justice Marshall's observation in *Dartmouth College* that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law," and Justice Stevens's more recent reminder that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires."¹³¹ Justices Breyer and Kagan were content to confine their dissent to Justice Ginsburg's assertion that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial,"¹³² and therefore fails to satisfy that essential RFRA requirement. Justices Breyer and Kagan therefore declined to decide "whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act."¹³³

Justice Alito's majority opinion in *Hobby Lobby* departs from traditional corporate law theory¹³⁴ as a proclamation of expansive corporate purpose and a repudiation of the profit-maximizing view of corporations. The opinion rejects the argument that for-profit corporations exist solely to make money as "fly[ing] in the face of modern corporate law."¹³⁵ Corporate law in every American jurisdiction, according to the *Hobby Lobby* majority, "either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business."¹³⁶ These lawful purposes include engaging in "humanitarian and other altruistic objectives," such as undertaking stricter pollution-control measures or providing better working conditions than the law requires.¹³⁷ Consequently, the Court concluded, "If for-profit corporations may pursue such

¹³⁰ *Id.* at 2797.

¹³¹ *Id.* at 2794 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 636 (1819)); *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting in part).

¹³² *Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

¹³³ *Id.* at 2806 (Breyer, J., and Kagan, J., dissenting).

¹³⁴ *Cf.* Strine & Walter, *supra* note 64, at 345 n.14 (describing *Hobby Lobby* as a case in which "the same conservative five-Justice majority that decided *Citizens United* held explicitly that profit is *not* the sole end of corporate governance"). For additional analysis of the corporate law issues raised by the *Hobby Lobby* majority opinion, see Part II, *infra*.

¹³⁵ *Id.* at 2770.

¹³⁶ *Id.* at 2770-71.

¹³⁷ *Id.* at 2771.

worthy objectives, there is no apparent reason why they may not further religious objectives as well.”¹³⁸

Justice Alito’s exposition on the “modern corporate law” governing charitable contributions and other socially responsible corporate activities is at best an inadequate oversimplification and at worst a results-oriented misstatement of the law. And Justice Alito appears to take on a different view of corporations than Justice Kennedy. Justice Kennedy’s opinion in *Citizens United* regards the corporation (whether for-profit or nonprofit) as an autonomous entity, embodying the collective aspirations of its shareholders and exercising its own will, through the operation of “corporate democracy.” “Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”¹³⁹ In contrast, Justice Alito’s opinion in *Hobby Lobby* pierces the veil, regarding the closely held corporation as the alter ego of its owners, a mere conduit through which the owners may express and act on their *personal* beliefs, even as the corporate form protects them from personal liability for its debts and other obligations.¹⁴⁰ According to Justice Alito:

Congress provided protection for people like the Hahns and Greens [owners of the plaintiff businesses] 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. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.¹⁴¹

We think the Third Circuit had the better argument:

General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or

¹³⁸ *Hobby Lobby*, 134 S. Ct. at 2771.

¹³⁹ *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

¹⁴⁰ Justice Alito did not, however, explain how this flexible, porous conception of the corporate form could be harmonized with the transformative, irreversible conception of corporate formation articulated by Chief Justice Rehnquist in the *Braswell* majority opinion. See *supra* notes 62-68 (defining the modern “collective entity doctrine” and holding that corporate formation effectively waives the incorporator’s Fifth Amendment privilege against self-incrimination). This inconsistency is discussed further in Part II, *infra*.

¹⁴¹ *Hobby Lobby*, 134 S. Ct. at 2768.

take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.¹⁴²

Justice Alito retorted: “All of this is true—but quite beside the point. Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”¹⁴³ In a tangible, physical sense, that is true.¹⁴⁴ But notwithstanding Justice Alito’s parenthetical reference to “shareholders, officers, and employees,” the *Citizens United* and *Hobby Lobby* holdings strongly suggest that the only human beings that count in corporations are the ones who control them. The people who are employed by them or hold minority ownership interests in them seem to count for little.¹⁴⁵

For a long time, we have understood that corporations could speak. Now, apparently, they can get religion, too.

II. FUNDAMENTAL MISCONCEPTIONS OF CORPORATE LAW IN *CITIZENS UNITED* AND *HOBBY LOBBY*

Both *Citizens United* and *Hobby Lobby* rely upon misconceptions and oversimplifications of corporate law. Some of those flaws can be traced back to Justice Powell’s seminal corporate campaign finance law opinion in *Bellotti*, while others appear to be uninformed assumptions or wishful thinking. These fundamental corporate law flaws are discussed in greater detail below.

A. *Citizens United and Corporate Law*

The majority opinion’s corporate law analysis in *Citizens United* suffers from two critical flaws, one an error of omission and the other an unwarranted supposition.¹⁴⁶ The error of

¹⁴² *Conestoga Wood Specialties v. U.S. Dep’t of Health and Hum. Servs.*, 724 F.3d 377, 385 (3d Cir. 2013) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012)).

¹⁴³ *Hobby Lobby*, 134 S. Ct. at 2768.

¹⁴⁴ See *infra* note 246 and accompanying text; see also Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173, 202 (2015) (arguing that “corporations may be treated as if they possess rights of religious freedom as a way of protecting the religious freedom rights of the corporation’s controlling members”).

¹⁴⁵ In other recent cases, the Court seems to say that the only human beings who count in *unions* are the ones who dissent from them. See *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *infra* notes 433-34 and accompanying text.

¹⁴⁶ While the U.S. Supreme Court’s primary function may be expounding on the Constitution, it cannot entirely disregard the nonconstitutional legal context in which cases arise. It is not surprising, however, that the corporate law implications of

omission is the Court's failure to recognize the inherent conflict between giving corporations a new constitutional right to participate in the political process by spending shareholder moneys on political expression and the long-held corporate law assumption that corporations exist to earn money for their shareholders¹⁴⁷—not to advance the political preferences of corporate management.¹⁴⁸ Most important, by giving corporations new political clout, the Court has, perhaps unwittingly, destabilized the delicate balance between managerial discretion and the public interest in regulating corporate profit-maximizing actions that can overreach and cause social harms.¹⁴⁹ As Strine and Walter point out, in the absence of regulatory restraints, corporations in pursuit of profit will do nasty things (spoiling the environment and such), and *Citizens United* allows corporations to influence politics so as to erode regulatory constraints, allowing them to engage in rent-seeking conduct and do those nasty things.¹⁵⁰ In Part IV, we propose state legislative action to respond

the Court's *Citizens United* analysis appear to have received less attention than the constitutional issues presented by the case. No members of the current Court have significant experience as corporate law practitioners or scholars, and the inadequate and incomplete corporate law analysis found in both *Citizens United* and *Hobby Lobby* reflects the Court's lack of corporate law expertise. Cf. Fisk & Chemerinsky, *supra* note 65, at 1024-25 (observing that the *Citizens United* majority opinion "dismissed in a few sentences the idea that the corporate leadership's use of corporate resources on politics might infringe the rights of dissenting shareholders"). But see Susanna Kim Ripken, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 285, 286 (2012) (arguing that a careful reading of the *Citizens United* opinion reveals that "[i]t did not matter whether the speaker was a corporation or a human being because the political speech at issue in the case . . . was covered by the First Amendment"); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1031 (2011) ("The Court, however, avoided the artificial entity problem by holding that the First Amendment 'protects speech and speaker, and the ideas that flow from each' without regard to the speaker's corporate identity." (quoting *Citizens United v. FEC*, 558 U.S. 310 (2010))).

¹⁴⁷ See generally David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181 (2013) [hereinafter Yosifon, *The Law of Corporate Purpose*] ("Delaware corporate law requires corporate directors to manage firms for the benefit of shareholders, and not for any other constituency"); text accompanying notes 483 & 489, *infra*.

¹⁴⁸ "As-applied" consideration of *Citizens United* might have obviated this problem, because *Citizens United* was a corporation explicitly formed to address political issues. The Court's overly broad facial consideration of the statute invites analysis of its effect on for-profit business corporations.

¹⁴⁹ Cf. Yosifon, *The Law of Corporate Purpose*, *supra* note 147, at 228 ("But in *Citizens United* [] the Supreme Court of the United States made clear that the First Amendment forbids Congress from restricting the political activity of corporations. As long as *Citizens United* is good constitutional law, shareholder primacy is bad corporate theory." (footnote omitted)). Strine and Walter have explained how this misconception of corporate law runs counter to traditional conservative notions of the modern business corporation as limited in its profit-making activities by external regulatory/political constraints. See Strine & Walter, *supra* note 64, at 342-43 (discussed in Part I, *supra*).

¹⁵⁰ See Strine & Walter, *supra* note 64, at 383-86.

to the tension between *Citizens United*'s new constitutional doctrine and the traditional corporate governance model that has evolved in American corporate law over the last century.

The second corporate law flaw in the *Citizens United* decision was Justice Kennedy's reliance on *Bellotti* to assert that there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"¹⁵¹ Although that blithe supposition was at best an overly optimistic assessment when *Citizens United* was decided, subsequent events and scholarly analysis have proved it simply wrong. If any doubts existed as to the impact of the Court's decision in *Citizens United*, the 2014 midterm elections made clear that the Court had opened a door to unprecedented corporate political spending—with no meaningful control or limitation by "the procedures of corporate democracy."¹⁵² Below, we will demonstrate that, contrary to the dismissive assertion in the *Citizens United* majority opinion, it is clear that the "procedures of corporate democracy" of neither federal nor state corporate law are adequate to protect corporate shareholders from abuse of the new constitutional right that empowers corporate management to engage in political spending with shareholder funds, whether or not the shareholders agree.¹⁵³

In short, the *Citizens United* and *Hobby Lobby* majorities limited their focus almost entirely to the constitutional issues presented in the cases¹⁵⁴ and failed to recognize the consequences for both corporate law and corporate shareholders. The Court failed to see both the outward parameters of the effects its decisions would have on corporate law at a macro level and the inadequacy of the corporate law mechanisms the Court assumed could prevent misuse of shareholder resources.

¹⁵¹ See *Citizens United*, 558 U.S. at 361-62 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794, n.34 (1978)).

¹⁵² See, e.g., Derek Willis, *Outside Groups Set Spending Record in Midterms*, N.Y. TIMES (Dec. 10, 2014), http://www.nytimes.com/2014/12/11/upshot/outside-groups-set-spending-record-in-midterms.html?_r=0 [<http://perma.cc/PCR9-57VE>] (reporting that total independent expenditures by election cycle, in 2014 dollars, increased from \$423.2 million in 2010 to \$814.1 million in 2014); see also Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2010) (arguing that corporate political spending increases "corruption" in the political process and that the Supreme Court wrongly decided *Citizens United*).

¹⁵³ See *infra* Part III.

¹⁵⁴ Cf. Yosifon, *The Public Choice Problem*, *supra* note 10, at 1219 ("Corporate law is thus wholly irrelevant both to the majority and the dissent in *Citizens United*").

1. “Missing the Big Picture”—The Analytical Hole in the *Citizens United* Corporate Law Analysis

We are not the first commentators to recognize that *Citizens United* simply “missed the big picture” corporate law repercussions of its holding when it granted corporations a new constitutional right to make unlimited independent political expenditures. In 2011, Professor David G. Yosifon recognized that *Citizens United* conflicts with the “shareholder primacy norm” of corporate law because it creates a constitutional law barrier to the external regulation of corporate political activity that is necessary to “curb corporate exploitation of non-shareholding stakeholders in corporate enterprise, including workers, consumers, and communities.”¹⁵⁵ Professor Yosifon pointed out that *Citizens United* both creates new constitutional impediments to regulatory legislation that is essential under a shareholder primacy model of corporate governance¹⁵⁶ and “stands for the proposition that government [now] cannot insulate the political arena from the influence of corporations.”¹⁵⁷

The solution proposed by Professor Yosifon is to change the fundamental model of corporate governance: “Because the Supreme Court has told us we cannot keep corporations out of our democracy, then the next best way to accomplish the goals motivating such legislation is to bring more democracy into our corporations.”¹⁵⁸ To accomplish this goal, he proposes expanding the fiduciary duty obligations of corporate directors by allowing nonshareholder constituency groups, such as employees and customers, to elect representatives on corporate boards.¹⁵⁹ While we agree with Professor Yosifon’s insight that *Citizens United* is incompatible with the shareholder primacy norm of corporate law,¹⁶⁰ and while we applaud the bold audacity of his proposed

¹⁵⁵ *Id.* at 1198, 1237 (“My argument is that shareholder primacy is not viable unless one is prepared to allow government to restrict corporate political activity, which I argue would be unprincipled, unwise, and, according to the Supreme Court, unconstitutional.”).

¹⁵⁶ *Id.* at 1212-13.

¹⁵⁷ *Id.* at 1219.

¹⁵⁸ *Id.* at 1235.

¹⁵⁹ *Id.* at 1236-47.

¹⁶⁰ We also agree with Professor Yosifon’s analysis in a subsequent work, cited above, in which he convincingly demonstrates that shareholder wealth maximization is the law of Delaware, and academic arguments to the contrary are inconsistent with both Delaware case law and the extrajudicial statements and writings of Delaware judges. See Yosifon, *The Law of Corporate Purpose*, *supra* note 147, at 181 (“While I am a critic of the ‘shareholder primacy norm’ in corporate governance, I am nevertheless convinced that shareholder primacy is the law.”). To the extent that *Citizens United* creates constitutional law impediments to either legislation or shareholder lawsuits

solution—a fundamental reconception of corporate governance—we believe there is a simpler and more practical means of achieving the same fundamental objective. As discussed in Part IV, *infra*, we instead argue for an expansion of corporate constituency statutes, which are already in place in a number of states, to require corporate directors to consider the interests of nonshareholder interest groups.¹⁶¹ This dilution of the shareholder primacy model would impose a modest level of communitarian social responsibility on U.S. corporations that is commensurate with the new political participation right that the Supreme Court bestowed upon corporations in *Citizens United*.

Like Professor Yosifon, Professor Jay Kesten has recognized that corporate law is focused on shareholder wealth maximization and that *Citizens United* has “constitutionally foreclosed” an important means of controlling corporate political activity that is undertaken as a means of avoiding external regulation which “constrains corporate behavior that society deems too costly.”¹⁶² Professor Kesten argues that “if corporations have a constitutionally protected right to participate in shaping the very laws that govern them, moral agents, and not just economic agents, should guide their activities.”¹⁶³ As a solution to this “moral agency” problem, Professor Kesten proposes that corporate law be reformed

that are aimed at enforcing the shareholder primacy norm, the decision conflicts with the central maxim of modern American corporate law.

¹⁶¹ Our approach differs from Professor Yosifon’s proposal for a “multi-stakeholder regime” corporate-governance model, which would give both employees and consumers voting rights in corporate elections—a change that Professor Yosifon believes “would be complicated, but not insurmountable.” Yosifon, *The Public Choice Problem*, *supra* note 10, at 1245. While we agree with Professor Yosifon that his approach might be the optimal model if we had the luxury of redesigning corporate governance from a “clean slate,” we believe that the practical difficulties of changing the fundamental system of corporate governance now shared (with important differences at the margins, of course) by all the states and territories without question falls at or near the “insurmountable” end of the achievable change spectrum. Our approach, in contrast, merely expands a statutory provision already in place in some states and in a way that one state had already adopted prior to *Citizens United*. See *infra* Section IV.A.2.

¹⁶² See Kesten, *supra* note 92, at 512-13 (noting that “for many companies, political activity is simply another means to the end of profit maximization” and that corporations “have strong incentives to oppose efficient regulation, if such laws constrain their ability to externalize costs and thereby maximize profits”).

¹⁶³ Kesten, *supra* note 92, at 513. As Professor Kesten explains his proposal,

To be more concrete, the law should recognize shareholders’ entitlement to adopt, amend, and repeal bylaws that restrict managerial discretion concerning matters of substantial social, political, or moral import (collectively “social policy”). Put slightly differently, this approach to the bylaw power empowers shareholders to act as moral agents of the corporation.

to allow shareholders “to enact bylaws that restrict managerial discretion as to matters of social policy.”¹⁶⁴

Our reaction to Professor Kesten’s corporate bylaw proposal is similar to our reaction to Professor Yosifon’s expanded corporate voting proposal. We agree that *Citizens United* has created a serious communitarian moral accountability problem by constitutionally insulating a broad swath of corporate political activity from federal or state regulation. We believe, however, that increasing shareholders’ private, contractual bylaws powers is neither a practical nor an adequate solution to what is at its core a public regulatory problem. Many shareholders may prefer the status quo and decline to expand their bylaw powers or not care enough about corporate political expenditures to fight for greater bylaw powers. And even in those cases (which we suspect would be only an insignificant minority)¹⁶⁵ in which shareholders choose to expand their bylaws powers, those who do so might not be inclined to exercise those powers in a manner consistent with the greater public interests that *Citizens United* has imperiled.¹⁶⁶ In contrast, we propose two solutions: (1) expansion of disclosure requirements to ensure that shareholders are informed of corporate political activity and (2) expansion of corporate constituency statutes to require consideration of all stakeholder groups when a business corporation engages in political spending.¹⁶⁷ These solutions are broader in scope because the statutes would apply to all businesses incorporated in a state. They are also more targeted in application because the statutes would require corporate boards to take into account the interests of all affected constituencies (employees, customers, suppliers, and communities) when making decisions concerning exercise of the new corporate political

¹⁶⁴ *Id.* at 519. Professor Kesten acknowledges the practical impediments to effective shareholder action in this regard, including the problem of institutional investors who may prefer short-term profits and disregard the social policy preferences of the ultimate beneficial owners, and the difficulty presented when management and shareholders disagree on social issues. *Id.* at 518-21. Despite these practical challenges, Professor Kesten argues that we should seek “a low-cost mechanism by which the ultimate beneficial owners of equity securities can express their moral preferences.” *See id.* at 521.

¹⁶⁵ See the discussion of legal obstacles to shareholder-initiated amendments of corporate bylaws in Section II.A.2, *infra*.

¹⁶⁶ *Cf.* Kesten, *supra* note 92, at 491 n.30 (“For example, it seems odd to argue that the recent financial crisis was caused by excessive risk taking, but that we should nevertheless empower the most risk-seeking corporate constituency [shareholders] with respect to a firm’s business decisions.”); Ribstein, *supra* note 146, at 1050 (“Investors who seek maximum returns would favor profit-maximizing commercial speech.”).

¹⁶⁷ We elaborate on these proposals later in this article. *See infra* notes 449-506 and accompanying text.

participation rights created by *Citizens United* or the exercise of new corporate religious rights created by *Hobby Lobby*.¹⁶⁸

2. “Compounding a Prior Error”—*Citizens United*’s Unwarranted Reliance on *Bellotti*

As noted above, the reason for the paucity and superficiality of the corporate analysis in *Citizens United* may be as simple as the lack of corporate law expertise among the current members of the Court.¹⁶⁹ Another, not inconsistent, explanation may be that the Court relied too heavily on the *Bellotti* precedent in dismissing concerns about the effect on corporate shareholders of striking down the independent expenditure limits previously applicable to corporations. In any event, the corporate law analysis in *Citizens United* is fundamentally flawed.

The linchpin of Justice Powell’s corporate law analysis in *Bellotti* was his assertion that “[u]ltimately shareholders may decide, through the *procedures of corporate democracy*, whether their corporation should engage in debate on public issues.”¹⁷⁰ It is much easier today to assess the validity of this assertion than in 1978, when Powell made the statement. Corporate law and ownership have evolved greatly since 1978, particularly as to how the “procedures of corporate democracy” actually operate in the context in which Powell was using the term. *Bellotti* was, at its core, a pro-business decision that rejected an effort to limit the political participation rights of banks and business corporations

¹⁶⁸ Obviously, we also favor this approach because it would create a new communitarian “responsibility” paradigm beyond the present shareholder primacy norm in corporate law, which we believe would have positive spillover benefits for society in a wide range of areas—worker rights, consumer protection, community investment, etc.—extending beyond the imposition of a more socially responsible approach to corporate political expenditures. Cf. Yosifon, *The Law of Corporate Purpose*, *supra* note 147, at 228 (“Corporations with narrow interests and access to persuasive agents (like lawyers) will tend to enjoy an advantage in the competition for regulatory favor over widely dispersed, structurally impotent non-shareholders. Shareholder primacy in practice gives rise to a public choice problem that renders shareholder primacy unjustifiable in theory.”); *id.* at 229 (“Any attention that is given to nonshareholders presently [under the shareholder primacy model] has to be done . . . in hushed tones, through lies. This is not sustainable, and it is not desirable. To govern effectively a corporate board must govern openly and honestly.”). *But see* Michael E. DuBow, *Communitarianism and Corporate Law*, in *TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER* 83 (David E. Carney ed. 1999) (advancing a pre-*Citizens United*, pre-2008 financial system collapse argument that the shareholder wealth maximization principle serves the public good and “that there is effectively no role for communitarian ideas to play in American corporate law”).

¹⁶⁹ See *supra* note 146 and accompanying text.

¹⁷⁰ First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978) (emphasis added).

compared to the rights of individuals and media companies.¹⁷¹ It was in the context of rejecting a ban on corporate advertising in referenda that Powell,¹⁷² a former business lawyer and an expert on corporate law,¹⁷³ expressed his belief that the “procedures of corporate democracy” were adequate to protect the interests of shareholders in corporations that engaged in political activities. Whether Powell’s confidence in the procedures of corporate democracy was based on his optimistic assessment of the law’s future efficacy in his chosen field of legal specialization or his distaste for regulatory interference in corporate affairs,¹⁷⁴ there is good reason to question the basis for his confidence, even as of 1978 when he wrote the *Bellotti* opinion.

The essence of Powell’s argument was that shareholders could control corporate management, either by voting to elect directors, imposing limitations on political activity in corporate charters, or bringing shareholder derivative suits “to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of

¹⁷¹ See *id.* at 778 (“The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”); see also *id.* at 788-95 (recognizing that “[p]reserving the integrity of the electoral process, preventing corruption, and ‘sustaining’ individual citizen participation are ‘interests of the highest importance’ in our democracy, but nonetheless concluding that the arguments advanced to support limiting corporate participation—at least in a referendum election “held on issues, not candidates for public office”—were insufficient to support a ban on corporate advertising); cf. Mutch, *supra* note 25, at 315 (describing *Bellotti* as “qualitatively different” from prior corporate election law cases because for the first time, large, publicly traded corporations were suing the state to prevent prosecution and obtain the right to participate openly in the political process).

¹⁷² *Bellotti*, 435 U.S. at 767.

¹⁷³ Prior to his Supreme Court appointment, Justice Powell had been a corporate lawyer at a prestigious Virginia law firm and had served as the president of the American Bar Association. See Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, at A1. During his tenure on the Court, Justice Powell wrote many of the Court’s most important corporate and securities law opinions, including a number of decisions limiting the scope of corporate antifraud laws. See, e.g., *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975) (rejecting application of federal securities law to a transaction involving the purchase of stock in a cooperative housing project); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (rejecting imposition of federal securities fraud liability based upon an accounting firm’s negligent conduct); *Chiarella v. United States*, 445 U.S. 222 (1980) (rejecting insider trading liability based on nondisclosure absent a relationship of trust and confidence between the parties to the transaction); *Dirks v. SEC*, 463 U.S. 646 (1983) (rejecting insider trading liability for a tippee absent a breach of fiduciary duty by the tipper).

¹⁷⁴ See Mutch, *supra* note 25, at 315 (discussing the “Attack on the American Free Enterprise System” memorandum that Powell wrote to the U.S. Chamber of Commerce in 1971, shortly before he was appointed to the Supreme Court, warning among other things of a “massive assault” on the American business’s “right to continue to manage its own affairs”).

management.”¹⁷⁵ While these multiple means of maintaining shareholder control over corporate management may sound comforting to those not steeped in the intricacies of corporate law, the reality is far less reassuring. Although the relevant corporate law was less developed at the time, even in 1978, shareholders in public companies were unlikely to unseat directors for making political contributions, amend their corporate charters to limit or prohibit corporate political contributions, or prevail in shareholder derivative suits challenging corporate political contributions.

Bellotti is now relatively ancient history, of course, so we can give Justice Powell the benefit of the doubt and assume that his reassurances were optimistic and perhaps even well intended.¹⁷⁶ But we cannot do the same with what passes for the more contemporary analysis in *Citizens United*. The two short paragraphs in the *Citizens United* majority opinion that address the corporate law implications of the case’s holding¹⁷⁷ would be inadequate on their face but for their citation of *Bellotti* as dispositive of the issue. Corporate law and ownership have changed dramatically since *Bellotti* was decided, and corporate America no longer looks or operates as it did when Powell wrote his *Bellotti* opinion.¹⁷⁸ Below we analyze how the Court’s approach overstates the protections afforded by each procedure of corporate democracy.

a. Shareholder Voting for Corporate Directors

The assertion that shareholder voting for corporate directors can curb corporate management’s abuses in political spending is perhaps the most easily dismissed of the *Bellotti/Citizens United* corporate law misconceptions. First, as Professors Bebchuk and Jackson have observed, for shareholders to vote based on an issue, they must have information about that

¹⁷⁵ *Bellotti*, 435 U.S. at 795.

¹⁷⁶ Professor Coates credits Justice Powell with a philosophy (formulated prior to his ascension to the bench) advocating the aggressive use of the courts to defend capitalism and free enterprise. See Coates, *Corporate Speech and the First Amendment: History, Data, and Implications*, *supra* note 119, at 15.

¹⁷⁷ See *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010).

¹⁷⁸ The same Court majority was more than willing to note changes in the political landscape in striking down provisions of the Voting Rights Act that it felt were unwarranted several decades after the legislation’s initial enactment. Chief Justice Roberts, writing for the majority, proclaimed, “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.” *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). In the Court’s view, by extending the Voting Rights Act in 2006, Congress “reenacted a formula based on 40-year-old facts having no logical relation to the present day.” *Id.* at 2629.

issue.¹⁷⁹ The Federal Election Commission (FEC) only recently proposed regulations to implement a reporting requirement for corporate independent expenditures in federal elections,¹⁸⁰ and while a number of states have implemented reporting requirements for independent expenditures, not all states' independent expenditure reporting requirements apply to corporations.¹⁸¹ The SEC has received a petition for rulemaking on a proposed disclosure requirement for corporate political expenditures,¹⁸² but despite the proposal having received a record number of public comments—most of which were supportive¹⁸³—almost four years later the agency has not adopted a disclosure rule, and it appears increasingly less likely that it will adopt one.¹⁸⁴ Without a disclosure rule that would inform shareholders of public companies' political spending activities,¹⁸⁵ it is hard to

¹⁷⁹ See generally Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) (advocating for Securities and Exchange Commission (SEC) rules requiring public companies to disclose their political spending).

¹⁸⁰ See Independent Expenditures and Electioneering Communications by Corporations and Labor Association, 79 Fed. Reg. 62,797 (Oct. 21, 2014) (to be codified at 11 C.F.R. pts. 104 and 114).

¹⁸¹ See NAT'L CONFERENCE OF STATE LEGISLATURES, STATES' INDEPENDENT EXPENDITURE REPORTING 2014 (2014), http://www.ncsl.org/Portals/1/documents/legismgt/2014_Independent_Expenditures_Chart.pdf [<http://perma.cc/D6XS-Y4E6>] (summarizing state reporting requirements for independent expenditures as of July 2014).

¹⁸² Committee on Disclosure of Corporate Political Spending, *Petition for Rulemaking to Elizabeth M. Murphy, Sec'y*, SEC File No. 4-637 (Aug. 3, 2011), <https://www.sec.gov/rules/petitions/2011/petn4-637.pdf> [<http://perma.cc/GTQ9-VPB7>].

¹⁸³ See Alan Dye & Todd Aman, *Mandatory Disclosure of Corporate Political Spending: Prospects for New SEC Disclosure Requirements in an Atmosphere of Disclosure Reform*, 42 SEC. REG. L.J. 207, 207 (2014); see also Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, SEC File No. 4-637, <http://www.sec.gov/comments/4-637/4-637.shtml> [<http://perma.cc/Z7LC-KCZD>] (last modified May 12, 2016) (listing public comments).

¹⁸⁴ See Dye & Aman, *supra* note 183, at 208 ("Despite apparently significant support and momentum for a political spending disclosure requirement, however, prospects for the adoption of such a requirement appear to be fading."); see also Jenna Greene, *Dear SEC: Time to Act*, NAT'L L.J., June 1, 2015 (describing May 27, 2015, letter from three former SEC commissioners to current SEC chair Mary Jo White calling the agency's failure to act "inexplicable" and urging it to adopt corporate political spending disclosure rules); cf. Ribstein, *supra* note 146, at 1042 (arguing that proposed federal legislation to enhance reporting of corporate political spending would not survive First Amendment scrutiny under *Citizens United* because it would be "based on speech").

¹⁸⁵ In privately held corporations, the situation is no better. Minority shareholders in a particular company may or may not have access to information about corporate political expenditures, but the unity of management and controlling shareholders in almost all private companies makes it unlikely that even minority shareholders who are aware of and object to such spending can influence it through voting. See, e.g., Ribstein, *supra* note 146, at 1047 (observing that "in a closely held firm, the majority's plenary control over corporate acts may result in complete silencing of minority shareholders with substantial investments"). In addition, while some states have case law that protects minority shareholders in closely held corporations (which,

see how shareholder voting can be expected to curb abusive political spending by corporate managers.¹⁸⁶

b. Derivative Suits

The same holds true for the litigation relief avenue suggested in *Bellotti*—that “minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.”¹⁸⁷ Shareholders of course cannot sue to challenge activity that they do not know has occurred, so the lack of disclosure requirements for corporate political spending alone likely is a crippling impediment to the litigation relief argument in most cases. More important, even if shareholders do learn of political expenditures and wish to “challenge corporate disbursements”¹⁸⁸ in the courts, a derivative suit is unlikely to provide a remedy.

At the time *Bellotti* was decided, in 1978, the modern law of shareholder derivative litigation was in its relative infancy, so again, Justice Powell perhaps can be forgiven for undue optimism as to the potential impact of the law in this area on corporate political spending. Most of the landmark cases that now govern shareholder derivative litigation were decided after 1978, and for the most part those decisions make recovery by shareholders who challenge corporate political expenditures extremely unlikely, particularly when shareholders seek to challenge corporate

of course, are only a subset of privately held corporations) from unfair treatment by majority shareholders (see, for example, *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505 (Mass. 1975)), it is unlikely that those cases would provide a remedy for management’s use of corporate funds for political expenditures. Moreover, Delaware, the state of incorporation for many large privately held companies, has expressly rejected special rules protecting against unfair treatment of minority shareholders by majority shareholders in closely held corporations. See *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993). In short, corporate law provides no meaningful information rights, voting powers, or “fairness” protections that would assist minority shareholders in privately held corporations who wish to challenge political expenditures by corporate management.

¹⁸⁶ Cf. Bebachuk & Jackson, *supra* note 179, at 927 (“Without disclosure of information about public companies’ spending on politics, corporate-governance procedures that could help address such concerns cannot operate.”). We can only speculate as to whether the SEC’s reluctance to adopt a disclosure requirement is a consequence of the corporate regulatory capture Strine and Walter feared as a consequence of *Citizens United*. Strine & Walter, *supra* note 64, at 383-84.

¹⁸⁷ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978).

¹⁸⁸ *Id.*

management's business decisions.¹⁸⁹ The law is now well settled that in so-called demand required derivative suits—in which a dissident shareholder must first make a demand on the board to itself initiate suit before the shareholder can sue managers or others—the business judgment rule applies to a board's decision to reject the shareholder's demand and not bring suit.¹⁹⁰ Overcoming the business judgment rule's protections is a notoriously difficult obstacle for plaintiffs in corporate litigation,¹⁹¹ particularly in Delaware, where the courts are extremely deferential to managerial prerogatives.¹⁹² Thus, as a practical matter, the law since *Bellotti* has evolved to make recovery very unlikely in a “demand required” derivative suit challenging corporate political spending that does not involve corporate managers engaging in self-dealing or some other egregious violation of the duty of loyalty.

¹⁸⁹ Cf. David Rosenberg, *Galactic Stupidity and the Business Judgment Rule*, 32 J. CORP. L. 301, 301-02 (2007) (“It is a truth almost universally acknowledged that American courts will not review the substance of the business decisions of corporate directors except under extraordinary circumstances.”).

¹⁹⁰ See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 784 n.10 (Del. 1981) (“In other words, when stockholders, after making demand and having their suit rejected, attack the board's decision as improper, the board's decision falls under the ‘business judgment’ rule and will be respected if the requirements of the rule are met.”). Those unfamiliar with the law in this area are often shocked to learn that it is well-settled law in Delaware and elsewhere that merely having previously voted in favor of a challenged transaction or expenditure is not sufficient to disqualify corporate directors from participating in a decision to accept or reject a shareholder demand. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) (holding that board approval of a challenged transaction does not automatically excuse demand); *Marx v. Akers*, 666 N.E.2d 1034, 1040 (N.Y. 1996) (noting error in prior cases that had “excus[ed] demand whenever a majority of the board members who approved the transaction were named as defendants”).

¹⁹¹ See William Alan Nelson II, *Post-Citizens United: Using Shareholder Derivative Claims of Corporate Waste to Challenge Corporate Independent Political Expenditures*, 13 NEV. L.J. 134, 151-55 (2012) (discussing New York and California cases in which courts invoked the business judgment rule in refusing to permit shareholder suits challenging political expenditures to go forward); see also *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (observing that the onerous standard for proving a claim of corporate waste, the legal theory most likely to apply to a challenge of corporate political spending, “is a corollary of the proposition that where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose” (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971))); cf. Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility*, 79 WASH. U. L.R. 569 (2001) (analyzing shareholder derivative suits challenging executive pay decisions).

¹⁹² See, e.g., *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 131 (Del. Ch. 2009) (declining to impose liability on corporate managers despite “staggering losses” caused by their business misjudgments in the subprime mortgage market); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (applying the business judgment rule and finding no breach of fiduciary duty in a \$130 million severance payout to an officer terminated without cause).

Some jurisdictions, notably including Delaware and New York,¹⁹³ excuse derivative-suit plaintiffs from making presuit demand on the board of directors in “demand futile” cases where a majority of the board is interested in the challenged transaction.¹⁹⁴ Even in those kinds of cases, however, the derivative litigation route is unlikely to provide a remedy regarding political expenditures. First, some jurisdictions, such as New York, allow boards to appoint a “special litigation committee” to evaluate whether or not to pursue “demand futile” claims, and then apply the business judgment rule to a committee’s decision not to pursue the claim¹⁹⁵ (which is what such committees almost always decide, other than in cases involving the acts of disgraced and deposed former managers). Other jurisdictions, like Pennsylvania,¹⁹⁶ follow the approach recommended by the American Law Institute (ALI) in its *Principles of Corporate Governance*.¹⁹⁷ This approach rejects the demand futility paradigm altogether and imposes a “universal demand” requirement, with the business judgment rule applying to the board’s decision to accept or reject the demand in all cases except those that involve self-dealing or a “knowing and culpable violation of law.”¹⁹⁸ Finally, even in jurisdictions like Delaware

¹⁹³ See *Zapata*, 430 A.2d 779.

¹⁹⁴ See *Lewis*, 473 A.2d 805; *Marx v. Akers*, 666 N.E.2d 1034 (N.Y. 1996). The Delaware Supreme Court has explained that a derivative suit plaintiff is excused from making a pre-suit demand on the corporation’s board of directors only if the plaintiff can “articulate particularized facts showing that there is a reasonable doubt either that (a) a majority of the board is independent for purposes of responding to the demand, or (b) the underlying transaction is protected by the business judgment rule.” *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1217 (1996)). This showing would be especially difficult for a derivative suit plaintiff in a corporate political expenditure case, because there would be no issue of board independence (assuming the political candidate had no familial or business relationship with a majority of the directors on the board (see *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004))) and the board would claim that the expenditure in some way conveyed some marginal benefit on the corporation that would be sufficient to satisfy the very lax test for business judgment rule protection (under which “[d]irectors’ business ‘decisions will not be disturbed if they can be attributed to any rational business purpose.’” See *Eisner*, 746 A.2d at 264 n.65 (quoting *Sinclair Oil Corp.*, 280 A.2d at 717, 720)).

¹⁹⁵ See *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979).

¹⁹⁶ See *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997).

¹⁹⁷ PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.03(b) cmt. a (AM. LAW INST. 1994) (requiring demand in all cases except those in which the plaintiffs can make a specific showing that “irreparable injury to the corporation” would result if they are not able to commence litigation without first making a demand on the board).

¹⁹⁸ See *id.* § 7.10(a)(1). Thus, the ALI approach might allow shareholder plaintiffs to avoid the hurdle of the business judgment rule in a case involving an illegal direct political contribution (compare *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 762 (3d Cir. 1974) (holding that the business judgment rule would not apply if plaintiffs could show a violation of federal election law)), but it is unlikely to lead to recovery for shareholders challenging independent corporate political spending of the kind permitted by *Citizens United*.

that provide heightened judicial scrutiny in “demand futile” derivative cases, in most instances a court reviewing a special litigation committee’s decision to rebuff a shareholder demand still will apply the business judgment rule and decline to second guess a board’s decision not to proceed with litigation.¹⁹⁹ As a consequence, the law of corporate derivative litigation as it has evolved since *Bellotti* was decided presents significant obstacles to effectively using “the judicial remedy of a derivative suit to challenge corporate disbursements”²⁰⁰ that Justice Powell believed would serve as a means of preventing corporate political spending abuses.²⁰¹ In short, even if a majority of shareholders disapproves of a political expenditure or religious practice undertaken by corporate managers, it cannot reverse such action so long as that action can be regarded as at all reasonable.

For our purposes, however, the point is not to provide an exhaustive analysis of how the law of shareholder derivative litigation applies to corporate political expenditures or religious practices.²⁰² (And in the preceding discussion we admittedly have done little more than scratch the surface of this complex area of law.) Rather, the goal is to demonstrate how out of date the *Bellotti* precedent was when the *Citizens United* majority relied upon it—apparently without any analysis or consideration of subsequent development of the relevant legal authorities.²⁰³ All of

¹⁹⁹ See *Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981) (holding that a court reviewing a special litigation committee’s motion to dismiss derivative litigation “may proceed, in its discretion, to the next step” of judicial review of the merits of the committee’s decision, but is not required to do so).

²⁰⁰ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 796 (1978). Professor Stephen Bainbridge has asserted that under the business judgment rule, the appropriate legal responses to a charge that excessive independent political expenditures have damaged a for-profit business corporation are “so what” and “who cares.” He observes that even if the allegation is that corporate officers and directors have “use[d] corporate treasury funds to further their own personal political goals,” a plaintiff is unlikely to prevail: “Getting past the motion stage of such a case is thus damned difficult, because courts will require considerable evidence of self-dealing before the business judgment rule will be rebutted.” Stephen Bainbridge, *Citizens United, Corporate Political Expenditures, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 24, 2012, 12:25 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2012/05/citizens-united-corporate-political-expenditures-and-the-business-judgment-rule.html> [<http://perma.cc/JY9W-VQ52>]. Although Professor Bainbridge’s prose may be provocative, and probably intentionally so, for better or worse his summation of corporate law is spot on.

²⁰¹ But see Nelson, *supra* note 191, at 172-73 (proposing that shareholders pursue derivative claims under the corporate waste doctrine to challenge independent political expenditures, but recognizing that shareholders “must meet a high burden” to successfully assert a corporate waste claim that would overcome the business judgment rule).

²⁰² Nelson, *supra* note 191, provides an analysis of how one kind of derivative claim, corporate waste, might be used to challenge independent political expenditures.

²⁰³ But see Nelson, *supra* note 191, at 154 (advocating use of derivative litigation to challenge excessive corporate independent political expenditures and citing language in *Citizens United* and other Supreme Court opinions indicating that “the

the cases cited above governing the modern law of corporate derivative litigation were decided after *Bellotti*. For the Supreme Court in *Citizens United* to have ignored more than three decades of development in this critically important and relevant area of corporate law, with no more than a dismissive citation to precedent that was questionable even when it was first advanced, is an abdication of the Court's responsibility to base its decisions on thorough, well-reasoned, and up-to-date legal analysis.

c. Shareholder Amendment of Articles of Incorporation and Bylaws

The other avenue of “corporate democracy” redress for aggrieved shareholders as identified in *Bellotti* and re-embraced in *Citizens United*—shareholder amendment of corporate articles of incorporation or bylaws—fares no better under close scrutiny. State law today, as was the case when *Bellotti* was decided, permits corporations to be formed to “conduct or promote any lawful business or purposes”²⁰⁴ and specifically authorizes corporations to make contributions and donations.²⁰⁵ In addition, the business judgment rule likely protects corporate management's decisions to engage in political spending.²⁰⁶ Thus, as currently structured, corporate law is designed to give management wide discretion that encompasses a decision to engage in political spending.²⁰⁷ The assertion that shareholders can somehow contravene this structural support for managerial discretion is naïve and far-fetched from the reality of modern corporate governance. As one commentator has summarized the law, “The primacy of the shareholder franchise is widely understood as a myth in practice under current law.”²⁰⁸

Court also believes that if the expenditures are detrimental to the corporation, shareholders have a judicial remedy based upon the corporate waste doctrine”).

²⁰⁴ See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (2015) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”); 15 PA. CONS. STAT. § 1301 (2015) (“Corporations may be incorporated under this subpart for any lawful purpose or purposes.”).

²⁰⁵ See, e.g., DEL. CODE ANN. tit. 8, § 122(9) (2015) (giving Delaware corporations the power to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes”); 15 PA. CONS. STAT. § 1502 (a)(9) (2015) (giving Pennsylvania corporations the power to “make contributions and donations”).

²⁰⁶ See *supra* notes 184-91 and accompanying text (discussing the application of the business judgment rule to shareholder challenges to corporate political expenditures).

²⁰⁷ Cf. Rosenberg, *supra* note 189, at 301-02.

²⁰⁸ Michael S. Kang, *Shareholder Voting as Veto*, 88 IND. L.J. 1299, 1305 (2013). We distinguish efforts by corporate founders to place limits on their own conduct, although such limits are more often reflected in initial public offerings and other disclosures, not in the governing documents. See *infra* notes 213-15 and accompanying text.

First, any effort to amend a company's charter to limit managerial prerogatives on political spending (or religious practices) would require both shareholder knowledge of the spending and a majority vote of the company's shareholders in opposition to that spending or practice,²⁰⁹ and in some states would also require the approval of the company's board of directors.²¹⁰ As a practical matter, this would end the analysis in most cases because a majority of shareholders are unlikely to rise up and oppose the management group they have previously elected,²¹¹ and any minority shareholder group that does oppose management due to political spending will not have sufficient votes to effect change.²¹² Second, even in an extraordinary case where a majority of shareholders opposes management's political spending activities, the mechanics of corporate governance make a successful shareholder insurgency exceedingly unlikely.²¹³ The

²⁰⁹ See MODEL BUS. CORP. ACT §§ 10.03-10.04 (2005) (providing for amendment of the articles of incorporation by a majority vote of the shareholders); see also 7A FLETCHER CYCLOPEDIA CORPORATIONS § 3719 (2015) [hereinafter FLETCHER] ("Amendments to the articles or certificate of incorporation may require (1) a resolution of the corporation's board of directors, although in jurisdictions following the Model Business Corporation Act, no particular form is required for directoral adoption or proposal to shareholders; (2) written notice to the shareholders of the proposed amendment or a summary of the changes to be affected by it; (3) the affirmative vote at an annual or special meeting of the shareholders of at least a majority or two-thirds of the shares entitled to vote on the proposed amendment, or of a particular class of shares when voting as a class, unless a greater proportionate vote on the proposed amendment is specifically required by the corporation's original articles or certificate of incorporation; (4) the preparation of 'articles of amendment' or a 'certificate of amendment' and the delivery of such instrument to the secretary of state or other designated state official." (footnotes omitted)).

²¹⁰ See, e.g., DEL. CODE ANN. tit. 8, § 242 (2015) (specifying procedures for bylaw amendments beginning with adoption of a board of directors resolution in favor of the amendments); see also 7A FLETCHER, *supra* note 209, § 3719 (2014) ("Amendments to the articles or certificate of incorporation may require . . . a resolution of the corporation's board of directors . . ."); Kesten, *supra* note 92, at 494 n.46 (discussing Delaware law and noting that "the charter, which can only be amended if both the board and shareholders agree, trumps the bylaws" (emphasis added)).

²¹¹ Moreover, in Delaware and other states that require board action to amend the corporate charter, the shareholders almost certainly will not be able to obtain the requisite board assent.

²¹² Nor are shareholders of a newly formed business corporation likely to include in its certificate of incorporation a provision limiting management's discretion to engage in political spending. As the brief discussion above suggests, the recent history of corporate law, from the time of *Bellotti* to the present, is marked by development of organic corporate documents that have expanded the range of managerial discretion, not constrained it by "tying the hands of management" at the corporate formation stage.

²¹³ See generally Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990); Christopher Gulinello, *The Retail-Investor Vote: Mobilizing Rationally Apathetic Shareholders to Preserve or Challenge the Board's Presumption of Authority*, 2010 UTAH L. REV. 547 (2010). See also Alexander G. Simpson, Note, *Shareholder Voting and the Chicago School: Now Is the Winter of Our Discontent*, 43 DUKE L.J. 189, 193-94 (1993) (noting that while disaffected shareholders theoretically

assumption that shareholders can simply amend the articles/certificate of incorporation to check corporate political spending is almost entirely theoretical, with little or no basis in the real world of corporate governance.²¹⁴

The same is true for the argument that shareholders might amend a corporation's bylaws to restrict corporate political spending.²¹⁵ While bylaw amendments might at first blush appear to provide an easier path to shareholder influence over corporate activity, because shareholders can initiate bylaw changes without board assent and implement them by a majority vote,²¹⁶ the reality is somewhat more complex and considerably less hospitable to shareholder action. First, the process of using a bylaw amendment to change corporate policy is subject to a hidden trap that is not immediately evident to those not steeped in corporate law: bylaw changes cannot contravene the provisions of a company's articles/certificate of incorporation.²¹⁷ As Professor Kesten has astutely noted, "the seemingly innocuous carve out—that the bylaws must not be 'inconsistent with law'—threatens to swallow the entire grant of authority, because several other provisions of the same statute purport to require that any restraints on managerial authority must be set forth in the charter."²¹⁸ Shareholders are caught in a circular trap: even if they somehow can act without board assent and muster a majority of votes to amend the corporate bylaws to restrict corporate political spending, the corporate charter/articles of incorporation may contain general (authority to "conduct or

can amend a company's certificate of incorporation or bylaws, "many authors have questioned shareholders' power to control their corporations in this way, noting that management generally controls the corporate machinery").

²¹⁴ The problems stemming from separation of ownership and control popularized by Berle and Means are exacerbated in the age of *Citizens United*. In the current corporate landscape, entities such as mutual and pension funds own the majority of stock in American public corporations. The result, Strine and Walter posit, is not simply separation of ownership and control, but "separation of ownership from ownership." See Strine & Walter, *supra* note 64, at 370, 376. Strine and Walter conclude that the realities of separation of ownership from ownership strengthen the argument that "the tools available to those whose equity capital is ultimately at stake are not well designed to constrain management from pursuing ends those investors may not support." Strine & Walter, *supra* note 64, at 376.

²¹⁵ Cf. Simpson, *supra* note 213, at 193-94 (dismissing the argument that disaffected shareholders will amend the certificate of incorporation or the bylaws).

²¹⁶ See Kesten, *supra* note 92, at 494 ("The bylaw power allows shareholders, by majority vote and by their own initiative, to impose their will directly on a company's affairs and governance." (discussing Delaware law)).

²¹⁷ *Id.* (discussing section 109(b) of the Delaware corporate code, which permits shareholders to amend the bylaws to restrict management's authority "as long as the bylaw does not contravene the company's charter").

²¹⁸ *Id.* at 494-95.

promote any lawful business or purposes”²¹⁹) or specific (power to “make contributions and donations”²²⁰) provisions that a court would construe as invalidating a bylaw change.²²¹

The problems with bylaw amendments go well beyond this potential technical trap, however. Even if one assumes that shareholders opposing corporate political activity could amass the support of a majority of shareholders and amend the corporate bylaws to prevent or restrict political spending, and even assuming that no provisions of that particular corporation’s articles/certificate of incorporation would invalidate the bylaw amendment, it is not clear that courts would uphold the amendment.²²² As Professor Kesten has explained, the scope of the shareholder bylaw amendment power is “uncertain,” and it is unclear that courts will uphold a bylaw amendment that intrudes upon management prerogatives²²³ (especially prerogatives that are now protected by the First Amendment or RFRA under *Citizens United* or *Hobby Lobby*). While an in-depth analysis of the law governing shareholder-proposed bylaw amendments is beyond the scope of this article, it is sufficient here to note that there is no more reason to believe that bylaw amendments can meaningfully constrain corporate political activity than to believe that shareholder derivative litigation or corporate charter amendments can do so.²²⁴ None of the “corporate democracy”

²¹⁹ See *supra* note 204 and accompanying text (discussing corporate formation statutes).

²²⁰ See *supra* note 205 and accompanying text (discussing enabling provisions in corporate charters/articles of incorporation).

²²¹ See Kesten, *supra* note 92, at 494 n.46 (“It is settled Delaware law that a bylaw that is inconsistent with the corporation’s charter is invalid.” (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1189 (Del. 2010))).

²²² Cf. *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227 (Del. 2008) (invalidating a shareholder-proposed bylaw); *Gen. Datacomm Indus., Inc. v. State of Wis. Inv. Bd.*, 731 A.2d 818, 821 n.2 (Del. Ch. 1999) (“[W]hile stockholders have unquestioned power to adopt bylaws covering a broad range of subjects, it is also well established in corporate law that stockholders may not directly manage the business and affairs of the corporation, at least without specific authorization either by statute or . . . articles of incorporation.” (quoting Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409, 415-16 (1998))).

²²³ See Kesten, *supra* note 92, at 492-500 (analyzing authorities and recognizing that shareholder bylaw amendments that would constrain board authority may run afoul of the ubiquitous corporate law statutory provision that the business and affairs of a corporation shall be managed by or under the direction of a board of directors).

²²⁴ Cf. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 732 (2007) (“The shareholder franchise is largely a myth. Shareholders commonly do not have a viable power to replace the directors of public companies.”); Kang, *Shareholder Voting as Veto*, *supra* note 208, at 1299 (“The Delaware Chancery Court has famously declared that the ‘shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests,’ but the effective practice of the shareholder franchise to constrain board discretion under current law is

avenues identified in *Bellotti* and *Citizens United* provide any real-world prospects for shareholders to limit or constrain corporate political spending.

3. “Ignoring Practical Realities”—Disgruntled Shareholder Exit Options in the Real World

As the discussion above suggests, shareholders who oppose their company’s political spending and take a hard, practical look at the available “corporate democracy” options are left with only one realistic option—“dissatisfied shareholders can simply follow the ‘Wall Street’ rule and sell off their shares” in protest.²²⁵ Unfortunately for many corporate shareholders, and contrary to the superficial corporate law analysis in *Bellotti*²²⁶ and *Citizens United*,²²⁷ even this “ultimate shareholder democracy” option is realistically unavailable in many instances. When the option is available, as it is for shareholders in a public company with a liquid trading market for its stock, shareholders who decide to sell their shares are unlikely to influence political spending by the company’s management. To the contrary, the selling shareholders are likely to suffer by forgoing the future benefits of their investment, while management will benefit by ridding themselves of shareholders who disapprove of their conduct. Each of these points is discussed further below.

The “sell your shares” remedy for disaffected shareholders who oppose a corporation’s political activities is illusory for at least four reasons. First, for shareholders in privately held companies with no liquid trading market for corporate stock, the option of selling their shares is simply not available.²²⁸ There may

‘largely a myth’ in practice.” (footnote omitted) (quoting *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988))).

²²⁵ Kang, *Shareholder Voting as Veto*, *supra* note 208, at 1308 (citing Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 *BUFF. L. REV.* 1, 41 (1993) (explaining the Wall Street rule that “it is more efficient to sell a particular stock than it is to try to reform the company”)).

²²⁶ See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) (stating that a corporate shareholder “invests in a company at his own volition and is free to withdraw his investment at any time and for any reason”).

²²⁷ See *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010).

²²⁸ See, e.g., Ribstein, *supra* note 146, at 1047 (observing that “the owners of closely held corporations, which do not trade in public securities markets, may have no ability to object to corporate speech by exiting as do shareholders in publicly traded firms”); see also Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 *DUKE L.J.* 293, 295 (2004) (describing the lack of a market for shares in closely held corporations). As one corporate law scholar has recently succinctly explained, “Mistreated minority shareholders [in a closely held corporation] cannot exit and recover the value of their investment because the shares are not publicly traded and no rational investor would

be no buyers for their stock, or at least no buyers who will pay anything approaching the stock's underlying economic value.²²⁹ Worse still, in some instances the owner of shares in a privately held company cannot offer to sell those shares to the public without risking liability under the federal securities laws for an illegal sale of unregistered securities.²³⁰ Therefore, for entire classes of shareholders—owners of shares in small, closely held corporations and in large, privately held corporations in which there is no public market for the company's shares—Justice Powell's generalization in *Bellotti* that a shareholder "is free to withdraw his investment at any time and for any reason"²³¹ simply is not the case.²³²

The second reason the "sell your shares" option cannot serve as a meaningful check on corporate political spending is that even in public companies where shareholders could freely sell their stock to protest management's political spending of corporate funds, they may have good reason not to do so. Selling means that a shareholder must give up significant future economic benefits, such as corporate growth, dividend payments, and stock price increases. It seems unlikely that many shareholders who have made an economic decision to invest in a company would give up these significant future benefits as a means of protesting against corporate political spending—especially shareholders of large, publicly traded companies (the only companies whose shareholders can readily sell, as explained above) where such expenditures are likely to be only a de minimis portion of corporate expenditures.

A recent law review article co-authored by the Chief Justice of the Delaware Supreme Court²³³ identifies a third reason that the

pay for the shares of a frozen-out minority." Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1200 (2013) (citations omitted).

²²⁹ See Moll, *supra* note 228, at 315-18 (describing the difficulty of selling stock in a closely held corporation and discussing the "minority discount" and "marketability discount" that reduces the price a seller can obtain for minority shares in a closely held corporation).

²³⁰ See generally Thomas M. Devaney & Paul "Chip" Lion, *Secondary Markets for Restricted Securities in Private Markets*, ASPATORE (Mar. 2012), 2012 WL 4751795 (discussing federal securities law limitations on sales of restricted securities). For the definition of "restricted securities," see *id.* at 12 n.47. Shareholders in privately held companies must take care to avoid potential liability under section 5 of the Securities Act of 1933, 15 U.S.C. § 77e (2012), which makes it unlawful to offer a security for sale unless a registration statement has been filed.

²³¹ See *Bellotti*, 435 U.S. at 794 n.34.

²³² This problem is especially likely to be present in a closely held corporation such as Conestoga or Mardel (as discussed in Part II *infra*, we question whether Hobby Lobby is in fact a closely held corporation).

²³³ Strine & Walter, *supra* note 64, at 365-79 (explaining the "separation of ownership from ownership" that exists today when most of the stock of publicly traded

sell your shares “exit” option is “much less tenable today”²³⁴ than it was when Justice Powell wrote the *Bellotti* majority opinion. Strine and Walter explain that at the time *Bellotti* was decided, and even into the 1980s, “the class of Americans who were invested in the stock market was likely to be far more affluent than the average person,” and “ordinary American workers were typically not considered part of the investing class” because they were not likely to be invested in the stock market.²³⁵ Strine and Walter note that “[t]he *Citizens United* majority appears to have adopted this simplistic idea of the relationship between stockholders and for-profit, public corporations.”²³⁶

Strine and Walter identify a number of significant impediments to the shareholder exit option relied upon in *Bellotti*: most American workers now do not have a defined-benefit pension plan and, as a practical matter, are forced to save for retirement in a defined-contribution 401(k) plan. But most 401(k) plans do not give workers the option to buy or sell particular stocks—they instead must invest in mutual funds and therefore have no ability to sell the shares of companies whose political spending or religious activities they disfavor.²³⁷ If a worker withdraws funds early from a 401(k) plan, he or she will suffer a significant tax penalty, so the only realistic choice a 401(k) investor has is to move funds among his or her plan’s mutual fund options.²³⁸ Similar restrictions exist in the section 529 accounts that many Americans use to invest savings for their children’s higher education.²³⁹ The current reality of investor participation in the American stock market, as Strine and Walter point out—and as the *Citizens United* majority failed to recognize—is that

American corporations is owned by institutional investors such as mutual or pension funds, rather than directly by individual investors who theoretically might “exit” by selling their shares in a public corporation if they disagreed with management’s political activities). For additional analysis of the “separation of ownership from ownership,” see Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822 (2011).

²³⁴ Strine & Walter, *supra* note 64, at 368.

²³⁵ *Id.* (citations omitted).

²³⁶ *Id.* at 369. In a subsequent paper, Strine and Walter have analyzed the historical understanding of the rights of business corporations as of 1791, when the First Amendment was adopted, and 1868, when the Fourteenth Amendment was adopted, and concluded that *Citizens United* is not consistent with an originalist interpretation of the Constitution. Leo E. Strine, Jr. & Nicholas Walter, Originalist or Original: The Difficulties of Reconciling *Citizens United* with Corporate Law History (Feb. 13, 2015) (Harvard Law School Program on Corporate Governance Discussion Paper 2015-2) (concluding that “the decision in *Citizens United* to overturn a bipartisan statute appears to us more original than originalist”).

²³⁷ Strine & Walter, *supra* note 64, at 372.

²³⁸ *See id.* at 374-75.

²³⁹ *See id.* at 375.

“the tools available to those whose equity capital is ultimately at stake are not well designed to constrain management from pursuing ends those investors may not support.”²⁴⁰

In other words, even if the *Bellotti* assurance that a corporate shareholder “can withdraw his investment at any time and for any reason” had some merit when first advanced, in today’s much more complex investing markets, it simply is no longer true. Instead, as Strine and Walter summarize, investing has changed to the extent that

[m]ost Americans have become “forced capitalists” who must give over a large portion of their wealth to the stock market to fund their retirements and their children’s educations. As a result, the actual human beings whose capital is invested by these intermediaries do not directly vote on who sits on corporate boards, do not have the option to buy and sell the securities of particular companies on any basis, and only retain very limited rights of exit from the market without facing expropriatory levels of taxation.²⁴¹

The *Citizens United* majority’s failure to recognize the import of these seismic shifts in the country’s capital markets exposes the fundamental weakness of the majority opinion’s corporate law analysis.

The final, but arguably most important, reason the “sell your shares” option will not correct “abuse” of corporations’ political spending powers is that sales of shares, even if a realistic possibility, will not influence management’s actions. For shareholders who sell their shares to influence management, the sales must be sufficient in volume to affect the company’s share price.²⁴² In any large, publicly traded company (again, the only kind of company in which the “sell your shares” option is realistically available to dissident shareholders), it is unlikely, for the reasons discussed above, that a significant number of shareholders will opt to sell their shares to protest political spending or religiously motivated conduct. So long as selling shareholders do not reach a “critical mass” sufficient for their actions to drive down the company’s stock price, management is unlikely to change its political spending or religiously motivated practices—and, in fact, probably will not even take notice of the shareholders’ actions. Only in an exceptional case of egregious

²⁴⁰ *Id.* at 376.

²⁴¹ *See id.* at 370 (footnotes omitted).

²⁴² *See, e.g.*, Kesten, *supra* note 92, at 493 (“By definition, though, exit is a market mechanism that affects a firm’s corporate governance only insofar as it causes sufficient changes in the market price of a firm’s shares and the signals sent thereby can be linked to the underlying conduct at issue.”).

and widespread abuse of the corporate political spending power might there be a widespread “shareholder revolt” and a “mass exodus” of dumping shares on the market and driving down the company’s stock price.²⁴³ And the decline in stock price as shares were dumped in this manner would subject the selling shareholders to significant financial loss. Even if this unlikely scenario were to occur in the real world, it would be an unacceptable means of curbing management abuses—a regulation at the margins that would have no impact on the vast majority of companies. At most, the ability to dump one’s shares would provide a dissenting shareholder with a modicum of freedom (i.e., the option to part company with the corporation, not to alter its practices). Only the rare institutional investor with a conscience (perhaps, for example, an institution of higher education or a socially conscious mutual fund²⁴⁴) might have enough market clout to stir the corporate conscience.

4. The “Procedures of Corporate Democracy” Provide No Real Means of Redress for Shareholders Who Oppose Corporate Political Spending

For all of the reasons set forth above, the portion of *Bellotti* that relied upon “procedures of corporate democracy” to curb corporate political spending abuses was at best a weak argument when Justice Powell advanced it in 1978 and an outdated and untenable one when the *Citizens United* majority cited it in 2010. If we acknowledge that corporate democracy cannot constrain corporate political spending, then what can be done? We propose an answer to that question in Part IV, but first we will examine the Supreme Court’s more recent exposition on corporate governance in *Hobby Lobby*.

B. Hobby Lobby and Corporate Law

The flaws in the *Citizens United* corporate law analysis described above are important, but for the most part, they are

²⁴³ Cf. Ribstein, *supra* note 146, at 1034 (“Corporations compete for capital in highly competitive capital markets. Firms that waste money on speech that does not help their bottom line will have to pay more for capital.”).

²⁴⁴ E.g., Calvert Social Investment Equity and Parnassus Endeavor Fund employ positive and negative social screens (i.e., investment procedures that eliminate tobacco and alcohol stocks and prefer investment in firms with strong environmental records and good employee relations). A state employees’ retirement fund might have similar concerns. See *infra* note 501 and accompanying text (discussing New York State Common Retirement Fund’s lawsuit against Qualcomm, Inc.).

technical, “real-world application” issues that could be expected to foster confusion in judges who are not experts in corporate law.²⁴⁵ The flaws in the corporate law analysis in the *Hobby Lobby* majority decision, in contrast, implicate the core conceptual underpinnings of corporate law that should be familiar to all judges and lawyers.²⁴⁶

1. Conflation of the Identities and Interests of Corporations and Their Controlling Shareholders

The principal flaw in *Hobby Lobby*’s corporate law analysis is that Justice Alito’s majority opinion essentially “pierced the corporate veil” and disregarded the separate legal identities of the privately held corporations in the case and the shareholders who own those corporations. While veil piercing certainly is a viable corporate law doctrine, and while there certainly are instances in which corporate law treats closely held corporations differently, there is no support in corporate law doctrine for the kind of blanket disregard of the corporate entity (and corresponding attribution of shareholder interests to the corporation) that the majority opinion employed in *Hobby Lobby*.²⁴⁷

Hobby Lobby’s flawed conception of the corporate form rests on two assertions. First, in rejecting the Third Circuit’s conclusion that RFRA protections do not apply to for-profit corporations, Justice Alito asserted that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”²⁴⁸ Corporations of course cannot “do things” in a tangible, physical sense, but as legal “persons” with separate identities under the law, corporations in fact can do many, many important things—enter into contracts, sue and be sued in legal proceedings, be prosecuted in their own names for violating the law, etc.²⁴⁹ While this

²⁴⁵ The exception is the degree to which *Citizens United* conflicts with the prevailing “shareholder primacy norm” in corporate law; the corporate law analysis in *Hobby Lobby* suffers from the same analytical oversight.

²⁴⁶ Cf. Strine & Walter, *supra* note 64, at 345 n.14 (discussing the view of corporate governance held by the five Justices in the *Hobby Lobby* (and *Citizens United*) majority as a view that “conservative corporate legal theory rejects” and “is at odds with traditional conservative [‘contractarian’ corporate] thought”).

²⁴⁷ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) (asserting that “allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and Hahns”).

²⁴⁸ *Id.* at 2768. The second assertion, regarding the extent to which for-profit business corporations can act to “further humanitarian and other altruistic objectives” and to “further religious objectives,” see *id.* at 2771, is discussed in Part III, *infra*.

²⁴⁹ See generally *supra* Part I (discussing the history of corporate personification). See also Sepinwall, *supra* note 144, at 202 (arguing that “corporations

distinction between corporations as artificial legal entities and the human beings who own and operate them may at times cause confusion for persons not trained in the law,²⁵⁰ for lawyers and judges it is second nature to recognize and respect the distinction.

The majority opinion then went on to conflate, repeatedly, the religious convictions of the individuals who own the corporations involved in the case (Conestoga, Hobby Lobby, and Mardel) and the actions of those corporations in refusing to comply with the Affordable Care Act's contraceptive coverage requirement. The opinion conveniently ignored that the corporations were acting "separate and apart from" the individuals who own them, for it was the corporations, and not the individuals whose sincerely held religious beliefs the majority sought to protect, that were subject to the ACA and were refusing to comply with it.²⁵¹

Corporate law of course does not support treating corporate entities and the individuals who own and manage the corporations as indistinguishable,²⁵² a basic legal proposition that

may be treated as if they possess rights of religious freedom as a way of protecting the religious freedom rights of the corporation's controlling members").

²⁵⁰ Even those trained in law may misstep in this area, as presidential candidate Mitt Romney, an honors graduate of Harvard Law School, found in 2011, when he told a heckler in the audience at the Iowa State Fair that "[c]orporations are people, my friend." See Ashley Parker, 'Corporations are People,' *Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES, Aug. 12, 2011, at A16. The widespread negative response to candidate Romney's statement suggests that even though corporations may well be persons in the eyes of the law for most purposes, they are not "people" in the eyes of the public. This distinction perhaps explains more powerfully than all our legal analysis why the general public has reacted so strongly, and so negatively, to the Supreme Court's holdings in *Citizens United* and *Hobby Lobby*. This article seeks to explain why those holdings are not only inconsistent with public opinion, but also with relevant legal authorities and longstanding corporate law theoretical underpinnings.

²⁵¹ See *Hobby Lobby*, 134 S. Ct. at 2769 ("[A]llowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns."); *id.* at 2774 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of *their* religious beliefs." (emphasis added)); *id.* at 2775 ("By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that *they* engage in conduct that seriously violates *their* religious beliefs." (emphasis added)); *id.* at 2776 ("[T]he Hahns and the Greens and their companies have religious reasons for providing health-insurance coverage for *their* employees." (emphasis added)); *id.* at 2778 ("The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for *them* to provide the coverage." (emphasis added)).

²⁵² To illustrate just how extraordinary is the position taken by the *Hobby Lobby* majority and the Tenth Circuit in attributing the shareholders' religious beliefs to the corporations they controlled, and then treating those corporations as "persons" protected by RFRA, it is useful to quote the reaction of U.S. District Judge Joe L. Heaton, the trial judge in the *Hobby Lobby* case, after the Tenth Circuit, much to Judge Heaton's surprise, held that "business corporations are persons for purposes of RFRA" (in Judge Heaton's words)

was ably presented to the Court in the *Hobby Lobby* briefs²⁵³ and that the Third Circuit recognized in its holding.²⁵⁴ Justice Alito's majority opinion departed sharply from established corporate law and disagreed, at least with respect to "closely held corporations . . . owned and controlled by . . . a single family . . . [where] no one has disputed the sincerity of their religious beliefs."²⁵⁵

and remanded the case back to him to decide whether or not a preliminary injunction should be entered for Hobby Lobby and Mardel.

I would say in all candor that in wrestling with the issues in this case, there have been a lot of them that were close, hard questions, but I, frankly, would never have envisioned the question of whether Hobby Lobby and Mardel as business corporations qualify as persons for purposes of RFRA. I don't see that as a close question, and I'm frankly extraordinarily surprised that the court of appeals would draw the conclusion that they have there. It seems to me that that is extraordinarily difficult to justify as a matter of statutory interpretation. It's a conclusion that I think complicates and in some ways makes just simply an analytical hash of trying to work through some of these hard issues if we're proceeding on the basis of the legal fiction that business corporations have religious exercise rights. I'm not sure that conclusion arises to the status of being what Justice Scalia would call a jaw-dropping conclusion, but it seems to me that it gets very fairly close. Nonetheless, that is what they have concluded, and so I'm, of course, obliged to go forward in connection with that.

Hearing on Plaintiffs' Motion for Preliminary Injunction, *Hobby Lobby Stores, Inc. v. Sebelius*, 2013 WL 3869832 (W.D. Okla. July 19, 2013) (No. CIV-12-1000_HE), 2013 WL 6994543.

²⁵³ See Reply Brief for the Petitioners at 5-6, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 13-354), 2014 WL 985095 ("And we recognize that in situations involving small closely held corporations owned, directed, and managed by a tightly knit group of individuals, the claim that the corporations' actions reflect the religious commitments of their owners is not without appeal. But respondents cannot articulate a principled justification for allowing claims to proceed in such circumstances that would not also embroil courts in disputes over corporate governance (such as the rights of minority owners) or the meaning and sincerity of religious commitments (such as those made by proxy vote in public corporations) . . ."); Brief of Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 3-18, *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Nos. 13-354, 13-356), 2014 WL 333889 (arguing that "attributing to a corporation the religious identity of its controlling shareholders is contrary to corporate law").

²⁵⁴ *Conestoga Wood Specialties Corp. v. U.S. Dep't of Health and Human Servs.*, 724 F. 3d 377, 385 (3d Cir. 2013).

²⁵⁵ See *Hobby Lobby*, 134 S. Ct. at 2774. Here we emphasize, as we will throughout our analysis below, that there is more than adequate support for interpreting the Court's RFRA holding as applying only to closely held corporations, as Justice Alito indicated at the end of his majority opinion, see *id.* at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA." (emphasis added)), and as Justice Kennedy, in his concurring opinion that provided the crucial fifth vote for the majority, emphasized. See *id.* ("In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations." (emphasis added)).

2. Limiting *Hobby Lobby's* Holding to Only Closely Held Corporations Whose Shareholders Have Unanimously Agreed to Adopt Explicitly Identified Religious Beliefs and Apply Those Beliefs to the Operation of the Corporation's Business

In addition to distinguishing between closely held family corporations and publicly traded “corporate giants,” which he thought “unlikely” to assert RFRA claims,²⁵⁶ Justice Alito asked the rhetorical question why the for-profit corporations before the Court in *Hobby Lobby* “cannot exercise religion,” and then chastened “HHS and the dissent” for failing to provide an answer to his question.²⁵⁷ The likely reason no answer was provided is that prior to Justice Alito’s opinion in *Hobby Lobby*, no Supreme Court case had ever protected religious exercise by for-profit corporations.²⁵⁸ We believe, however, that there is a good answer to Justice Alito’s question, albeit one that requires a more nuanced analysis of how corporate law should apply to an effort by controlling shareholders of closely held corporations to use those corporations to advance their personal religious beliefs.

As Justice Alito’s majority opinion did recognize, there is an extensive body of corporate law that applies to the situation before the Court in *Hobby Lobby*: “An established body of law

²⁵⁶ See *id.* at 2774. As noted above, we believe that the majority and concurring opinions support interpreting the Court’s holding as applicable only to closely held family corporations, see *id.* at 2769 (referring to “the closely held corporations involved in these cases” and the application of RFRA to “these corporations”), and that a close reading of the opinions is sufficient to dispel any suggestion that its corporate law/exercise of religion analysis encompasses corporations that are not both closely held and controlled by a single family with shared religious beliefs. Unfortunately, however, the majority opinion is disappointingly imprecise on the all-important question of the extent of its application. See *id.* at 2774 (stating that “it seems unlikely that . . . corporate giants . . . will often assert RFRA claims” and thereby suggesting that larger companies also might be viewed by the majority as having a right to assert RFRA claims if they sought to do so).

²⁵⁷ See *id.* at 2769.

²⁵⁸ Justice Ginsburg emphasized this point in her dissent and provided a comprehensive analysis of how for-profit corporations differ from religious organizations in terms of the exercise of religion. See *id.* at 2794-97 (Ginsburg, J., dissenting). The same point was included in briefs submitted to the Court. See Reply Brief for the Petitioners at 1, *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (No. 13-354), 2014 WL 985095 (“Respondents have not identified a single case in this Nation’s history in which a commercial enterprise has successfully invoked either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 (RFRA) to secure what respondents seek here: an exemption from a neutral law regulating a for-profit corporation’s commercial activities.” (citation omitted)). It was also included by the Third Circuit in its opinion below. See *Conestoga*, 724 F.3d at 384 (“[W]e are not aware of any case preceding the commencement of litigation about the [Affordable Care Act contraceptive] Mandate, in which a for-profit, secular corporation *was itself* found to have free exercise rights.” (emphasis added)).

specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.”²⁵⁹ Unfortunately, the majority opinion made no effort to apply *that* body of law and instead immediately jumped to the second conclusion Justice Alito wished to reach: “When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”²⁶⁰ The reality of how corporate law applies is much more complex, and it implicates concerns and policy issues that extend far beyond the “rights” of the controlling shareholders of corporations.²⁶¹

Corporate law has an intricate and highly evolved set of rules with which controlling shareholders (such as the Greens and the Hahns in the cases before the *Hobby Lobby* Court) must comply in operating corporations, whether wholly owned,²⁶² closely held,²⁶³ privately held,²⁶⁴ or publicly traded.²⁶⁵ Most

²⁵⁹ *Hobby Lobby*, 134 S. Ct. at 2768.

²⁶⁰ *Id.*

²⁶¹ For an incisive analysis refuting this new “pass through theory” of corporate legal rights, see Strine & Walter, *supra* note 64, at 382 n.196 (discussing pre-*Citizens United* authorities supporting limiting political participation rights of corporations and concluding by quoting Justice Rehnquist’s dissenting opinion in *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 33 (1986): “Extension of the individual[s] freedom of conscience decisions to business corporations strains the rationale of those [First Amendment ‘negative free speech rights’] cases beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”). *But see* Sepinwall, *supra* note 144, at 199-200 (arguing that a corporation’s owners and managers should be treated differently from “rank-and-file employees” because it is the owners and managers who will be held morally accountable for the corporation’s actions).

²⁶² Conestoga Wood Specialties Corporation is a Pennsylvania for-profit corporation that is wholly owned by members of the Hahn family, see *Hobby Lobby*, 134 S. Ct. at 2764, so presumably that corporation has no minority shareholders who might raise objections to the Hahn family’s actions in operating the corporation. As discussed below, however, this lack of minority shareholders does not release the Hahns from their obligations to comply with the requirements of Pennsylvania law, including the duty of care and the duty of loyalty, that apply to the operation of all for-profit corporations organized under the laws of the Commonwealth of Pennsylvania.

²⁶³ Hobby Lobby and Mardel are Oklahoma for-profit corporations founded and controlled by the Green family; Hobby Lobby has more than 13,000 employees, and Mardel has “close to 400” employees. See *id.* at 2765. Justice Alito’s majority opinion stated that although Hobby Lobby and Mardel “have expanded over the years, *they remain closely held*,” and David, Barbara, and their children retain exclusive control of both companies.” See *id.* (emphasis added). The Verified Complaint filed by the companies and the Greens, however, stated that the companies are “privately held” (paras. 2-3 and 23-24) and that “members of the Green family operate Hobby Lobby and Mardel through a management trust, *which owns all of the voting stock of these companies*” (para. 38 (emphasis added)). Complaint ¶¶ 1, 6, 9, *Hobby Lobby Stores v. Sebelius*, 870 F. Supp.2d 1278 (W.D. Okla. 2012) (No. 12-cv-0100), 2012 WL 4009450. The latter phrase is significant because it suggests that the companies may have additional, nonvoting stock outstanding that is not owned by the Green family. This is important for two reasons: (1) if the companies have nonvoting stock outstanding that is held by more than a few shareholders, then they technically are not “closely held” corporations—

contrary to Justice Alito's description of the companies but consistent with the presumably carefully chosen language in the Verified Complaint; and (2) whether or not the corporations are closely held, any minority shareholders have legal rights that cannot be ignored, even if the stock they hold is nonvoting. The distinction between a closely held corporation (a corporation with a small number of shareholders and no public trading market for its securities) and a privately held corporation that is not closely held can be confusing even for lawyers who are not experts in corporate law. The district court spotted this issue, however, and noted that it was "unclear" whether Hobby Lobby and Mardel had minority shareholders. But because that court denied Hobby Lobby's request for an injunction, it was not necessary for it to resolve the issue. See *Hobby Lobby Stores, Inc.*, 870 F. Supp. 2d 1278, 1284 n.6 (W.D. Okla. 2012) ("It is not altogether clear from the parties' submissions whether Hobby Lobby and Mardel are wholly owned by the Green plaintiffs or just wholly controlled by them, with some portion of the non-voting, equity ownership of the companies held by others. The complaint alleges only voting control. The distinction does not affect the disposition of the pending motion." (citation omitted)). Hobby Lobby's Amended Certificate of Incorporation filed with the Oklahoma Secretary of State on September 30, 2009, increased the amount of the company's authorized capital stock to 10 million shares, of which only 100,000 shares are Class A Voting Common Stock (presumably owned by the Green family, as indicated in the Verified Complaint) and the remaining 9,900,000 shares are Class B Nonvoting Common Stock (which the wording of the Verified Complaint suggests may be owned at least in part by minority shareholders other than the Green family). If, as the district court opinion, Verified Complaint, and Hobby Lobby Amended Certificate of Incorporation all suggest may be the case, Hobby Lobby has minority shareholders who hold shares of the company's Class B Nonvoting Common Stock, then Justice Alito's characterization of Hobby Lobby as a closely held corporation may be inaccurate and his analysis inadequate because it does not take into account the interests and rights of Hobby Lobby minority shareholders. Copies of the Hobby Lobby Stores, Inc. certificate of incorporation and amendments to the certificate of incorporation obtained from the Oklahoma Secretary of State are on file with the authors.

²⁶⁴ A privately held corporation does not have publicly traded securities outstanding but has more than the small number of shareholders that characterizes a closely held corporation. See, e.g., 15 PA. CONS. STAT. ANN. § 1103 (2015) (defining a "[c]losely held corporation" in Pennsylvania as a business corporation that either "(1) has not more than 30 shareholders; or" (2) has registered as a "statutory close corporation" under Pennsylvania law). Section 501 of the JOBS Act, Pub. L. No. 112-106, § 501, 126 Stat. 326 (2012), amended section 12(g)(1) of the Securities Exchange Act of 1934, to require companies to register their equity securities with the SEC if the company has total assets of more than \$10 million and any class of equity securities (such as the Hobby Lobby Class B Nonvoting Common Stock) that is "held of record" by either (1) 2,000 persons, or (2) 500 persons who are not "accredited investors" as defined by SEC regulations. See generally Changes to Exchange Act Requirements to Implement Title V and Title VI of the JOBS Act, SEC Release No. 34-73876 (Dec. 17, 2014) (proposing release). So long as a privately held company, such as Hobby Lobby, stays within these limitations, it is not required to register its securities with the SEC. Privately held companies can thus be very large and can now have up to 2,000 shareholders of each class of shares it has outstanding. As Justice Ginsburg pointed out in her *Hobby Lobby* dissent, examples of large, privately held corporations include, among many others, the agribusiness giant Cargill, Inc., with \$136 billion of annual revenue and the Mars, Inc. family-owned candy company. See *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting). If companies of this size, even though privately held, can exercise religious and other First Amendment rights in the way the *Hobby Lobby* decision permits, without considering the interests and rights of minority shareholders, then *Hobby Lobby* has abandoned longstanding corporate law principles without offering adequate supporting analysis or a sufficient rationale for doing so.

²⁶⁵ Cf. Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 565 (2011) ("Even when the shareholders elect to govern a close corporation directly, Delaware law says they are still subject to the liabilities (presumably including fiduciary duties) of directors.").

important among these rules is the requirement that controlling shareholders who serve as directors and officers²⁶⁶ comply with their fiduciary duties of care and loyalty in performing their corporate roles.²⁶⁷ The *Hobby Lobby* majority opinion did not examine the application of these fundamental principles of corporate law to the actions of the Green and Hahn families or consider whether the families' actions—and the holding of the majority opinion—contradict long-standing and universally accepted precepts of corporate law.

Although the paucity of corporate law analysis in the majority opinion makes it difficult to discern why the Court does not consider the application of traditional fiduciary duty requirements to the actions of the Greens and Hahns, it appears that Justice Alito (whether intentionally or unwittingly) embraced an extreme “contractarian” view of corporate law.²⁶⁸ This view would have no application beyond closely held family corporations with express provisions in their organic corporate documents memorializing the religious convictions of the shareholder-owners and agreed to by all of those shareholder-owners.²⁶⁹ At the very least, one can hope that in future cases, the Court will recognize the *Hobby Lobby* holding as so limited.

The *Hobby Lobby* majority opinion quoted Conestoga's “Vision and Values Statements” and its “board-adopted ‘Statement on the Sanctity of Human Life,’” which reflects the Hahn family's belief that “human life begins at conception.”²⁷⁰ Similarly, the majority opinion quoted *Hobby Lobby*'s “statement of purpose” that

²⁶⁶ The Delaware Supreme Court has confirmed that corporate officers owe fiduciary duties to the corporation they serve that are “identical” to the duties owed by corporate directors. *See Gantler v. Stephens*, 965 A.2d 695, 708-09 & n.37 (Del. 2009). This holding eliminates any uncertainty, for Delaware corporations at least, as to whether corporate directors owe fiduciary duties that are “higher” or “stricter” than the fiduciary duties of corporate officers.

²⁶⁷ *See generally* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. IV, intro. note (c) (AM. LAW INST. 1994) (discussing the duty of care and the duty of loyalty and describing the American Bar Association's *Corporate Director's Guidebook* as “properly distinguish[ing] between the two,” and quoting it as stating that under the duty of loyalty, “the corporate director commits allegiance to the enterprise and acknowledges that the best interests of the corporation and its shareholders must prevail over any individual interest of his own”).

²⁶⁸ *See infra* Part III (discussing the theoretical battle between “contractarian” and “communitarian” legal theorists).

²⁶⁹ *Cf.* Strine & Walter, *supra* note 64, at 376 (“Respected scholars have noted that it is problematic for public corporations to make political expenditures even if those expenditures are supported by a majority of stockholders, because that would associate the minority [shareholders] with political speech they might find inconsistent with their own consciences.”); Sepinwall, *supra* note 144, at 177 (recognizing that the *Hobby Lobby* ruling applied to “a closely-held for-profit corporation” and questioning whether the ruling could be extended to publicly traded corporations).

²⁷⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014).

commits the Greens to operating the company “in a manner consistent with Biblical principles,” and the opinion noted that “[e]ach family member has signed a pledge to run the businesses [Hobby Lobby and Mardel] in accordance with the family’s religious beliefs.”²⁷¹ The opinion went on to detail how Hobby Lobby and Mardel pursue business policies, such as closing all stores on Sundays and “refus[ing] to engage in profitable transactions that facilitate or promote alcohol use,” that reduce corporate profits and are motivated by the Greens’ religious beliefs.²⁷² Although the *Hobby Lobby* majority opinion did not explicitly say so, it appears that the Court took the position that if a corporation’s shareholders have unanimously agreed to operate a business in a certain manner, even a manner that reduces corporate profits and thereby harms the shareholders’ economic interests, then they should be permitted to do so, and analysis of the application of the traditional requirements imposed upon for-profit corporations, including the duties of care and loyalty, is not necessary.²⁷³

This outcome may well be correct as a practical matter, if there are no minority shareholders who will object or take legal action to challenge the manner in which the business is being operated,²⁷⁴ but it nonetheless raises important doctrinal issues, discussed below, that the Court did not address. It also strictly limits the application of the Court’s *Hobby Lobby* holding to those companies in which there is unanimous agreement among the shareholders²⁷⁵ to forgo greater profits for the business in the interest of operating the business in conformity with the shareholders’ religious beliefs.²⁷⁶ That point merits emphasis because it means that any for-profit corporation seeking to avail itself of the new RFRA rights recognized in *Hobby Lobby* must

²⁷¹ *Id.* at 2766.

²⁷² *Id.*

²⁷³ In this sense, Conestoga’s, Hobby Lobby’s and Mardel’s founding documents express concepts analogous to the secular precepts expressed in Google’s founding documents. *See infra* text accompanying notes 382-87.

²⁷⁴ As noted above, it appears that is the case with Conestoga, and perhaps also Mardel, but it may not be the case with Hobby Lobby.

²⁷⁵ As discussed in note 273, *supra*, for Hobby Lobby at least, there is a significant question whether all the company’s shareholders—holding both voting and nonvoting stock—agreed to operate the business in conformity with the religious beliefs of the Green family (who hold all the voting stock of the company).

²⁷⁶ *Cf.* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 note (6), at 53 (AM. LAW INST. 1994) (discussing “the question, under what circumstances may a corporation that is organized under a business corporation law restrict the general profitmaking objective” in a shareholders’ agreement or certificate of incorporation provision, and noting that “there is little doubt that such limitations would normally be permissible *if agreed to by all the shareholders*” (emphasis added)). This point is discussed in more detail in Part III, *infra*.

demonstrate that all its shareholders have embraced a common set of explicitly defined “sincerely held religious beliefs”²⁷⁷ and are willing to give up greater profits, incur the risk of reputational harm among some customers, and perhaps incur legal expenses or be subject to legal sanctions by operating the business in the manner that they believe those religious values dictate. Otherwise, corporate law requires consideration of the rights of the minority shareholders, who have not agreed to give up profits or expose the business to the risk of economic harm to further the religious convictions of the majority shareholders, no matter how “sincerely held” the controlling majority stockholders’ religious beliefs may be.²⁷⁸

Justice Alito’s opinion implicitly recognized this point, although admittedly not in the context of any fiduciary duty or minority shareholder rights analysis, when it dismissed the dissent’s concerns about the breadth of the Court’s holding and its potential application to large, publicly traded corporations by stating that “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”²⁷⁹ While this language is imprecise, it appears to recognize that all of a corporation’s shareholders must agree to “run a corporation under the same religious beliefs” if RFRA is to apply.²⁸⁰ This point is significant because it strongly suggests—more clearly than the very general and imprecise language

²⁷⁷ *Hobby Lobby*, 134 S. Ct. at 2759.

²⁷⁸ Cf. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. V (Duty of Fair Dealing), intro. note (d), at 195-96 (AM. LAW INST. 1994) (discussing the duty of fair dealing and noting that “the principles set forth in Chapter 3 [Duty of Fair Dealing of Controlling Shareholders] would not apply to situations where *all existing shareholders* have approved a transaction or *agreed upon a specific course of conduct*” (emphasis added)). We note, however, that the duty of fair dealing as defined by the ALI *Principles* applies only to instances in which a director, officer, or controlling shareholder has a pecuniary interest in a matter involving the corporation, and “Part V does not address nonpecuniary conflict-of-interest situations which might be dealt with by the courts in appropriate cases.” *Id.* at intro. note (a), at 192. Although the actions taken by the Greens and Hahns as controlling shareholders of their companies that were at issue in *Hobby Lobby* undoubtedly will have an indirect pecuniary effect on those companies, they are not like the traditional “self-dealing” and “taking of corporate opportunity” transactions that Part V of the ALI *Principles* was intended to address, and therefore those actions might be viewed as within the ALI *Principles*’ “nonpecuniary” exception quoted above. Accordingly, our analysis below focuses on the duty of care and its procedural corollary, the business judgment rule.

²⁷⁹ *Hobby Lobby*, 134 S. Ct. at 2774.

²⁸⁰ This is consistent with the ALI *Principles*’ acknowledgment that the duty of fair dealing of controlling shareholders “would not apply to situations where all existing shareholders have . . . agreed upon a specific course of conduct.” PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. V (Duty of Fair Dealing), intro. note (d), at 195-96. See *infra* Part III for additional analysis of this issue.

elsewhere in the majority opinion—that the holding of *Hobby Lobby* applies *only* to corporations where *all* of the shareholders have agreed to operate the business in conformity with particular religious tenets.

Equally important, this point provides the answer to Justice Alito’s rhetorical question of why for-profit corporations cannot “exercise religion” for purposes of RFRA and the First Amendment. The two-fold answer is that first, a corporation is a separate entity from the shareholders who own and control it, and, second, only in the most unusual circumstance will those shareholders unanimously and explicitly adopt a set of religious beliefs as applicable to and governing the corporation’s operations. Absent either of these necessary predicates—an explicit and express adoption of religious principles in the corporation’s organic documents *and* unanimous agreement of all shareholders (voting and nonvoting, because nonvoting shareholders have economic interests in the corporation that are protected by law, even if they do not have the right to vote) to adopt those principles—it cannot properly be said that a corporation has religious beliefs that it can “exercise” under either RFRA or the First Amendment.

3. *Hobby Lobby* Misstates the Discretion That State Law Provides Corporate Managers to Operate Their Businesses in Accordance with Their Personal Religious Beliefs

Justice Alito’s *Hobby Lobby* corporate law analysis becomes more suspect when he seeks to use state incorporation statutes to bolster his conclusion that for-profit corporations can exercise religious beliefs.²⁸¹ The majority opinion made reference to “modern corporate law”²⁸² and cited a leading corporate law treatise²⁸³ for the proposition that the general incorporation laws of all states now include provisions stating that corporations may be formed “for any lawful purpose,” or similar statutory language.²⁸⁴ This is an accurate description of the modern statutory language, but to suggest that the “any lawful purpose” language supports the

²⁸¹ See *Hobby Lobby*, 134 S. Ct. at 2770-72.

²⁸² *Id.* at 2770.

²⁸³ *Id.* at 2770-71. The opinion refers to “J. Cox & T. Hazen, Treatise of the Law of Corporations” (emphasis added). The correct name is “Treatise on the Law of Corporations” (emphasis added).

²⁸⁴ *Hobby Lobby*, 134 S. Ct. at 2770-71 (quoting J. COX & T. HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 4:1 p. 224 (3d ed. 2010)).

actions of the Greens and Hahns in the *Hobby Lobby* case is at best inaccurate²⁸⁵ and at worst disingenuous.

The “any lawful purpose” language in modern statutes providing for the formation of for-profit corporations was a legislative response to antiquated corporate law rules, dating back to the nineteenth century “concession theory” era when corporations were chartered by the state for a particular purpose, requiring that a corporation’s charter explicitly identify a corporate business purpose.²⁸⁶ This requirement resulted in the practice of including in articles of incorporation long lists of corporate purposes,²⁸⁷ intended to give greater flexibility to corporate managers to expand into new business arenas over time as the corporation grew and new opportunities arose.²⁸⁸ This practice changed when the Model Business Corporation Act of 1969 permitted incorporation “for the transaction of any lawful business,” and states subsequently amended their incorporation statutes to reflect this innovation.²⁸⁹

As the *Hobby Lobby* opinion noted, for-profit business incorporation statutes in both Oklahoma and Pennsylvania include the “any lawful purpose” provision.²⁹⁰ The majority opinion went on to say, however, that these “any lawful business or purpose” statutory provisions permit for-profit corporations to engage in the “pursuit of profit in conformity with the owners’ religious principles.”²⁹¹ As the history summarized above demonstrates, this misstates the intent and effect of these statutory provisions. They were meant to give corporations greater flexibility to pursue new and different “lines or kinds of

²⁸⁵ Cf. Strine & Walter, *supra* note 64, at 345 n.14 (quoting the “any lawful purpose” argument in *Hobby Lobby* and stating that traditional “conservative corporate [contractarian] legal theory rejects this view”).

²⁸⁶ In fact, this history is explained in the same corporate law treatise that the *Hobby Lobby* majority cited, just a few sections before the section cited by the majority for the modern practice of “any lawful purpose” statutes. See 1 J. COX & T. HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 3.6 (3d ed. 2010).

²⁸⁷ *Id.*

²⁸⁸ As two prominent corporate law scholars have explained, “it was possible to string together a large number of such clauses to produce articles of incorporation that were impressively long,” and purpose clauses “often ran pages in length but usually gave little or no information as to what precise business the corporation actually planned to engage in.” ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 217 (10th ed. 2007).

²⁸⁹ See *id.*

²⁹⁰ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771-72 (2014).

²⁹¹ *Id.* (citing PA. CONS. STAT. § 1301 (2015); OKLA. STAT. tit. 18 §§ 1002, 1005 (West 2012), Brief for State of Oklahoma as Amici Curiae, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354)).

business,”²⁹² without the need to include long and prolix lists of business purposes in their articles of incorporation.

Viewing these statutes in their proper legal and historical context, it is striking that the *Hobby Lobby* majority opinion could interpret them as supporting activity that is both contrary to legal mandate (i.e., the Affordable Care Act)²⁹³ and not in furtherance of any business objectives. None of the companies argued that their business activities and prospects would be enhanced by the actions they were taking. Instead, they argued only that their owners had a right to operate their companies in conformity with their personal religious beliefs.²⁹⁴

The weakness of the majority’s analysis of this point is underscored by the reference in the same section of the opinion to the “benefit corporation” that over half of the states now permit.²⁹⁵ Benefit corporations were developed as a new form of business entity that could pursue both public benefits and profits for the entity’s owners.²⁹⁶ The mere fact that a new form of entity was perceived as needed (and in a relatively short time was adopted by over half the states) to pursue public benefits at the potential expense of maximizing shareholder profits demonstrates that the law governing traditional for-profit corporations does not clearly permit such a dual role. Once again, however, the *Hobby Lobby* majority opinion stood logic on its head when it asserted that the existence of benefit corporations somehow demonstrates that for-profit corporations should be permitted to pursue nonprofit religious or charitable goals.²⁹⁷ This argument makes even less

²⁹² See HAMILTON & MACEY, *supra* note 288, at 217.

²⁹³ See *infra* note 313 for a discussion of legal authority permitting a corporation to violate a rule for the purpose of testing its validity or interpretation.

²⁹⁴ Unlike Conestoga and Hobby Lobby, which are companies that offer goods and services to the general public without any religious or faith-based aspect to their business models, Mardel as a Christian bookstore chain might easily have made an argument that the company’s business performance and prospects would be enhanced by adherence to its owners’ religious principles. The *Hobby Lobby* opinion, however, draws no such distinction and, to the contrary, repeatedly strains to find support in the law governing for-profit corporations for the faith-based position taken by all three of the companies before the Court.

²⁹⁵ See *Hobby Lobby*, 134 S. Ct. at 2771.

²⁹⁶ See *id.* In Pennsylvania, for example, a benefit corporation can be formed with a corporate purpose of creating general public benefit, or have as a purpose the creation of one or more specific public benefits. For an existing business corporation to convert to benefit corporation status, a supermajority vote of two-thirds of the company’s shareholders is required. Every benefit corporation must file an “Annual Benefit Report” with the Department of State each year describing its efforts to create public benefit during the preceding year. See *Pennsylvania Benefit Corporation*, PENN. DEPT. STATE, <http://www.dos.pa.gov/BusinessCharities/Business/Resources/Pages/Pennsylvania-Benefit-Corporation.aspx#.Vzzn5vkrLGg> [<http://perma.cc/7YRJ-42N7>] (last visited June 7, 2016).

²⁹⁷ See *Hobby Lobby*, 134 S. Ct. at 2771.

sense than the “any lawful business purpose” argument that accompanies it. In short, the majority opinion’s treatment of both of these points appear to be makeweight arguments that strain to support its preferred result, without any discerning or principled analysis of the basic corporate law concepts that are invoked.

4. *Hobby Lobby’s* Expansion of Controlling Owners’ Rights to Pursue Personal Objectives

Although the topic has been the subject of extensive academic commentary and debate,²⁹⁸ it is widely accepted among corporate shareholders, courts, corporate law practitioners, and business executives that, as the American Law Institute has stated, “A corporation [] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”²⁹⁹ This is not to say, of course, that every activity undertaken by corporate management must be intended solely to enhance corporate profit and shareholder gain. The ALI *Principles of Corporate Governance* recognize, in accordance with longstanding corporate law precedents,³⁰⁰ that corporations “[m]ay devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.”³⁰¹ In addition, and most important for purposes of a corporate law analysis of the *Hobby Lobby* holding, the ALI *Principles* permit a corporation, in the conduct of its business, to “take into account ethical considerations *that are reasonably regarded as appropriate to the responsible conduct of business.*”³⁰²

Despite the obvious relevance of these fundamental corporate law principles to the corporate actions that were before the Court in *Hobby Lobby*, the majority did not address their application to the case. This analytical gap also includes a failure to

²⁹⁸ See, e.g., Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003 (2013); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012). But see, e.g., Strine & Walter, *supra* note 64; Yosifon, *The Law of Corporate Purpose*, *supra* note 147; Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907 (2013).

²⁹⁹ PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, at 53 (AM. LAW INST. 1994).

³⁰⁰ A leading and influential case, well-known to law students who take a course in basic corporate law, is *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953). A leading Delaware authority on this point is *Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969).

³⁰¹ PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(3), at 53 (AM. LAW INST. 1994).

³⁰² *Id.* at § 2.01(b)(2), at 53 (emphasis added).

recognize the obvious relevance of one of the best-known cases in all of American corporate law—*Dodge v. Ford Motor Company*.³⁰³

Although it may (or may not) technically be dicta,³⁰⁴ and although it has been the subject of academic criticism,³⁰⁵ the famous line from *Dodge v. Ford* that corporations are “organized and carried on primarily for the profit of the stockholders”³⁰⁶ is well-known to students of corporate law. Moreover, the similarity of the facts in *Dodge v. Ford* to the facts in the *Hobby Lobby* cases is striking. In *Dodge v. Ford*, the Michigan Supreme Court characterized the plaintiffs’ objections to Henry Ford’s plan to increase worker pay and cut prices on cars in part to benefit the general public as a plan “to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution.”³⁰⁷ That, the court concluded, was beyond the discretion corporate law bestows upon managers of for-profit corporations and therefore could not be permitted.³⁰⁸ The discretion of corporate managers in operating a business corporation “does not extend to a change in the end itself [of profit of the stockholders]” or “to the reduction of profits . . . in order to devote them to other purposes.”³⁰⁹ In the *Hobby Lobby* cases, the Green and Hahn families were seeking the right to operate their companies as semi-religious institutions and not solely as profit-maximizing business institutions.³¹⁰ The obvious parallels between the cases raise two questions: (1) How could the Court

³⁰³ *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); see also Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 164 (2008) (“The facts underlying *Dodge v. Ford* are familiar to virtually every student who has taken a course in corporate law.”).

³⁰⁴ See Stout, *supra* note 303, at 168 (“[N]ot only is the Michigan Supreme Court’s statement on corporate purpose in *Dodge v. Ford* dicta, but it is much more mealy-mouthed dicta than is generally appreciated.”). But see Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 180 (2008) (“[T]he shareholder maximization ideal actually drives the holding and is not mere dicta.”).

³⁰⁵ See Stout, *supra* note 303.

³⁰⁶ *Dodge*, 170 N.W. at 684.

³⁰⁷ *Id.* at 683.

³⁰⁸ See *id.* at 684.

³⁰⁹ *Id.*

³¹⁰ Here it is worth noting again that many of the business practices adopted by the Greens and Hahns, such as not opening stores on Sundays, would reduce corporate profits and were based solely on the families’ religious convictions rather than upon some goal of enhancing the general goodwill of the business, loyalty among customers, etc. See *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2766 (2014) (“In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so.”). In this regard, the actions of the Greens and Hahns are similar to Henry Ford’s avowed plan to subjugate his company’s profitmaking activities to his personal beliefs about the good of society at large.

decide *Hobby Lobby* without at least acknowledging *Dodge v. Ford*, and (2) how can the holding in *Hobby Lobby* be reconciled with *Dodge v. Ford* and the consistent line of corporate law authorities that followed that case, including the relevant provisions of the ALI *Principles*?³¹¹

For better or worse, the corporate actions by the Green and Hahn families contradict the general principle of shareholder profit maximization set out in *Dodge v. Ford*. Their actions also would not meet any of the ALI *Principles*' exceptions to the general requirement of maximizing "corporate profit and shareholder gain."³¹² Even the exception for "ethical considerations" cannot be stretched to cover the religiously motivated practices of the companies before the Court in *Hobby Lobby*, because that exception applies only to actions "that are reasonably regarded as appropriate to the responsible conduct of [a] business."³¹³ As the commentary to that section of the ALI *Principles* makes clear, the exception would not apply to the actions of the Greens and Hahns in refusing to comply with the Affordable Care Act.³¹⁴ It is hard to

³¹¹ Conceivably, the U.S. Supreme Court could say that the corporate law implications of *Dodge v. Ford* with respect to *Hobby Lobby* are for the relevant state courts to decide. But it is the Court's neglect of these implications that allows it to conflate the interests of the corporation with those of its controlling shareholders.

³¹² See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, at 53 (AM. LAW INST. 1994).

³¹³ See *id.* § 2.01(b)(2), at 53. We do acknowledge that the commentary to the ALI *Principles* recognizes as an exception to the "norm of obedience to law" situations "where, under appropriate conditions, a rule is violated openly for the purposes of testing its validity or interpretation." *Id.* cmt. g, at 60-61. While this exception might well cover the actions of the Greens and Hahns in challenging the Affordable Care Act provisions to which they objected (and insulate them from suit by objecting shareholders for pursuing a "test case" to challenge the ACA), it does not dictate a conclusion that their challenges had merit or in any way support creating an exception to the general corporate profit and shareholder gain requirement of the ALI *Principles*. Moreover, none of the other "obedience to law" exceptions discussed in comment g support a corporation violating a duly enacted and applicable law because of the personal religious beliefs of the corporation's controlling shareholders. See *id.* at 60-61.

³¹⁴ See *id.* cmt. h, at 62-63. In fact, the commentary states that "[b]ecause [corporate] officials are dealing with other people's money, they will act properly in taking ethical principles into account *only where those considerations are reasonably regarded as appropriate to the responsible conduct of business.*" *Id.* at 63 (emphasis added). This incisive observation in the ALI *Principles* commentary supports our conclusion, discussed above, that the holding of *Hobby Lobby* should apply only to closely held corporations where the shareholders have unanimously agreed to conduct their business in accordance with certain religious principles and in so doing forgo some corporate profits. As discussed in more detail in Part III, *infra*, if properly understood as so limited, the *Hobby Lobby* holding not only avoids conflict with the *Dodge v. Ford*/ALI *Principles*' shareholder profit maximization requirement, it also is explicitly permitted by established corporate law practice as reflected in the commentary to the ALI *Principles*. See *id.* reporter's note (6), at 73 (stating that "a corporation that is organized under a business corporation law" can "restrict the general profitmaking objective, in a manner that goes beyond § 2.01(b), by a shareholders' agreement or certificate [of incorporation] provision" and "there is little

imagine how RFRA would allow a for-profit corporation's controlling shareholders not only to elevate their religious beliefs over the mandates of the ACA, but also to elevate these beliefs over the rights of the minority shareholders of the same corporation in contravention of the controlling shareholders' fiduciary obligations.

This inconsistency between the corporate law analysis of the *Hobby Lobby* majority and the basic profit maximization principle of corporate law³¹⁵ reflects a deeper deficiency in the *Hobby Lobby* majority's corporate law analysis. The reason that the actions of the Hahns and Greens are contrary to established corporate law principles goes beyond the profit maximization issue. Their actions also are contrary to the central precept of corporate law that governs the conduct of corporate managers—the duty of care (and its procedural corollary the business judgment rule).

The actions of the Hahns and Greens violate their fiduciary duties to their corporations because those actions were based not on the best interests of the corporations, but instead on the families' personal religious beliefs. Both the duty of care and the business judgment rule, however, require that corporate managers put aside their personal interests and make decisions based on the corporation's business interests. The ALI *Principles* articulate the duty of care as requiring that corporate directors and officers act “in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.”³¹⁶ The actions of the Green and Hahn families did not meet this fundamental requirement because they acknowledged—and the *Hobby Lobby* majority emphasized—that they were acting based on their personal religious beliefs and not based on an argument (even a makeweight argument) that their actions were also in the best interests of their corporations.³¹⁷

doubt that such limitations would normally be permissible *if agreed to by all the shareholders*” (emphasis added)). *But see* Sepinwall, *supra* note 144, at 181 (arguing that the ALI *Principles* support the holding in *Hobby Lobby*).

³¹⁵ Cf. Strine & Walter, *supra* note 64, at 345 n.14 (noting that *Hobby Lobby* is further evidence that the five-Justice majority in that case and the *Citizens United* case are “at odds with traditional conservative [contractarian corporate] thought”).

³¹⁶ PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(a), at 133 (AM. LAW INST. 1994) (emphasis added).

³¹⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014) (describing the adverse economic impact on Hobby Lobby and Mardel of the Green family's adherence to religious convictions in the operation of the corporations).

The duty of care of course does provide corporate managers with wide latitude in making decisions that are in the best interests of the corporation.³¹⁸ This latitude is ensured by the courts' application of the "business judgment rule" to determine whether corporate managers have violated the duty of care.³¹⁹ The ALI *Principles* provide that a director or officer who makes a business judgment fulfills the duty of care if the director or officer

(1) is not interested in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and (3) *rationally believes that the business judgment is in the best interests of the corporation*.³²⁰

Courts in Pennsylvania³²¹ and Oklahoma³²² recognize and apply the duty of care and the business judgment rule in determining whether corporate managers have met their fiduciary obligations to the corporations they manage. Thus, the actions of the Greens (Oklahoma) and Hahns (Pennsylvania) in refusing to comply with the ACA should have been evaluated in light of the duty of care and the business judgment rule.³²³

³¹⁸ Like Henry Ford's actions in *Dodge v. Ford Motor Co.*, the Green and Hahn families' actions most likely (and in the case of the Mardel company almost certainly) could survive judicial scrutiny under the business judgment rule if some effort had been made to present their business practices as consistent with the goal of profit maximization for shareholders. See Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, *supra* note 304, at 182 (asserting that "it would have been [easy] for Mr. Ford to have won [the] case" if he testified that his plans were consistent with the goal of profit maximization for shareholders). Likely because of their desire to obtain the protections of RFRA, however, the Greens and Hahns put all their eggs in the personal religious convictions basket, which should have lost the case for them in the same way that Ford's unwillingness to downplay his personal beliefs and motives lost his case for him. In *Hobby Lobby*, of course, the majority saved the Greens and Hahns by ignoring *Dodge v. Ford* and other relevant corporate precedents and instead creating a new concept of the (closely held, we emphasize) for-profit business corporation.

³¹⁹ In this sense, the Hobby Lobby managers' principles are indeed distinguishable from those professed by Google's managers. See *infra* text accompanying notes 385-86. At Google, the founders' principles went more to the *manner* in which the company would produce profits, rather than to matters that took precedence over the production of profit.

³²⁰ PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (AM. LAW INST. 1994) (emphasis added).

³²¹ See *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997) (confirming that the business judgment rule is the law in Pennsylvania and adopting portions of the ALI *Principles of Corporate Governance* to apply in shareholder derivative litigation in Pennsylvania alleging breach of fiduciary duties or other wrongdoing by corporate management).

³²² See *Egleston ex rel. Chesapeake Energy Corp. v. McClendon*, 318 P.3d 210, 215 (Okla. Civ. App. 2013) (confirming that the business judgment rule is the law in Oklahoma and noting that because "Oklahoma law in this area is not well-developed," the Oklahoma courts look to Delaware law on corporate law issues); *Beard v. Love*, 173 P.3d 796, 805 (Okla. Civ. App. 2007) (applying the business judgment rule and recognizing the precedential value of Delaware law).

³²³ Here again, the failure of the *Hobby Lobby* majority to include *Dodge v. Ford Motor Co.* in its corporate law analysis is a critical oversight. Had the majority

Here, we finally come to the core failing of the *Hobby Lobby* majority's corporate law analysis. Because the Greens and Hahns relied solely upon their personal religious convictions as reasons for their actions in managing their corporations, the case was presented to the Court in a manner that would not have permitted the Court to uphold the families' actions under universally accepted principles of corporate law (except by limiting the holding in the manner described below). Whether it recognized this or not, the *Hobby Lobby* majority simply ignored most of the relevant corporate law legal principles—shareholder wealth maximization, the duty of care, and the business judgment rule—and embraced a new “pass through” concept of the closely held corporation as a vehicle for the expression of the corporation's owners' personal religious convictions. We are not certain that this is altogether bad for closely held corporations in which all the shareholders are in agreement (as was the case with *Conestoga*). But if extended beyond that narrow context, it signals a radical change in American corporate law that we believe calls for a significant modification to the way for-profit corporations are governed (which we propose in Part IV, *infra*).

As a final point on this issue, we note that had the Court rigorously and scrupulously applied the universally accepted corporate law principles discussed above to the *Hobby Lobby* cases, it could have reached the same outcome—but in a way that would have resulted in a much narrower and clearer holding. Had the majority centered its analysis on the unanimous shareholder agreement requirement, already recognized in corporate law,³²⁴ and confirmed that none of the corporations before the Court had any minority shareholders who could be harmed,³²⁵ it could have held that the corporations had appropriately and lawfully adopted business policies and practices that reflected their owners' religious

done so, it almost certainly would have been compelled to consider the application of the business judgment rule to the actions of the Greens and Hahns, because in addition to the shareholder profit maximization principle discussed above, *Dodge v. Ford Motor Co.* is well-known to every student of corporate law for its early articulation of the business judgment rule, recognizing that “judges are not business experts” in declining to enjoin Henry Ford's business expansion plans. See *Dodge v. Ford Motor Co.*, 70 N.W. 668, 684 (Mich. 1919).

³²⁴ See *supra* note 276 and accompanying text (noting that under the ALI *Principles* and their commentary, a corporation can restrict the general profitmaking objective by a shareholder agreement or certificate of incorporation provision and that there is little doubt that such limitations are permissible if agreed to by all the shareholders).

³²⁵ As is discussed above, this may not have been the case with the *Hobby Lobby* company, but again it is impossible to tell from the opinion whether the majority simply missed this issue or chose to ignore it.

beliefs. A holding based on this rationale would have comported much more closely with prior Court precedent recognizing religious free exercise rights of nonprofit religion-based organizations³²⁶ and would not have conflicted so dramatically with the core principles of American corporate law.³²⁷

5. The *Hobby Lobby* Court's Lack of Deference to Precedent

Finally, and in addition to disregarding the importance of the separate legal identity of corporations and the established legal principles governing the discretion of corporate managers, the *Hobby Lobby* majority ignored relevant Supreme Court precedent holding that converting a business from a sole proprietorship (or partnership) to a corporation can indeed affect the constitutional rights of the business owner(s).³²⁸ As discussed earlier,³²⁹ in *Braswell v. United States*,³³⁰ the Court explicitly held that Mr. Braswell's choice to operate his businesses as corporations rather than sole proprietorships prevented him from asserting his constitutional privilege against self-incrimination under the Fifth Amendment.³³¹

³²⁶ Cf. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2794-97 (2014) (Ginsburg, J., dissenting).

³²⁷ An oddity of such a holding would be that the Court in essence would be upholding unlawful conduct (actions that violated the duty of care and the business judgment rule) simply because no one who was harmed (by the lower corporate profits and the other costs associated with the actions) wished to pursue a remedy for the harm (which is the effect of unanimous shareholder agreement to pursue those actions). While we recognize that this technically comports with the requirements of corporate law, we nonetheless believe that it has significant negative "spillover costs" for nonshareholder corporate constituent groups, especially employees and maybe creditors. This is one of the reasons we propose, in the next part, a revised corporate-governance system featuring mandatory constituency statutes that would require corporate managers to consider the effects of such actions on employees, suppliers, creditors, and communities. As we discuss in Part IV, in extreme cases—such as a company closing or selling stores and plants to generate corporate funds to make political contributions based upon the personal religious beliefs of the corporation's owners—those powerless constituency groups should be able to seek judicial relief to prevent damage to the corporation from such extreme departures from what the ALI *Principles* call "responsible conduct of business." Any business owners who did not wish to be constrained by the threat of lawsuits of this kind would be free to operate their businesses as sole proprietorships or partnerships or to divert their personal assets to nonprofit organizations, but they would not have carte blanche to operate a for-profit corporation in the manner that *Citizens United* and *Hobby Lobby* will permit if the holdings of those cases are stretched to their logical extremes. *But see* Sepinwall, *supra* note 144, at 181 (arguing that the ALI *Principles* support the holding in *Hobby Lobby*).

³²⁸ See *supra* Part I (discussing "Corporate Personhood and the Privilege Against Self-Incrimination").

³²⁹ See *supra* notes 55-61 and accompanying text.

³³⁰ *Braswell v. United States*, 487 U.S. 99 (1988).

³³¹ See *id.* at 104; see also *supra* notes 55-61 and accompanying text (discussing the *Braswell* holding).

Although *Braswell* was cited in both the government's briefs submitted to the Court³³² and an amicus curiae brief submitted to the Court by 44 law professors who specialize in corporate and criminal law,³³³ neither *Braswell* nor the collective entity doctrine³³⁴ was mentioned in Justice Alito's *Hobby Lobby* majority opinion.³³⁵ The failure of the Court to address the glaring inconsistency between the holdings in *Braswell* and *Hobby Lobby* is another strong indicator that the *Hobby Lobby* majority was taking what might be charitably called a novel approach under corporate law.³³⁶ We would have expected the *Hobby Lobby* Court to have acknowledged the inconsistency with *Braswell* and invited future reconsideration of its holding to harmonize it with *Hobby Lobby*.

We are inclined to disagree with the holdings in both *Braswell* and *Hobby Lobby*. We do not believe that the collective entity doctrine should have been applied to deprive Mr. Braswell of his Fifth Amendment privilege, and we do not believe that the shareholders' First Amendment religious beliefs in the *Hobby*

³³² See Brief for the Respondents at 20-21, *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 1536 (2014) (No. 13-356), 2014 WL 546900 (discussing *Braswell* and arguing that the Conestoga owners' claims should "fail for the same reasons" that the Court rejected Braswell's Fifth Amendment claims); Reply Brief for the Petitioners at 10, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985095 (citing *Braswell* and arguing that "[w]hen the Greens act on behalf of the corporations [Hobby Lobby and Mardell], they do not do so in their personal capacities.").

³³³ See Brief of Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 13, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333899 (citing *Braswell* and noting that the Court had recognized the principle of corporate separateness "even between a sole shareholder and the corporation for purposes of the Fifth Amendment").

³³⁴ See *supra* Part I (discussing "Corporate Personhood and the Privilege Against Self-Incrimination").

³³⁵ The failure of the *Hobby Lobby* majority opinion to consider the relevance of the *Braswell* case is particularly curious in view of the fact that Justice Alito, the author of the majority opinion, wrote a law review article in 1986 about the application of the Fifth Amendment privilege against self-incrimination to documents, the same issue before the Court in *Braswell*. See Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1984). In addition, while a Department of Justice Prosecutor, Justice Alito argued in the Supreme Court one of the leading cases on the application of the Fifth Amendment privilege to documents. See *United States v. Doe*, 465 U.S. 605, 606 (1984) (Samuel A. Alito Jr. argued the cause for the United States). It seems unlikely, in light of his extensive personal involvement with this area of law, that Justice Alito would have been unaware of *Braswell* and its obvious inconsistency with the majority's holding in *Hobby Lobby*.

³³⁶ Cf. Reply Brief for the Petitioners at 1, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 985095 ("Respondents have not identified a single case in this Nation's history in which a commercial enterprise has successfully invoked either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 (RFRA) to secure what respondents seek here: an exemption from a neutral law regulating a for-profit corporation's commercial activities." (citation omitted)).

Lobby cases should have been attributed to their corporations. *Braswell* was an unduly formalistic application of a questionable legal doctrine, which the Court admitted was motivated by a desire to protect “the Government’s efforts to prosecute ‘white-collar crime.’”³³⁷ *Hobby Lobby* attributed to corporations a characteristic peculiar to *individuals*—the ability to practice religion. Application of rights to corporations should be based on the values underlying these rights, whether they make any sense in the corporate context, and whether the corporation has taken a form that makes it the functional equivalent of a natural person (as may be the case with a closely held corporation). While communitarians would like corporations to behave in a humane manner, corporations can go to neither heaven nor hell. Application of RFRA to broadly held corporations is simply inapposite.

6. Unless Limited to Its Facts, *Hobby Lobby*
Fundamentally Unsettles Basic Concepts of
American Corporate Law

The failure in *Hobby Lobby* to follow established corporate law principles and distinguish properly between the corporations subject to the ACA and the shareholders who controlled those corporations and sought (successfully after the Court’s ruling) to use those corporations as vehicles for their personal religious beliefs is a legal bombshell—or more accurately a yet-to-be-triggered depth charge—in American corporate law. To avoid destabilizing the entire corporate law regulatory regime that has been in place over the last century, the case must be limited to the facts as presented by the Court in the majority opinion.³³⁸ If the holding of the case is interpreted as applying only to closely held corporations where the shareholders have unanimously agreed to operate the corporation in accordance with explicitly identified religious principles, even when doing so reduces corporate profits, then the case represents only a relatively minor expansion of RFRA to cover a small subset of corporations that previously were not understood to be entitled to the protections of that law. We believe that this is the only rational and principled interpretation of *Hobby Lobby*.

Even limited in this manner, however, *Hobby Lobby* represents a further expansion of the corporate personification

³³⁷ See *Braswell v. United States*, 487 U.S. 99, 115 (1988).

³³⁸ Thus, for purposes of our analysis, we need not determine with certainty whether the majority opinion is incorrect when it characterizes the *Hobby Lobby* company as a closely held corporation. See *supra* notes 256-57 and accompanying text.

that the *Citizens United* decision recently introduced into Supreme Court jurisprudence. Taken together, the two cases create a new concept of the corporation in American law—the corporation as a legal person with political expression and religious-exercise rights that are almost, if not yet entirely, coextensive with the rights of individuals. This new concept of corporate personage necessitates a new approach to corporate governance, which we propose in Part IV.

Nevertheless, the Supreme Court's expansive view of corporate rights and its limitation on the ability of the legislature—state or federal—to constrict those rights broadens the constitutionally protected functions of the corporation and repudiates those who would limit corporate objectives to only the maximization of shareholder profit. In the section that follows, we will show how the Roberts Court's personification of corporations provides unexpected support for the arguments of corporate communarians, notwithstanding the difficulty in perceiving the holdings of *Citizens United* and *Hobby Lobby* as communitarian in nature.

III. COMMUNITARIANISM AND CORPORATIONS

A. *Communitarianism Briefly Explained*

Communitarianism has been described as “a social movement aim[ed] at shoring up the moral, social, and political environment.”³³⁹ Communitarians desire to strike a reasonable balance between the extremes of repressive authoritarianism and radical libertarianism. They subscribe to the notion that “even (or perhaps especially) in a rights-conscious society, rights have limits and involve concomitant responsibilities.” Consequently, “Communitarians support basic civil liberties, but fear that our ability to confront societal problems effectively is compromised by the claims of ‘radical individualists’ who would subordinate the needs of the community to the absolute fulfillment of individual rights.”³⁴⁰

³³⁹ AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 247 (1993). Etzioni, a social scientist who has taught at George Washington University for many years, is generally considered the leader of the communitarian movement, and his book, *The Spirit of Community*, is considered the movement's definitive work.

³⁴⁰ Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 650 (1995) (quoting ETZIONI, *supra* note 339, at 11).

Two decades ago, Professor Amitai Etzioni, widely regarded as the communitarian movement's founder, promulgated a communitarian agenda, the first item of which called for a moratorium on "the manufacturing of new rights" because "[t]he incessant issuance of new rights, like the wholesale printing of currency, causes a massive inflation of rights that devalues their moral claims."³⁴¹ Rights come at a cost, Etzioni reminds us, because "each newly minted right generates a claim on someone."³⁴² The extension of rights, as in *Citizens United* or *Hobby Lobby*, is therefore not something to be taken lightly or to be exercised mechanically.³⁴³ In *Hobby Lobby*, for example, the extension of rights under RFRA to closely held corporations generated a claim on those employees who would be denied reproductive care coverage or, more likely, on the U.S. Treasury (and indirectly, the citizenry at large), which would be called upon to step in and finance coverage in lieu of the corporations.³⁴⁴

Second, the communitarian agenda insists that rights presume responsibilities.³⁴⁵ The state may assign these responsibilities as duties of citizenship (think taxation, military service, or jury duty), but more often, citizens assume them as moral obligations. In the United States, unfortunately, too many people and institutions tend to regard their moral obligations as extending no further than their legal duties. Professor Mary Ann Glendon has observed, "Buried deep in our rights dialect is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except

³⁴¹ ETZIONI, *supra* note 339, at 5.

³⁴² *Id.* at 5-6.

³⁴³ See Winter, *supra* note 94, at 1141-42 (criticizing the formalist approach of which the *Citizens United* opinion is an example).

³⁴⁴ At least two scholars have asserted that the Establishment Clause precludes the application of RFRA to exempt employers from the ACA mandate because doing so would impose significant costs on employees and other third parties who do not share the employer's religious beliefs. See Gedicks & Koppelman, *supra* note 15, at 60. Justice Alito suggested in *Hobby Lobby* that the government could foot the bill for the objected-to contraceptive coverage and that the cost would be relatively small compared to the overall cost of the ACA. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). Of course, one could contend that shifting the cost of the objectors' religious beliefs to the government would itself violate the Establishment Clause. But because the costs of pregnancy and childbirth normally exceed those of obtaining a contraceptive device, health insurance policies with full contraceptive coverage are generally no more costly than those that are not. See Gedicks & Koppelman, *supra* note 15, at 53. Therefore, it may not impose any additional financial cost on the taxpayers to pick up the tab for contraceptive coverage for employees of corporations like *Hobby Lobby* or *Conestoga*. The case is different where the objecting employer self-insures (e.g., the University of Notre Dame, a nonprofit that has obtained an exemption from HHS under 29 C.F.R. §§ 2590.715-2713A(a) (2013)) and will not take on the additional coverage itself.

³⁴⁵ ETZIONI, *supra* note 339, at 9.

to avoid the active infliction of harm.”³⁴⁶ But history demonstrates that we are far more interdependent than our American myth of rugged individualism would have us believe. Citizenship is a two-way street, and we must be prepared to give as we get.³⁴⁷ It is not enough for Hobby Lobby’s or Conestoga’s owners to act on their own religious beliefs, without regard to the rights of their employees (to health care) or the burden on taxpayers (if they must step up to supplant the coverage the owners are withholding). We are, in fact, our brothers’ and sisters’ keepers.

Third, we should recognize that certain responsibilities may exist without an immediate payback in the form of capturable rights.³⁴⁸ As the late American philosopher Yogi Berra said, “[A]lways go to other people’s funerals; otherwise, they won’t come to yours.”³⁴⁹ A responsibility not to engage in activities that over time degrade the environment is a prominent example of this principle at work.³⁵⁰ In the business world, a corporation might forgo a short-term advantage (e.g., a substantial shareholder dividend that might temporarily boost stock value) to thrive in the long term (e.g., by investing in research and development, or

³⁴⁶ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 77 (1991).

³⁴⁷ During the 2012 presidential election campaign, Republican candidate Mitt Romney was roundly criticized for a recorded remark in which he spoke of the 47% of the American public who had, in his view, a philosophy of entitlement.

[T]here are 47 percent of the people who are . . . dependent upon government, who believe that they are victims, who believe the government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, you-name-it. That that’s an entitlement. And the government should give it to them. And they will vote for the president no matter what. These are people who pay no income tax. . . . [M]y job is not to worry about those—I’ll never convince them they should take personal responsibility and care for their lives.

Mitt Romney, 2012 Republican Party Nominee for President of the United States, Remarks at Private Fundraising Event (May 17, 2012), <http://www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser> [<http://perma.cc/QZJ9-K8LH>]. Romney appears to have erroneously used the 2009 figure of 46.4% of Americans who paid no income tax (which included many working people with very low incomes) as the basis for 47% of the people who were “dependent upon government.” Robert Farley, *Dependency and Romney’s 47 Percenters*, FACTCHECK.ORG (Sept. 18, 2012), <http://www.factcheck.org/2012/09/dependency-and-romneys-47-percenters/> [<http://perma.cc/C4F4-D8FM>]. Romney also neglected to acknowledge that most of the people receiving government benefits were veterans, retirees, and others who had made significant contributions to society (and to the public treasury). It would have been less offensive, and more to the point, had he pointed out that a government that is supported by only 53.6% of the population is not economically sustainable. The very term “entitlement” suggests a nation in which we feel that the country owes us something, and we owe little in return.

³⁴⁸ ETZIONI, *supra* note 339, at 10.

³⁴⁹ *Yogi Berra Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/y/yogi_berra.html [<http://perma.cc/7LSL-RQ8L>] (last visited June 8, 2016).

³⁵⁰ ETZIONI, *supra* note 339, at 11.

in practices that sustain the natural resources on which the corporation depends).³⁵¹

Fourth, Etzioni asks that we engage in “[c]areful [a]djustments” to reconcile individual rights with the public welfare.³⁵² “[T]he best way to curb authoritarianism and right-wing tendencies is to stop the anarchic drift by introducing carefully calibrated responses to urgent and legitimate public concerns about safety and the control of epidemics,” declares Etzioni.³⁵³ We might add that the best way to curb the drift toward oligarchy and increased income inequality may be the placement of reasonable restraints on the use of corporate funds in political campaigns. We will return to that later. Suffice it to say, for now, that there is an appropriate role for the regulatory state in constraining conduct that might harm the public at large. Society cannot survive a return to *Lochner*.³⁵⁴

Etzioni and others have produced a “Communitarian Platform,” which has drawn signatures from several hundred political, community, and academic leaders, including both of your authors.³⁵⁵ The major point of the communitarian enterprise is that we acknowledge that we are interdependent members of a society that can ill-afford more atomization, that the myth of rugged individualism has never sustained us, that “I’ve got mine, Jack” can no longer be our rallying cry (if it ever was). Communitarianism does not always demand government intervention, but it rejects a formalism that transforms rights into abstract caricatures of rugged individualism that serve neither the community nor the individual in the long run.

B. *Communitarianism in the Corporate Context*

In writings about corporate law, communitarianism usually refers to a philosophy that corporations have legitimate constituencies beyond their shareholders and that they should look beyond the narrow objective of shareholder wealth maximization

³⁵¹ Whether our corporate structure, with its emphasis on short-term shareholder value, buttressed by the practice of corporate raiding, is conducive to such a far-sighted approach is open to question. See COLIN MAYER, FIRM COMMITMENT (2013).

³⁵² ETZIONI, *supra* note 339, at 11.

³⁵³ *Id.*

³⁵⁴ See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a labor law that restricted the hours employees could work and finding the restriction unnecessary to protect employee health and characterized the law as an improper attempt by the state legislature to regulate the terms of private employment).

³⁵⁵ ETZIONI, *supra* note 339, at 253-67; see also *Institute for Communitarian Policy Studies*, GEO. WASH. UNIV., <http://icps.gwu.edu/> [<http://perma.cc/P7ND-LXHB>] (last visited June 7, 2016).

and assume responsibility for constituencies such as employees, customers, the communities in which the corporations operate, and even the entire world.³⁵⁶ Communitarians regard the corporation as something grander than a wealth-maximization machine and prefer a legal regime designed to “promote a richer array of social and political values.”³⁵⁷ Presumably, most corporations are organized by people who wish to make a contribution beyond the mere making of money: to provide a desirable product or service, to meet an unmet need, to serve the public in some fashion, to build a better mousetrap. The making of profit is certainly an objective of such corporations, but it need not be the only or even the primary objective. This was as true of the nineteenth-century robber barons as it is for today’s high-tech entrepreneurs. Andrew Carnegie naturally wanted to make money, but he purposefully set out to make *steel*. Commodore Vanderbilt had a penchant for *railroads*. Horace Greeley, Joseph Pulitzer, and William Randolph Hearst wanted to disseminate the *news*, and thereby affect public opinion. (Indeed, traditional media corporations, which generally enjoy a smaller profit margin than many other corporations, tend to have intrinsic motives that rarely start with money. “Rosebud,” indeed!³⁵⁸) The fragmentation of corporate stock ownership (including institutional, mutual fund, and retirement account investors) brings with it a less purposeful class of owners, but the shareholders of the Ford Motor Company hardly have cause to fret if the corporation aims first and foremost to put America on wheels.³⁵⁹

³⁵⁶ See, e.g., David Millon, *Introduction: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993) [hereinafter Millon, *Communitarians*]; Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393 (1993); Paul N. Cox, *The Public, the Private and the Corporation*, 80 MARQ. L. REV. 391 (1997); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993). No less an advocate for the prerogatives of corporate boards than Martin Lipton recognized the obligation of corporations to nonshareholder constituencies at least as early as 1979. Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. (ABA) 101 (1979).

³⁵⁷ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202 (1990).

³⁵⁸ See CITIZEN KANE (RKO Radio Pictures 1941) (Orson Welles's critically acclaimed allegory roughly based on the life of publisher William Randolph Hearst).

³⁵⁹ Recently, Ford's management has been trying to restyle this industrial giant as a “transportation company.” Mike Ramsey, *Ford Says It Will Focus More on Transportation-Services Sector*, WALL ST. J. (Jan. 5, 2016, 12:49 PM), <http://www.wsj.com/articles/ford-says-it-will-focus-more-on-transportation-services-sector-1452016172> [http://perma.cc/3JAS-6MTK]. But it remains significant that Ford does not seek merely to be a “money-making company”; it maintains a *purpose*.

1. Communitarians Versus Contractarians

During most of the history of the modern business corporation, it has been corporate law dogma that corporate boards of directors could lawfully act only if their action conferred some benefit—direct or indirect, short-term or long-term—on the shareholders who owned the corporation.³⁶⁰ Underlying this widely accepted dogma, however, was ongoing tension between those who conceived of the role of the corporation as a wealth-generator for its shareholders and those who advocated for broader responsibilities for the corporation as a legal “person” with societal obligations that extend beyond merely maximizing shareholder wealth.³⁶¹ To date, the shareholder wealth maximization model has largely prevailed,³⁶² with one important exception—the advent of so-called constituency statutes in the 1980s.³⁶³

³⁶⁰ See ABA Comm. on Corporate Laws, *Other Constituency Statutes: Potential for Confusion*, 45 BUS. LAW. (ABA) 2253, 2255 (1990) [hereinafter *ABA Report*] (“With few exceptions, courts have consistently avowed the legal primacy of shareholder interests when management and directors make decisions. This conventional wisdom has not, of course, prevented courts from permitting on various grounds the limited use of corporate resources for eleemosynary and other non-profit oriented purposes; usually the conceptual justification has been the long-range interest of the corporation (and therefore the shareholders).”); see also Millon, *Communitarians*, *supra* note 356, at 1373-74 (footnote omitted). For much of this century, at least since the publication of Berle and Means’s classic in 1932, the orthodox assumption has been that corporate law’s objective is to develop legal structures that will maximize shareholder wealth. This shareholder primacy vision of corporate law therefore disregards claims of various nonshareholder constituencies (including employees, creditors, customers, suppliers, and communities in which firms operate) whose interests may be adversely affected by managerial pursuit of shareholder welfare. Managerial accountability to shareholders is corporate law’s central problem. Nonshareholder interests, if entitled to any legal protection at all, are for other, noncorporate law legal regimes. Millon, *Communitarians*, *supra*, at 357. For historical analysis of the evolution of the nineteenth-century “special purpose” mercantile corporation, which received a special charter from the state to achieve some public good or objective, to the “classical corporation” formed under general incorporation acts and permitted to engage in any lawful business activity, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* (1991). Hovenkamp observes that, with the rise of the classical corporation and its separation of corporate ownership and control, such that its shareholders’ only interest is in corporate profits, “[t]he American business corporation had become a person but had lost its soul.” *Id.* at 16.

³⁶¹ The most influential scholarly debate on this topic was between Professor E. Merrick Dodd, Jr. of Harvard Law School, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932), and Professor A. A. Berle, Jr. of Columbia Law School, see A. A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). For a summary of the history of debates over “corporate social responsibility” in the twentieth century, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 U. KAN. L. REV. 77 (2002).

³⁶² See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a), at 53 (AM. LAW INST. 1994) (stating that “a corporation [] should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain,” but recognizing that “[e]ven if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . [m]ay

As more states enacted constituency statutes in the late 1980s and early 1990s, the statutes became hotly contested fronts in an ongoing battle between corporate law “contractarians” and “communitarians” who were disputing the validity of the “shareholder primacy” conceptual foundation of corporate law.³⁶⁴ The ideological and philosophical differences between contractarians and communitarians, however, extend far beyond the issues that surround corporate constituency statutes:

Contractarians start from the presumption that people ought to be free to make their own choices about how to live their lives (subject to an overriding duty not to harm others). Legal rules that redistribute wealth, mandate particular forms of behavior, or prevent people from making bargains they would otherwise choose to make are presumptively objectionable because they interfere with people’s ability to live their own lives according to their own preferences, structuring their relationships with others and defining their duties toward them by means of consent. This idea focuses on the individual as an autonomous being and is based on a particular vision of human liberty as freedom from external, unconsented-to restraint. Contractarians are willing to admit the legitimacy of certain mandatory rules, but such restraints on individual liberty must themselves be justified in terms of the liberty interests of those who may be harmed by the conduct restrained.

devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes”); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 6.02(b)(2) (AM. LAW INST. 1994) (stating that in taking action to block an unsolicited tender offer, a corporate board may “have regard for interests or groups (other than shareholders) with respect to which the corporation has a legitimate concern if to do so would not significantly disfavor the long-term interests of shareholders”); cf. Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 168 (1991) (“By reaffirming the fundamental precept that the duty of directors is to act in the best interests of the corporation, the corporate constituency statutes have placed corporate law back on track. The statutes have arrested the recent misguided tendency of the corporate law to venture away from a corporation-focused concept toward the erroneous notion that the directors’ duty is to act exclusively in the interests of the shareholders, with that interest increasingly defined by reference to short-term stock prices.”).

³⁶³ See JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 86-97 (3d ed. 2011) (noting that “other-constituencies” statutes “alter the traditional orientation that corporate decisions are to be adjudged by their impact on stockholder wealth as contrasted with some greater good, such as happier workers and a more vibrant community”). For further discussion of constituency statutes, see *infra* notes 456-67 and accompanying text.

³⁶⁴ See generally Millon, *Communitarians*, *supra* note 356, at 1377-79 (explaining that contractarians “would . . . leave it up to the various participants in corporate activity to specify their respective rights and obligations through contract” and therefore believe that “state corporate law provides the terms of the contract by which shareholders purchase management’s undivided loyalty to their welfare,” while communitarians “more readily look to legal rules to structure relations among the corporation’s diverse constituent groups, believing that corporate law must confront the harmful effects on nonshareholder constituencies of managerial pursuit of shareholder wealth maximization” and therefore are more willing “to use legal intervention to overcome the transaction costs and market failures that impede self-protection through contract”).

Communitarians approach these questions from a different perspective. Their view of society contrasts sharply with the contractarians' animating vision, emphasizing the social arena in which individual activity occurs. Simply by virtue of membership in a shared community, individuals owe obligations to each other that exist independently of contract. We are born into civil society and thereby inherit the benefits of life in a community. . . . Acknowledging our interdependence, we must recognize our responsibility for the quality of the lives of all community members. The state acts appropriately when it enforces such duties. . . . The market alone cannot adequately fulfill basic human needs for everyone because many people lack the resources to participate effectively in the market. Insistence on the market's sufficiency for the sake of individual liberty therefore ignores those civic obligations that flow from the social aspect of human existence. To communitarians, life chances should not depend entirely on accidents of birth and bargaining power: people are entitled to more out of life than what they can pay for.³⁶⁵

Corporate contractarians acknowledge that corporate actions can "cause enormous disruption in the lives of everyone connected with [the] firm[],"³⁶⁶ but they nonetheless believe that "the private contracting process, though not perfect, generates outcomes superior to the outcomes generated by government regulation."³⁶⁷ They therefore take the position that the interests of nonshareholder constituencies, such as creditors and employees, can and should be protected through the private contracting process rather than by "regulatory intervention."³⁶⁸ Contractarians also believe that shareholder interests should drive corporate directors' decisions because shareholders "have the greatest stake in the outcome of corporate decision-making."³⁶⁹

³⁶⁵ Millon, *Communitarians*, *supra* note 356, at 1382-83 (footnotes omitted). For a collection of essays exploring the impact of communitarianism across the U.S. legal spectrum, see DAVID E. CARNEY, TO PROMOTE THE GENERAL WELFARE: A COMMUNITARIAN LEGAL READER (1999).

³⁶⁶ Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 173 (1989) [hereinafter Macey, *Externalities*] (noting that employees, managers, suppliers, customers, philanthropists, rival firms, local governments, and the community in which the firm operates may all be significantly affected).

³⁶⁷ *Id.* at 174. Additionally, some commentators argue that constituency statutes may lead to reduced management accountability. See William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 424 (1990); see also Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 582 (1992) (arguing that "constituency statutes diminish the board's accountability to stockholders").

³⁶⁸ Macey, *Externalities*, *supra* note 366, at 200-01. Professor Millon has characterized this contractarian position as a belief that "to the extent that management's pursuit of shareholder welfare threatens nonshareholder interests, workers, creditors, and other affected nonshareholders are free to bargain with shareholders (through their agents) for whatever protections they are willing to pay for." Millon, *Communitarians*, *supra* note 356, at 1378.

³⁶⁹ Macey, *Externalities*, *supra* note 366, at 175 (asserting that it is more efficient for shareholders to retain control of the corporation because they place the

Most important, as Professor Bratton has pointed out, the contractarian shareholder wealth maximization principle has maintained its dominance because it “is assumed to be the means to the end of maximum wealth for the society as a whole.”³⁷⁰

Despite the force of these contractarian arguments, corporate communitarians counter that “the shareholder primacy model has exhausted its usefulness”³⁷¹ and that, contrary to the claims of contractarians, nonshareholder constituencies need external protections because these groups in fact are not able to protect their interests through private contracting.³⁷²

2. Ford and Google: Don’t Be Evil

A century ago, the model for corporate communitarianism was Henry Ford.³⁷³ We have previously alluded to the case of *Dodge v. Ford Motor Co.*,³⁷⁴ in which John and Horace Dodge, minority shareholders in the Ford Motor Company, challenged Henry Ford’s decision to limit Ford’s shareholder dividend in order to build the enormous River Rouge plant, ostensibly for the purpose of providing gainful employment for more workers and building more cars at prices the workers could afford.³⁷⁵ In the end, the court ordered a larger dividend, but it also declared that Henry Ford’s expansionist plans, which arguably would result in a lower return

highest value on the right to do so). In addition, some commentators assert that the broader discretion that constituency statutes give corporate boards may be abused to elevate the interests of incumbent management above the interests of shareholders and thereby to “maximize managers’ welfare.” See Carney, *supra* note 367, at 423 (allowing “managers to claim that they have ‘weighed all the factors’ . . . is to grant them unfettered discretion that cannot be monitored”).

³⁷⁰ See William W. Bratton, *Confronting the Ethical Case Against the Ethical Case for Constituency Rights*, 50 WASH. & LEE L. REV. 1449, 1450 (1993).

³⁷¹ Millon, *Communitarians*, *supra* note 356, at 1377.

³⁷² See *id.* at 1379 (noting that nonshareholder constituencies may be unable to contract to protect their interests for a variety of reasons, including an inability to foresee future harm, management’s informational advantages, and the practical difficulties in coordinating the bargaining efforts of similarly situated constituent groups); see also Strine & Walter, *supra* note 64, at 379-87. As Strine and Walter succinctly distill the fundamental problem, “Flesh-and-blood humans do not have the wallet to compete with corporations.” Strine & Walter, *supra* note 64, at 386.

³⁷³ We hasten to add that Ford did many evil things, not the least of which was establishing a notorious “Sociological Department” that policed the private lives of his employees. ROBERT LACEY, FORD: THE MEN AND THE MACHINE (1986); see also VICTORIA SAKER WOESTE, HENRY FORD’S WAR ON JEWS AND THE LEGAL BATTLE AGAINST HATE SPEECH (2012).

³⁷⁴ *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); see also *supra* Part I (discussing *Dodge v. Ford*).

³⁷⁵ *Ford Motor Co.*, 170 N.W. at 671; see also Jonathan Romiti, Note, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-Citizens United*, 53 B.C. L. REV. 737, 737-39 (2012); *supra* Part I (discussing *Dodge v. Ford*).

to stockholders, were legitimate corporate objectives that could be legally pursued under the “business judgment” rule.³⁷⁶

Ford went on to prove that he could have his cake and eat it, too. His quest for profits, notoriety, and power were often cloaked in populist, humanitarian rhetoric. But in fact, investment in the River Rouge plant (along with a generous dividend) was not only within the Ford Motor Company’s means, it resulted in unprecedented profits for Ford Motor and the Ford family.³⁷⁷ The Dodge Brothers, for that matter, used the Ford dividend to finance their own automotive company; their effort to enjoin Ford’s construction of the River Rouge plant was seen as a delay tactic designed to give the fledgling Dodge Motors a fighting chance against the growing Ford automotive empire.³⁷⁸ But it is instructive that the Dodges did not go into banking, publishing, or plastics; they continued to invest their assets in *automobiles*. They, too, wanted to make more than money; they wanted to make *cars*.³⁷⁹

Corporate communitarianism can encompass a vast array of objectives, including the welfare of workers, environmentally sustainable business practices,³⁸⁰ the welfare of communities in which the business is located, charitable contributions, and other well-meaning endeavors. The language of “corporate communitarianism” is entirely compatible with the more general language of Etzioni-style communitarianism, not only because such activities are seen as promoting the general welfare, but also because the communitarian view of legitimate corporate objectives is consistent with the “brother’s keeper” philosophy of the communitarian movement.³⁸¹

³⁷⁶ *Ford Motor Co.*, 170 N.W. at 684. While the case is often mischaracterized as an example of the narrow, “shareholder value maximization” view of corporate purpose, it is a better example of the fiduciary duty owed to minority shareholders. See M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in CORPORATE LAW STORIES 37 (J. Mark Ramseyer ed., 2009).

³⁷⁷ No sooner was the River Rouge plant constructed than Henry Ford turned his attention to other matters, including the construction of Greenfield Village. The first theme park of its day, Greenfield Village was a paean to the type of American village life that manufacturing processes and products such as Ford’s had largely brought to an end. *American Experience: Henry Ford* (PBS television broadcast Jan. 29, 2013).

³⁷⁸ Henderson, *supra* note 376, at 56.

³⁷⁹ This professed enthusiasm on the part of the Dodge Brothers is portrayed (perhaps in an exaggerated manner) in a contemporary television commercial commemorating the centennial of Dodge Motors. See *Dodge Motor Co., 2015 Dodge Charger Commercial Dodge Brothers: John v. Horace* (Oct. 2014), <https://www.youtube.com/watch?v=Oicu39lda0E> [http://perma.cc/2GYD-6RU2].

³⁸⁰ See Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541 (2011).

³⁸¹ See AMITAI ETZIONI, MY BROTHER’S KEEPER: A MEMOIR AND A MESSAGE (2003).

The modern counterpart to Ford-style corporate communitarianism may be Google. Employing an unofficial motto, “Don’t Be Evil,” Google’s management has claimed that it aspires

to make Google an institution that makes the world a better place. In pursuing this goal, we will always be mindful of our responsibilities to our shareholders, employees, customers and business partners.³⁸²

Our goal is to develop services that significantly improve the lives of as many people as possible. In pursuing this goal, we may do things that we believe have a positive impact on the world, even if the near term financial returns are not obvious.³⁸³

Elements of Google’s “Don’t Be Evil” ethos can be found in the Founders’ Letter accompanying its 2004 initial public offering and a Code of Conduct³⁸⁴ to which all Google employees are obligated to subscribe and follow. To a great extent, the Code reiterates principles that all corporations and their employees are obliged to follow: obeying the law, avoiding conflicts of interest, protecting corporate secrets. But the Founders’ Letter and Code of Conduct aspire to something greater than mere adherence to the law and generally accepted duties. Google’s founders are explicit about seeking long-term growth and profitability rather than short-term gain, even if it adversely affects the corporation’s balance sheet or profits—and therefore shareholder value—in the short term.³⁸⁵ They profess a desire to make Google a force for

³⁸² 2004 Founders’ IPO Letter, GOOGLE, <https://investor.google.com/corporate/2004/ipo-founders-letter.html> [<http://perma.cc/W6M6-4F9L>] (last visited Apr. 4, 2016).

³⁸³ *Id.*

³⁸⁴ *Investor Relations*, GOOGLE, <http://investor.google.com/corporate/code-of-conduct.html> [<http://perma.cc/R4HB-CGUQ>] (last visited June 7, 2016).

³⁸⁵

As a private company, we have concentrated on the long term, and this has served us well. As a public company, we will do the same. In our opinion, outside pressures too often tempt companies to sacrifice long term opportunities to meet quarterly market expectations. Sometimes this pressure has caused companies to manipulate financial results in order to “make their quarter.” . . . A management team distracted by a series of short term targets is as pointless as a dieter stepping on a scale every half hour.

2004 Founders’ IPO Letter, *supra* note 382, at 2-3. The IPO established two classes of stock—one with far more voting power than the other—to give the founders ongoing control and make the corporation a less attractive hostile takeover target, thereby avoiding some of the dilemmas identified by Colin Mayer in *Firm Commitment*. Mayer posits that the increased market for “corporate control”—mergers, acquisitions, and hostile takeovers—impedes the ability of corporations to serve as “commitment devices,” institutions that provide the self-restraint necessary for individuals to reach long-term goals by eroding trust in corporate ability to serve shareholder values. The solution, according to Mayer, is not a return to family ownership, but rather appointment of managers “whose interests are in the long-term success of the corporation.” MAYER, *supra* note 351, at 112, 151-52.

good, largely through variations on its initial function of providing access to information.³⁸⁶ And they announce the formation of a foundation, “ambitiously applying innovation and significant resources to the largest of the world’s problems” and employing “employee time and approximately 1% of Google’s equity and profits” to that end.³⁸⁷

These are lofty aspirations, and to Google’s critics³⁸⁸ that is all they are. Some detractors suggest that Google, through its alleged theft of intellectual property, its quasi-monopolistic efforts to dominate the information search industry, its collection of data on millions (perhaps billions) of people and businesses, and its use of this data to inflict targeted advertising on most anyone in possession of a computer, is the very essence of evil.³⁸⁹ But we are

³⁸⁶ “We aspire to make Google an institution that makes the world a better place. In pursuing this goal, we will always be mindful of our responsibilities to our shareholders, employees, customers and business partners. With our products, Google connects people and information all around the world for free.” *2004 Founders’ IPO Letter*, *supra* note 382, at 10.

³⁸⁷ *Id.*

³⁸⁸ See, e.g., Joshua Topolsky, *Maybe It’s Time for Google to Rethink Its ‘Don’t Be Evil’ Motto*, WASH. POST (Jan. 25, 2012), http://articles.washingtonpost.com/2012-01-25/business/35439271_1_search-product-google-search-search-feature [<http://perma.cc/UA6H-EL3G>]; Christopher Zara, *Google Kills Reader, Force-Feeds Us Google+: Don’t Be Evil?*, INT’L BUS. TIMES (Mar. 14, 2013, 12:31 PM), <http://www.ibtimes.com/google-kills-reader-force-feeds-us-google-dont-be-evil-1127159#> [<http://perma.cc/Q6ZS-KCUD>]; Tom Watson, *Google’s Strange Attack on Bloggers and the Public Internet: The Massive Reaction to Reader Shutdown*, FORBES (Mar. 13, 2013, 10:00 PM), <http://www.forbes.com/sites/tomwatson/2013/03/13/googles-strange-attack-on-bloggers-and-the-public-internet-the-massive-reaction-to-reader-shutdown/> [<http://perma.cc/B5KZ-Y8G4>].

³⁸⁹ One of your authors used Bing to search “Google is evil” and found, for example, Steve Tobak, *Why Google Really is Evil*, FOX BUS. (Jan. 17, 2014), <http://www.foxbusiness.com/technology/2014/01/17/why-google-really-is-evil/> [<http://perma.cc/UJ82-ZX67>] (alleging Google’s theft of the iPhone and tablet concepts from Apple, suggesting that the company has a “Big Brother” mentality with respect to privacy, and concluding that “the very idea of a company that behaves the way Google does knowing everything about me makes the hairs stand up on the back of my neck”); Ira Israel, *Why Google Is Evil*, HUFFINGTON POST (Aug. 7 2013, 12:47 PM), http://www.huffingtonpost.com/ira-israel/why-google-is-evil_b_3716786.html [<http://perma.cc/CVR8-YLHH>] (complaining about Google’s poor customer service, arguably a product of its domination of the search market); Ian Bogost, *What is ‘Evil’ to Google*, ATLANTIC (Oct. 15, 2013), <http://theatlantic.com/technology/archive/2013/10/what-is-evil-to-google/280573> [<http://perma.cc/XLG3-ZQM7>] (claiming that “Google’s motto seems to have largely succeeded at reframing ‘evil’ to exclude all actions performed by Google,” suggesting that Google defines evil as anything inimical to Google’s idea of progress, and stating, “All companies, particularly public ones, exist to maximize their own benefit,” and “Google never claimed otherwise; even in 2004 ‘Don’t be evil’ mostly clarified that the company wouldn’t sprint to short-term gains”); Rory O’Connor, *Google Is Evil*, WIRED (June 12, 2012, 8:02 PM), <http://www.wired.com/2012/06/opinion-google-is-evil/> [<http://perma.cc/9YT7-7CXH>] (claiming that Google’s “Street View cars surreptitiously collected private internet communications,” and asking, “Who gave these new media companies the right to invade our privacy without our permission or knowledge and then secretly store the data until they can figure out how to profit from it in the future?”). Recently, Google’s parent, Alphabet, Inc., became the world’s most valuable company. Jack Clark & Adam Satariano, *Google Parent Overtakes Apple as World’s Most Valuable Company*, BLOOMBERG BUS. (Feb. 1, 2016),

not willing to accept that, because Henry Ford, Google, and for that matter, Hobby Lobby, have all been accused of excessive zeal in pursuit of their objectives, one must accept the contractarian argument that corporation managers should pursue profit and profit alone.

C. *Corporations and Social Capital*

One thing Google professes to do is to create social capital, largely by connecting people to information and, indirectly, to other people. In his acclaimed book, *Bowling Alone*, Robert Putnam distinguishes between bonding social capital (i.e., connections *within* groups) and bridging social capital (i.e., connections *between* different groups).³⁹⁰ He observes that bridging social capital is most likely to be created where bonding social capital is strong.³⁹¹ The ethos that creates the *raison d'être* for a corporation—be it the building of automobiles (Ford), the connection of people to information (Google), the construction of lawn furniture (Conestoga), or even the desire to convey a political message (Citizens United)—creates bonds inside the corporation, where investors, managers, and workers engage in a common effort to create a product or provide a service.³⁹² That same ethos creates *bridging* social capital in two forms: (1) between people bringing different skills, backgrounds, cultures, and beliefs *into* the corporation, and (2) between those inside the corporation and those outside of it who are the consumers of its products or services. Even Conestoga—a seemingly homogeneous collection of people possessing similar skills and common ethnicity and professing a single religious belief—creates bridging social capital when it reaches out to the rest of the world (or at least

<http://www.bloomberg.com/news/articles/2016-02-02/google-parent-to-overtake-apple-as-world-s-most-valuable-company> [<http://perma.cc/3L5F-K4T9>].

³⁹⁰ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 22 (2000) (“Of all the dimensions along which forms of social capital vary, perhaps the most important is the distinction between *bridging* (or inclusive) and *bonding* (or exclusive). Some forms of social capital are, by choice or necessity, inward looking and tend to reinforce exclusive identities and homogeneous groups. Examples of bonding social capital include ethnic fraternal organizations, church-based women’s reading groups, and fashionable country clubs. Other networks are outward looking and encompass people across diverse social cleavages. Examples of bridging social capital include the civil rights movement, many youth service groups, and ecumenical religious organizations.” (footnote omitted)).

³⁹¹ *Id.* at 23-25.

³⁹² The historic clash between labor and management tells us that labor and capital do not always blend seamlessly. But most modern business corporations (Ford being a good example) now recognize that the interests of labor, management, and investors are most often reconcilable and even overlapping, if not identical.

neighboring communities), advertises its products, and sells them to purchasers of different professions, ethnicities, and religious backgrounds.³⁹³ And bridging social capital is presumably what Citizens United hoped to create when it tried to persuade the electorate that Hillary Clinton would be unsuitable for the presidency. About three decades earlier, Ronald Reagan won the presidency—and started what some would call a revolution³⁹⁴—not by courting just Republicans, but by winning over millions of “Reagan Democrats.”³⁹⁵ The point of marketing, including political marketing, is getting the world to beat a path to your door.

There is, to be sure, a downside to this. Putnam warns that bonding social capital can create a sense of insularity and strong out-group antagonisms.³⁹⁶ Indeed, the current extreme political partisanship we lament may be an unhealthy manifestation of this phenomenon. But groups that cultivate out-group antagonisms (be they the Ku Klux Klan or the American Nazi Party) are unlikely to thrive for long either in the economic marketplace or the marketplace of ideas. Corporations, especially those formed for profit, operate at their peril if they try to be exclusionary.³⁹⁷ To employ Putnam’s language, a corporation may

³⁹³ One need not share the Hahns’ religious beliefs to appreciate their craftsmanship. Disclosure: About 20 years ago, one of the authors purchased a set of lawn furniture from Conestoga; he continues to enjoy the furniture today.

³⁹⁴ Others might call it a counter-revolution. Thomas Piketty connects the electoral victories of Britain’s Margaret Thatcher (1979) and the United States’ Ronald Reagan (1980) to the growth of capital’s share of the income split between labor and capital. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 42 (2014).

³⁹⁵ STANLEY B. GREENBERG, *MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY* 39-40 (1996). Greenberg spent most of his prolific career studying the middle-class residents of Macomb County, Michigan, who abandoned their traditionally strong Democratic views and overwhelmingly supported Ronald Reagan in the 1980s. According to Greenberg, the Reagan Democrats arose out of a deep-seated fear among white, blue-collar workers that the Democratic Party was no longer a champion of working class dreams; rather, their party now sought to benefit only the very poor, the unemployed, and minorities. Reagan, in contrast, was credited with ushering in a new period of economic growth and held similar views on issues such as pornography, crime, and taxes. See also William Schneider, *The New Shape of American Politics*, ATLANTIC (Jan. 1987), <http://www.theatlantic.com/magazine/archive/1987/01/the-new-shape-of-american-politics/303363/> [<http://perma.cc/JZX6-7JZU>] (commenting on Reagan’s ability to unite disparate interests into new political coalitions).

³⁹⁶ PUTNAM, *supra* note 390, at 23.

³⁹⁷ Snob appeal may be an advertising ploy, but it is designed to make everyday folks *feel* as if they are something special if they purchase the advertiser’s product or service. See Marie D. Smith, *Decoding Victoria’s Secret: The Marketing of Sexual Beauty and Ambivalence*, 25 *STUD. IN POPULAR CULTURE* 39, 40 (2002) (concluding that the popular women’s lingerie brand appeals to women and men alike via a marketing scheme that employs “the snob appeal of European luxury” combined with sexualized ambivalence to convey the message that women who wear its products are more desirable). Even many formerly exclusive private clubs now seek to expand their membership, reaching out to previously excluded groups as a survival strategy. See Britt Peterson, *Private Social Clubs Try to Delay Their Doom*, WASHINGTONIAN

function as a centripetal force serving the predilections of its members, or as a centrifugal force, sending its energy outward and forging connections.³⁹⁸

D. Citizens United and Communitarianism

At first blush, there is much reason to criticize *Citizens United* from a communitarian perspective. In *Citizens United*, a statute enacted by a democratically elected legislature “in response to a virtual mountain of research”³⁹⁹ as part of a “delicate and interconnected regulatory scheme”⁴⁰⁰ designed to level the playing field and promote fair elections, was struck down in favor of a corporation’s “right” to influence elections on a par with flesh-and-blood individuals. Many communitarians, subscribing to Amitai Etzioni’s proposed moratorium on the minting of new rights⁴⁰¹ and aware of the need for carefully calibrated regulations to balance rights with responsibilities, would regard the decision as a step backward. The Court elevated the right of a private, discrete entity (i.e., a corporation or union) over a broad-based endeavor—promoted by politicians as conservative as Republican Senator John McCain and as liberal as his Democratic counterpart, Russell Feingold—to provide for balanced elections and assure a democratic future for the nation. The *Citizens United* majority rejected a product of the political process in favor of radical libertarian individualism.⁴⁰² It also rejected centuries of legal tradition in which corporations had been treated as a hybrid legal entity, sometimes possessing human characteristics but more often treated as something less than a fully incarnate legal being, a history noted in Justice Stevens’s dissent.⁴⁰³

(Apr. 29, 2015), <http://www.washingtonian.com/blogs/capitalcomment/private-social-clubs-are-doomed.php> [<http://perma.cc/9UDK-KTGK>] (commenting on strategies employed by previously exclusive Washington, D.C., social clubs to maintain membership in troubled economic times, including a “half-price-beer-and-burger night” designed to attract younger crowds).

³⁹⁸ ROBERT D. PUTNAM & LEWIS M. FELDSTEIN, *BETTER TOGETHER: RESTORING THE AMERICAN COMMUNITY* 255 (2003).

³⁹⁹ *Citizens United v. FEC*, 558 U.S. 310, 400 (2010) (Stevens, J., dissenting).

⁴⁰⁰ *Id.* at 412 (Stevens, J., dissenting) (quoting *McConnell v. FEC*, 540 U.S. 93, 172 (2003)).

⁴⁰¹ ETZIONI, *supra* note 339, at 4.

⁴⁰² See Steven L. Winter, *John Roberts’s Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 557-58 (2009).

⁴⁰³ *Citizens United*, 558 U.S. at 394-95 (Stevens, J., dissenting); see also Cole, *Reexamining the Collective Entity Doctrine*, *supra* note 37, at 77-84 (discussing the rise of new forms of business entities, such as limited liability companies and limited liability partnerships that blur the traditional distinctions between individual and group business activities).

Citizens United has been attacked for equating corporations with people and for equating money with speech (i.e., as a commodification of rights).⁴⁰⁴ These criticisms fall somewhat wide of the mark. We have discussed earlier how *Buckley* and *Bellotti* had previously broached the “money equals speech” boundary.⁴⁰⁵ *Citizens United* leaves intact restrictions on corporate campaign contributions,⁴⁰⁶ as distinguished from direct corporate expenditures. And while Justice Kennedy’s language regarding corporate free speech rights is more sweeping than it need be,⁴⁰⁷ it is unnecessary to equate corporate First Amendment rights with those of natural persons to recognize that there is value in allowing people to use a corporate vehicle to pool their resources and express their political views.

More to the point, *Citizens United* is an example of the Roberts Court’s excessive formalism. The opinion makes much of constitutional principle, but it largely ignores empirical data and social context⁴⁰⁸ and is lacking in broad constitutional vision.⁴⁰⁹ It

⁴⁰⁴ See, e.g., Allman, *supra* note 94, at 403-06; Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2668 (2008) (“Corporations are not human beings. They only have the qualities and the rights given to them by law, no more, no less.”); Lydia Saad, *Public Agrees with Court: Campaign Money Is “Free Speech,”* GALLUP (Jan. 22, 2010), <http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx> [<http://perma.cc/52RB-ASRL>].

⁴⁰⁵ See *supra* Part I.

⁴⁰⁶ “*Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.” *Citizens United*, 558 U.S. at 359; see also Jason S. Campbell, *Down the Rabbit Hole with Citizens United: Are Bans on Corporate Direct Campaign Contributions Still Constitutional?*, 45 LOY. L.A. L. REV. 171, 174 (2011) (“[C]itizens *United* does not reach the question of the constitutionality of the ban [on direct corporate expenditures].”); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217 (2010) (explaining how neither First Amendment concern applies to campaign contributions, as this type of expense has “limited inherent speech content” and has a “greater perceived relationship to misconduct”). In a subsequent case, however, the Court did strike down limitations on aggregate contributions by an individual to congressional campaigns. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014).

⁴⁰⁷ “The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.” *Citizens United*, 558 U.S. at 399 (Stevens, J., dissenting).

⁴⁰⁸ At one point, the Court declared, quite disingenuously, “[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 357. Witness, for example, some \$6 million in recent “independent” expenditures by the Koch Brothers to defeat Michigan Senate candidate Gary Peters, who had the temerity to object to a huge petroleum coke pile positioned by a Koch-related business alongside the Detroit River in Southwest Detroit, polluting the air and water. Greg Sargent, *When the Koch Brothers Become a Liability for Republicans*, WASH. POST (Aug. 7, 2014), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/08/07/when-the-koch-brothers-become-a-liability-for-republicans/> [<http://perma.cc/5LGN-7N5V>]; see also Manu Raju, *Senate Battle in Michigan*, POLITICO

has been justifiably criticized for elevating “assertion over tradition, absolutism over empiricism, [and] rhetoric over reality.”⁴¹⁰ In so doing, it elevates the rights of an individual entity (a corporation or union) over the general welfare, striking down an act of Congress that came into law with bipartisan support.⁴¹¹

That enactment, the Bipartisan Campaign Reform Act, was designed to address the perceived evils inherent in the private financing of elections, evils addressed in the Communitarian Platform as follows:

Campaign contributions to members of Congress and state legislatures, speaking fees, and bribes have become so pervasive that in many areas of public policy and on numerous occasions the public interest is ignored as legislators pay off their debts to special interests It is said that giving money to politicians is a form of democratic participation. In fact, the rich can “participate” in this way so much more effectively than the poor, that the democratic principle of one-person one-vote is severely compromised [T]hose who cannot grease [Congress] at all or not as well, lose out and so do long-run public goals that are not underwritten by any particular interest groups.⁴¹²

Of course, not all statutes can be defended on communitarian grounds simply because (by definition) they are the product of a democratically elected legislature. McCain-Feingold’s limitations on corporate speech could be viewed as having the purpose and effect of *narrowing* political participation. But that is true only in a formalistic sense (particularly given the availability of corporate and union PACs); the real-world effect of the *Citizens United* decision was to allow the economically well-endowed to wield disproportionate influence over elections,

(Feb. 20, 2014, 5:00 AM), <http://politi.co/1fjdleW> [<http://perma.cc/LP4Y-VPGL>]; *How to Blow a Right-Wing Billionaire’s Money*, WILL BUNNETT (Sept. 30, 2014), <http://willbunnett.com/how-to-blow-a-right-wing-billionaires-money/> [<http://perma.cc/MS5L-2JPE>] (Disclosure: One of the authors is acquainted with Peters and was a minor contributor to his campaign.). And the Court expresses the shockingly naive view that “[t]here is . . . little evidence of abuse that cannot be corrected by shareholders “through the procedures of corporate democracy.” *Citizens United*, 558 U.S. at 361-62 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

⁴⁰⁹ See Winter, *Citizens Disunited*, *supra* note 94, at 1135 (“Yet, while the Court’s opinion in *Citizens United* is long on free speech rhetoric, it is painfully short on empirical data, social context, and constitutional vision.”).

⁴¹⁰ See *Citizens United*, 558 U.S. at 478-79 (Stevens, J., dissenting).

⁴¹¹ Add to that Strine and Walter’s observation that *Citizens United* is not even consistent with an originalist interpretation of the Constitution. See *supra* note 236 and accompanying text.

⁴¹² ETZIONI, *supra* note 339. The platform’s language focuses on campaign contributions, not independent expenditures. But it is naive to assume that politicians are unaware of the identity of those individuals and entities that support their campaigns and causes through “independent” expenditures. *Id.*

producing undemocratic results.⁴¹³ By stating that the avoidance of quid pro quo influence buying is the only legitimate basis for statutory restraints on corporate political contributions, the Court ignored the deleterious effects of vast sums of money, amassed through corporate capital concentration, on the political system (the “antidistortion rationale”).⁴¹⁴ Supporters of the decision would nonetheless say that the First Amendment requires that the electorate, and not the courts, be credited with the ability to discriminate between the speech it chooses to heed and that which it prefers to ignore.⁴¹⁵

1. The Communitarian Side of *Citizens United*

There is, indeed, a communitarian side to *Citizens United* that is suggested by the very form of the corporation or union. Community is not always embodied in the form of government. As we have discussed earlier, intermediate communities—religious

⁴¹³ Strine and Walter have argued that this disproportionate influence

is likely as a general matter to make candidates of all persuasions more beholden to corporate desires [T]his will increase the danger of externality risk, because corporate expenditures will be made with the singular objective of stockholder profit in mind, and therefore will be likely to favor policies that leave the corporation with the profits from their operations, while shifting the cost of these operations (including . . . excessive risk taking or safety shortcuts) to others.

Strine & Walter, *supra* note 64, at 383.

⁴¹⁴ In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court, in upholding a Michigan ban on corporate expenditures in support or opposition of candidates for political office, recognized “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.” *Id.* at 660. *Austin* was derided in the *Citizens United* majority opinion, and particularly in Chief Justice Roberts’s concurring opinion. *Citizens United*, 558 U.S. at 351-52 (noting that *Austin*’s antidistortion rationale allows for the “dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations” and “wealthy media corporations could have their voices diminished to put them on par with other media entities”); *id.* at 354 (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.” (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008))); *see also id.* at 381 (Roberts, C.J., concurring) (“The First Amendment theory underlying *Austin*’s holding is extraordinarily broad. *Austin*’s logic would authorize government prohibition of political speech by a category of speakers in the name of equality—a point that most scholars acknowledge”). But Strine and Walter have pointed out that “because the for-profit corporation has been so successful as a means to generate wealth, the means at its disposal will be huge. Even before McCain-Feingold was struck down by *Citizens United*, corporate political spending far exceeded that of labor or other interest groups. After *Citizens United*, that imbalance grew.” Strine & Walter, *supra* note 64, at 384 (footnote omitted). Professor Coates regards *Citizens United* as a step in a “corporate takeover of the First Amendment [that] represents a pure redistribution of power over law with no efficiency gain.” John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, *supra* note 119, at 265.

⁴¹⁵ *Citizens United*, 558 U.S. at 371; *see* Garden, *supra* note 5, at 29.

organizations, nonprofit organizations, political clubs, civic improvement associations, bowling leagues (what we call “civil society”)—play an important role in knitting together community and building social capital.⁴¹⁶ Corporations and labor unions may be seen as vehicles through which people with common values or objectives organize themselves to have an impact on the world.⁴¹⁷ Whether that impact is largely economic, as in the case of most business organizations, social, as in the case of many nonprofit corporations, or political, as in the case of the Citizens United organization, we ought not delegitimize such efforts. In fact, communitarians are generally supportive of such organizations.⁴¹⁸ “Americans of all ages, all stations in life, and all types of disposition are forever forming associations,” Alexis de Tocqueville famously wrote.⁴¹⁹ Professor Margaret Blair has more recently observed,

Historically, the use of the corporate form for business activity developed first as a mechanism to enable groups of people to combine, invest, and preserve capital to provide a needed product or service to a community—be it churches, colleges, bridges, canals, etc.—and to provide a governance structure for that committed capital.⁴²⁰

In this sense, the *Citizens United* decision might be viewed not as a triumph of radical libertarian individualism, but as an assertion of the rights of the collective, as expressed through an intermediate community (i.e., the corporation or union).⁴²¹

Citizens United indeed expands the rights of unions, and in his acclaimed work, *Bowling Alone*, Robert Putnam extols the role of unions in the building of social capital.⁴²² Indeed, we can

⁴¹⁶ PUTNAM, *supra* note 390, at 22; ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 5 (2004).

⁴¹⁷ PUTNAM, *supra* note 390, at 49.

⁴¹⁸ Communitarians would differentiate groups, such as the Ku Klux Klan or Nazi Party, that create bonding social capital (i.e., strong ties *within* groups) but evince strong out-group antagonisms and deplore bridging social capital (ties *between* groups). Most corporations (business and nonprofit) and unions have more inclusive goals. *See id.* The organization Citizens United, as much as it deplored Hillary Clinton, sought to engage other people in the political spectrum and bring them to its side.

⁴¹⁹ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 485 (Jacob Peter Mayer & Max Lerner eds., George Lawrence trans., 1966).

⁴²⁰ Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297, 298 (2015).

⁴²¹ Those who value the free speech rights of dissenting corporate shareholders and union members might point out that the collective opinions of the majority of shareholders and members could have been expressed through the use of corporate and union PACs, rather than by use of corporate or union treasuries.

⁴²² Unions provide “an important locus of social solidarity, a mechanism for mutual assistance and shared experience.” PUTNAM, *supra* note 390, at 80. Putnam notes, “[w]ork-related organizations, both unions and business and professional organizations, have traditionally been among the most common forms of civic

see a direct correlation between the demise of labor unions and the growing income disparities that not only challenge our notions of equality, but also the very foundations of American democracy.⁴²³ Those who would eviscerate unions because they submerge the identity of the individual to the collective⁴²⁴ ignore the reality that it is only through the collective raising of voices that some people are heard at all.

2. The Court's Selective Deference to the Entity

Oddly, however, the Supreme Court has acted recently to muffle the collective voices of trade unions even as it seemingly extended their First Amendment rights in *Citizens United*. While the Court gave short shrift to the rights of dissenters in the corporate context in *Citizens United* (assuring us that "corporate democracy" would sufficiently protect their interests⁴²⁵) and to individual corporate employees in *Hobby Lobby* (subordinating their statutory right to health care and their constitutionally protected procreative rights), it has been especially deferential to dissenters' rights in a union context.⁴²⁶ In a recent article, Professor Catherine L. Fisk and Dean Erwin Chemerinsky noted that in *Knox v. Service Employees International Union, Local 1000*,⁴²⁷ the Court recently held "that a union may make a special assessment to support political activities only if employees first opt in, and suggest[ed] that it is poised to require opt in for other union expenditures."⁴²⁸ As a result, "[a]nti-union employees in unionized workplaces thus enjoy a right to refuse to subsidize organizational political activity that no shareholder or corporate employee enjoys and that no nonprofit association member enjoys."⁴²⁹

The problem was exacerbated in *Harris v. Quinn*,⁴³⁰ announced on the same day as *Hobby Lobby*. In that case, the Court held that the collection of agency fees (paid by nonunion

connectedness in America," and concludes that in measures of social capital involvement in such organizations is "an important ledger." *Id.*

⁴²³ An influential writer on contemporary economics has observed that "minimum pay can be markedly lower in sectors that are relatively underregulated or underunionized." PIKETTY, *supra* note 394, at 310-11.

⁴²⁴ See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *infra* notes 431-32 and accompanying text.

⁴²⁵ *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

⁴²⁶ Fisk & Chemerinsky, *supra* note 65, at 1026.

⁴²⁷ *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012).

⁴²⁸ Fisk & Chemerinsky, *supra* note 65, at 1026.

⁴²⁹ *Id.*

⁴³⁰ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

employees in lieu of union dues, so as to avoid financing the union's political activities) violated dissenting workers' First Amendment rights.⁴³¹ Thus, in both *Citizens United* and *Hobby Lobby*, the Court upheld the rights of the collective (the corporation) over those of its individual constituents (i.e., the corporation's dissenting shareholders and employees), while in *Knox* and *Harris*, the Court upheld the rights of dissenting employees over a collective entity (the union) democratically chosen to represent them.⁴³²

3. The Corporation as an Instrument of Free Speech

Given the cost of "publication" in modern media, freedom of expression often requires concerted action.⁴³³ While the Internet makes instant publishers of us all (or almost all, in light of the digital divide), there are very few individuals who, acting alone, could have funded production and distribution of the movie (*Hillary*) that *Citizens United* produced.⁴³⁴ Many of the same

⁴³¹ The plaintiffs were employed as home-care personal assistants who were hired by the recipients of care but whose salaries were paid by the state. While highly critical of its prior decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (upholding "fair share" agency shop provisions in public employee collective bargaining agreements), the Court, in an opinion by Justice Alito, stopped just short of overturning *Abood*, finding that the *Harris* plaintiffs were not public employees in the strict sense. *Harris*, 134 S. Ct. at 2644. Justice Kagan, dissenting, found this to be a distinction without a difference. *Id.* at 2645 (Kagan, J., dissenting). We quite agree. The decision has the potential of turning so-called right-to-work laws into a constitutional mandate and undermining labor unions that would be disabled from collecting even an agency fee from individuals whom they remained legally required to represent in collective bargaining and grievance procedures. It is one of the most anticommunitarian decisions of a Court that has all too often elevated claims of individual rights over the general welfare. The Court was invited to overturn *Abood* entirely in *Friedrichs v. California Teachers Association*, 135 S. Ct. 2933 (2015). The Court's 4-4 tie in that case (almost certainly a consequence of Justice Scalia's death earlier in the term) left *Abood* in place, averting a calamity for public sector unions and affording communarians a momentary sigh of relief.

⁴³² This mirrors the inconsistency we have earlier noted in connection with the Court's Fifth Amendment corporate jurisprudence. See *supra* Part I.

⁴³³ During the most recent election cycle, much attention was focused on wealthy *individuals* like the Koch brothers and Sheldon Adelson, who alone bankrolled a few political campaigns. So who is the antidemocratic culprit here? The corporate or union vehicle of group effort or (to borrow a phrase from Theodore Roosevelt) the lone "malefactor of great wealth"? President Theodore Roosevelt, Address on the Occasion of the Laying of the Corner Stone of the Pilgrim Memorial Monument (Aug. 20, 1907), https://www.archive.org/stream/addressofpreside00roo/addressofpreside00roo_djvu.txt [<http://perma.cc/L3VR-KHU3>].

⁴³⁴ The Koch brothers, frequently derided by liberals, are individuals with the financial wherewithal to do so. That they sometimes choose to do so through a corporate mechanism owes more to disclosure issues than the inherent evil of the corporate form. And *Citizens United* leaves intact the disclosure requirements of the challenged statute (*Citizens United v. FEC*, 558 U.S. 310, 315, 319 (2010)), notwithstanding Justice Thomas's spirited partial dissent. *Id.* at 480 (Thomas, J., dissenting in part).

people who have derided *Citizens United* justifiably applauded the Court's 1964 decision in *New York Times v. Sullivan*,⁴³⁵ holding that the New York Times Corporation enjoyed First Amendment protection when sued by a public official for allegedly defamatory speech.⁴³⁶ Why should that same protection not apply where a corporation wishes to influence an election through production and distribution of a motion picture, as in *Citizens United*? As Professor Joel Gora said in defense of the *Citizens United* decision, "First Amendment rights should be unified, universal, and indivisible."⁴³⁷ While Professor Gora's statement may be somewhat overdrawn and formalistic—much as the majority opinion in *Citizens United*—we cannot discriminate between those organized speakers we like and those we disdain. Just as we were compelled to accept Nazis marching through Skokie, we cannot treat *Citizens United* or the Koch brothers any differently than the *New York Times* and Ralph Abernathy and his associates.⁴³⁸

Indeed, the Communitarian Platform recognizes the organizing role of corporations and labor unions as intermediate communities, asking "how 'private governments,' whether corporations, labor unions, or voluntary associations, can become more responsive to their members and to the needs of the community."⁴³⁹ The platform's call is for responsibility, not

⁴³⁵ N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

⁴³⁶ We have, in the past, criticized the concept of "mediaocracy," through which media organizations would enjoy special First Amendment privileges. One of us declared, years ago, "Clearly, you and I should have the right to discuss on the street corner in the afternoon what *The New York Times* has published on its front page that morning." Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 303 (1994). Should any less protection be accorded a nonmedia corporate speaker? The *Citizens United* opinion emphatically says no:

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views.

Citizens United, 558 U.S. at 352.

⁴³⁷ Gora, *supra* note 94, at 939.

⁴³⁸ The Reverend Ralph Abernathy, Martin Luther King's deputy in the Southern Christian Leadership Conference, was the principal defendant in *Abernathy v. Sullivan*, 376 U.S. 967 (1964), the companion case to *New York Times v. Sullivan*, 376 U.S. 254 (1964). Abernathy had joined with several other prominent civil rights advocates in placing the advertisement in the *New York Times* that gave rise to this precedent-setting case.

⁴³⁹ *The Responsive Communitarian Platform*, COLUMBIAN COLL. OF ARTS & SCIS., <http://communitariannetwork.org/platform> [<http://perma.cc/3ST5-NST3>] (last visited June 7, 2016).

censorship. Responsibility may be provided for by requiring greater accountability on the part of corporations and unions (e.g., by requiring disclosure of the major contributors to the corporate effort and the recipients of the corporation's or union's largess), as we suggest below.⁴⁴⁰ *Citizens United's* preservation of the statutory disclaimer and disclosure requirements is an acknowledgment of the importance and constitutional legitimacy of accountability.⁴⁴¹ Indeed, more comprehensive statutory disclosure requirements would advance communitarian norms and free speech rights; by identifying the true sources of speech, they would edify a public whose access to information and ideas is often cited as the major justification for First Amendment speech rights.⁴⁴²

Democratic institutions and the community at large benefit from encouraging corporations and other intermediate associations to engage in a variety of behaviors, not by narrowly circumscribing the range of permissible behaviors. Even when a corporation, in its charter or bylaws, does not explicitly embrace activities other than profit maximization, the default premise should be that these activities are not only constitutionally permissible, but socially desirable. Communitarian principles would have us seek a proper balance such that the collective voice may be heard without placing a corporate stranglehold on political discourse.

E. Hobby Lobby as Communitarian Tract . . . Not

It is more difficult to conjure up a communitarian silver lining around the cloud that is *Hobby Lobby*. Granted, Hobby Lobby and Conestoga, like Google, may be regarded as corporations that place principle (in this case, religious principle) over profit and hew to an ethos other than profit maximization. But notwithstanding Justice Alito's effort to portray the corporation as an embodiment of the efforts and aspirations of its constituent parts, his opinion in *Hobby Lobby* fails as a communitarian text. It rejects the efforts of Congress and a government agency to adopt rules to provide health care coverage

⁴⁴⁰ See *infra* text accompanying notes 494-512.

⁴⁴¹ *Citizens United*, 558 U.S. at 370-71; see also *id.* at 483-85 (Thomas, J., dissenting).

⁴⁴²

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

Id. at 356, 371; see also Garden, *supra* note 5, at 29.

to a broad array of Americans (including constitutionally protected health measures)⁴⁴³ while taking pains to carve out carefully tailored exceptions for religious organizations (as distinguished from corporations with religiously committed owners). Some would say that religious liberty requires that owners of closely held corporations be allowed to exercise their beliefs through those corporations, even if it means treading on access to health care for corporate employees or imposing the burden of paying for that health care on the taxpaying citizenry. But most communitarians would characterize such a construction of RFRA as a radical libertarian view that advances the rights of the few at a cost to the many. Communitarianism calls for finer tuning and greater subtlety, not the analytical meat cleaver wielded by the Supreme Court's majority.

One could argue that the *Hobby Lobby* decision, by allowing a closely held corporation to be guided by the religious precepts of its owners, has allowed the corporation a conscience that would otherwise be lacking apart from the sentiments of its owners.⁴⁴⁴ But the majority in *Hobby Lobby* completely ignores the rights and interests of every corporate constituency *except* the owners. Neither the employees' own religious beliefs nor their access to health care counts for much in the face of the owners' religious imperatives. To the extent that employee access to contraception is given any regard, the majority appears confident that it is a burden that the government (i.e., the taxpayers), rather than the corporation, can assume. Thus, all needs and interests apart from those of the owners are externalized. The corporation owes nothing to anyone, except those who have an ownership interest. Any communitarian purpose served by the *collective* attributes of the corporation is ignored.

Finally, *Hobby Lobby* focuses myopically on the corporate owners' rights but says nothing of their responsibilities. The owners are allowed to avail themselves of the corporate form (such as perpetual existence and limitations on liability), but are relieved of its burdens, shedding the corporate veil only when it suits

⁴⁴³ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood Assoc. of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁴⁴ Professor Robert F. Cochran has argued, "Religious people should enter the business square and bring their values with them and their religious values should be protected. In my view, they will provide much more public benefit as a result of following their values than any public benefits that might come from placing limitations on their activities." Email from Robert F. Cochran to Robert M. Ackerman, July 17, 2015 (on file with author).

them.⁴⁴⁵ And they exercise their personal rights at a cost to their employees and the American taxpayers. *Hobby Lobby*, perhaps more so than any other case, reminds us of Etzioni's admonition that "each newly minted right generates a claim on someone."⁴⁴⁶

F. The Problem for Communitarians: Rights Without Responsibilities

The problem for communitarians, then, is not in a refusal to recognize the utility of corporations. The problem for communitarians arises when, through rent-seeking conduct, corporations obtain the rights of natural persons without assuming commensurate responsibilities. The result is an asymmetrical distortion of rights and political power and a lack of accountability.

Even as they advocated for principles embracing shareholder profit maximization as the sole function of the corporation, conservatives and contractarians recognized that external regulation of corporate behavior would be necessary to curb corporate rapaciousness.⁴⁴⁷ But, as Strine and Walter have noted, the *Citizens United* decision disturbed the delicate mechanism for external regulation that previously served as such a check, and replaced it with . . . nothing. Corporations previously limited in their political activities and regulated in matters such as employment practices and environmental control could now employ their wealth to tilt the political playing field and advocate (with increasing success) for the lifting of constraints on their behavior.⁴⁴⁸

Long before cases such as *Citizens United* and *Hobby Lobby*, it was feared that the corporation was a Frankenstein monster, and a disembodied one at that.⁴⁴⁹ Writing in another era of economic displacement caused in part by corporate overreaching, John Steinbeck placed the following words in the mouths of bank representatives foreclosing on farmland:

We're sorry. It's not us. It's the monster. The bank isn't like a man.

Yes, but the bank is only made of men [replied the tenant farmers].

⁴⁴⁵ It is fair to acknowledge that corporate owners may have the burden of double taxation (in the absence of a Subchapter S corporation or a corporate "inversion").

⁴⁴⁶ ETZIONI, *supra* note 339, at 5-6.

⁴⁴⁷ Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y 303 (1973); Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 427 (2014); STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 425 (2002).

⁴⁴⁸ Strine & Walter, *supra* note 64, at 383.

⁴⁴⁹ Edward, 1st Baron Thurlow, English jurist and Lord Chancellor (1731-1803).

No, you're wrong there—quite wrong there. The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It's the monster. Men made it, but they can't control it.⁴⁵⁰

Justice Alito would have it both ways, if one takes his *Hobby Lobby* opinion seriously. He agrees with Steinbeck's tenant farmers that the corporation is only made of men (and women). But he refuses to hold these men and women responsible for anyone but themselves. To paraphrase Hovenkamp, the American corporation has become a person but has lost its soul.⁴⁵¹ We believe that if corporations are to be endowed with human qualities and human rights, those qualities should include due regard for those who (along with shareholders) are affected by corporate conduct. Along with rights come responsibilities. Neither presumed shareholder greed nor owners' personal convictions can be all-controlling.

IV. TAMING THE MONSTER BY MAKING CORPORATIONS MORE COMMUNITARIAN

In his fine book, *Firm Commitment*, Colin Mayer recognizes the need to curb corporations as they engage in rent-seeking conduct. Says Mayer, "What have been progressively extinguished from the corporation are its values beyond its value to shareholders."⁴⁵² Mayer advocates for a diverse mix of management structures and corporate philosophies to curb harmful tendencies.⁴⁵³ Under the traditional view of corporate law, corporate greed and government regulation were seen as point and counterpoint, thesis and antithesis, yin and yang. *Citizens United* and *Hobby Lobby* have upset this balance. Our communitarian view therefore calls upon corporations to take on the responsibility of self-regulation by recognizing a broader array of corporate objectives. In light of the Supreme Court's personification of corporations, we see a need for at least two measures to embed a human conscience inside the brain of the corporate Frankenstein monster: effective "other constituency" statutes and compulsory disclosure to shareholders of political expenditures.

⁴⁵⁰ JOHN STEINBECK, *THE GRAPES OF WRATH* 33 (Steinbeck Centennial ed. 2002).

⁴⁵¹ HOVENKAMP, *supra* note 360, at 16.

⁴⁵² MAYER, *supra* note 351, at 240.

⁴⁵³ *Id.* at 187-90.

A. *The Need for Action at the State Level*

In *Citizens United* and *Hobby Lobby*, the Roberts Court changed the law to make for-profit business corporations more like “real people.” Many “real people” do not agree with these changes to the law, but it appears unlikely that Congress (to the extent it can or is even inclined) or the Supreme Court (to the extent it might reverse itself) will act to change the law back to what it was before those cases were decided.⁴⁵⁴ Recognizing that change is unlikely at the federal level, we believe that meaningful change nevertheless can be attained at the state level—if state legislatures are willing to make modest adjustments to their disclosure and corporate law statutes. By requiring disclosure of independent political expenditures by corporations and adopting mandatory constituency statutes for business corporations, state legislatures can help ensure that for-profit corporations exercise the new rights conferred on them by *Citizens United* and *Hobby Lobby* in ways that are both more transparent to all those affected by corporate actions and more responsible to broader societal interests. In other words, if the Supreme Court is going to treat corporations more like people, the states should make corporate governance law more communitarian and corporate political spending more transparent.

1. “Other Constituency” Statutes: A Communitarian Wedge in the Shareholder Primacy Wall

As we have discussed previously, traditional American corporate law has been dominated by the principle of shareholder primacy (i.e., that corporate boards of directors could lawfully act only if their action conferred some benefit—direct or indirect, short-term or long-term—on the shareholders who owned the corporation).⁴⁵⁵ Advocates of constituency statutes envision broader responsibilities for the corporation as a legal “person” with societal obligations that extend beyond merely maximizing shareholder wealth.⁴⁵⁶ Constituency statutes are controversial⁴⁵⁷

⁴⁵⁴ Justice Scalia’s recent passing might, however, put this issue back in play, depending on the choice of his successor. The doctrine of *stare decisis* looms strong, however.

⁴⁵⁵ For a discussion of the debate surrounding shareholder primacy, see *supra* note 360 and accompanying text.

⁴⁵⁶ See *supra* note 361 and accompanying text.

⁴⁵⁷ See Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16-17 (1992) (referring to “the unusually passionate debate over the proper interpretation of corporate constituency

and remain an unsettled area of corporate law,⁴⁵⁸ but the Supreme Court's *Citizens United* and *Hobby Lobby* decisions necessitate a fresh look at these measures, suggesting this question: Do constituency statutes provide a bridge between the newly recognized constitutional and statutory rights of corporations to engage in political spending and religious activities that the *Citizens United* and *Hobby Lobby* cases bestowed on business corporations and the shareholder wealth maximization principle that corporate law has for almost a century stubbornly refused to surrender?

Although the genesis of constituency statutes was as an antitakeover measure,⁴⁵⁹ their conceptual underpinnings stem from "stakeholder" management theories⁴⁶⁰ and the classic debate over corporate social responsibility between contractarians and communitarians.⁴⁶¹ Accordingly, even though constituency statutes were conceived as antitakeover legislation, in most instances their application is not confined to takeover situations.⁴⁶² A principled

statutes" and characterizing the *ABA Report* as "the best-known and most trenchant attack" on constituency statutes).

⁴⁵⁸ See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) cmt. a, at 53 (AM. LAW INST. 1994) ("Present law on the matters within the scope of § 2.01 cannot be stated with precision, because the case law is evolving and not entirely harmonious, while the statutes cover only some of the relevant issues and leave open significant questions even as to the issues they do cover.").

⁴⁵⁹ See *ABA Report*, *supra* note 360, at 2253 ("Other constituency statutes have typically been adopted as one measure, among others, designed to assist directors in forestalling unwanted takeovers."); Bratton, *supra* note 370, at 1466-67 (stating that constituency statutes originated as "interest group legislation" designed to protect managers defending against hostile takeovers by allowing them to consider constituent interests to justify their actions); *cf.* Orts, *supra* note 457, at 25-26 ("Legislative history in Pennsylvania, the first state to adopt a constituency statute, confirms that politically diverse coalitions commonly supported antitakeover statutes, even though particular native corporations threatened by takeovers usually initiated the legislation. The Pennsylvania Chamber of Commerce sponsored the original bill, and Scott Paper Company, which at the time faced a hostile acquisition attempt from a Canadian-based firm, strongly supported it. In addition, a proxy battle at the time pitted T. Boone Pickens and Mesa Petroleum Co. against Pittsburgh-based Gulf Oil Corp. Although state legislators were aware of the two contests for control, they appear not to have voted for the statute purely at the behest of the two targets. On the contrary, the evidence demonstrates significant involvement of labor interests and other considerations. Whatever the precise configurations of the various political coalitions responsible for constituency statutes, one aspect of the birth of the statutes is undisputed: an antitakeover motive. As one Pennsylvania legislator stated, 'I am not naive. . . . I also know this bill will probably have a chilling effect on adverse corporate takeovers.' On the antitakeover birth of constituency statutes, commentators agree." (footnotes omitted)).

⁴⁶⁰ Orts, *supra* note 457, at 20.

⁴⁶¹ *Id.* at 21-22 (observing that constituency statutes pose the same issues as the debate between Professors Berle and Dodd over whether corporations owe a duty to society beyond the interests of shareholders).

⁴⁶² See Wallman, *supra* note 362, app. A, at 194 (summarizing state constituency statutes as of 1991); Millon, *Communitarians*, *supra* note 356, at 1376.

analysis must account for some underlying substance to the statutes; they cannot be justified merely as pretext to ward off hostile takeovers. The statutes differ from state to state, but a common element is that they “purport to allow directors of public corporations to consider an expanded group of ‘interests’ when making decisions on behalf of the corporation.”⁴⁶³ The “interests” that the statutes allow directors to consider extend beyond those of the corporation’s shareholders and most often include “corporate employees, suppliers, and customers, as well as the communities in which the corporation does business.”⁴⁶⁴ Directors’ consideration of these “other constituencies” is not mandatory,⁴⁶⁵ however, and some states’ statutes explicitly provide that directors are not required “to afford any particular weight to any of the specified factors or interests defined under the statutes”—thereby avoiding the risk of suits by nonshareholder constituency groups.⁴⁶⁶ Proponents of constituency statutes believe that the legislation rightly recognizes the “profound effect” modern corporations have “on the lives of a variety of groups not traditionally within the corporate law structure.”⁴⁶⁷ Viewed “in this light,” they argue, “constituency statutes provide a basis for

Surveying the range of corporate constituency statutes in 1992, Professor Orts identified two common variations in constituency statutes across states, “opt-in” provisions and provisions applying to director decisions involving corporate control. *See also* Orts, *supra* note 457, at 30-31 (explaining that states with “opt in” statutes allow corporations to adopt charter amendments recognizing constituency interests, but if a corporation does not amend its charter, the statute does not apply). As of 2011, 30 states had enacted some form of constituency statute. McCall, *supra* note 265, at 563 & n.274.

⁴⁶³ *See* Orts, *supra* note 457, at 26.

⁴⁶⁴ *Id.* at 26-27.

⁴⁶⁵ Connecticut was the exception in initially enacting a statute that made directors’ consideration of other constituencies mandatory in takeover situations, but in 2010, the Connecticut legislature amended the statute to change the language of the operative provision from requiring that directors of publicly traded companies in takeover situations “shall consider” the interests of other constituencies to providing that public company directors “may consider” the interests of other constituencies if they wish to do so. *See* CONN. GEN. STAT. ANN. § 33-756(d) (West 2014) (providing that “a director of a corporation which has a class of voting stock registered pursuant to Section 12 of the Securities Exchange Act of 1934 . . . may consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation’s employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located”). The Connecticut statute also provides that a public company director in a takeover situation “may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.” *See id.*

⁴⁶⁶ Orts, *supra* note 457, at 29-30.

⁴⁶⁷ *See* Mitchell, *supra* note 367, at 584.

reallocating those costs among all constituent classes that directly or indirectly benefit from fiduciary rules.”⁴⁶⁸

By injecting new political participation and religious exercise rights into the debate, the Supreme Court’s *Citizens United* and *Hobby Lobby* decisions necessitate reexamination not only of constituency statutes, but also of the fundamental debate between the contractarian shareholder wealth maximization doctrine and the competing communitarian approach to corporate governance and corporate social responsibility. We believe—and Professors Coates, Kesten, and Yosifon, as well as Chief Justice Strine, apparently all agree—that *Citizens United* has undermined the conceptual foundation of the conservative, corporate law shareholder wealth maximization model by exposing the political system to a new risk of regulatory capture by corporate interests.⁴⁶⁹ This flaw is sometimes called the “externality risk” problem.⁴⁷⁰ The best way to alleviate this risk is to change the core principle that drives it, the shareholder wealth maximization imperative, and we believe that the most realistic available way to accomplish that objective is with the enactment of mandatory constituency statutes by the states.

2. A Proposal for Mandatory State Constituency Statutes

We can draw upon a prior legislative example to illustrate our proposal for mandatory constituency statutes. In 1994, Connecticut enacted a new Business Corporation Act that, among other things, included various provisions regulating mergers and

⁴⁶⁸ *Id.* at 585; see also Millon, *Communitarians*, *supra* note 356, at 1378-79 (noting that communitarians view corporate law as necessary to confront the negative impacts a corporation can have on nonshareholder constituencies); Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POLY. REV. 363, 406 (2007) (arguing that a corporation has an obligation to act responsibly because it “can and does affect the lives of others”).

⁴⁶⁹ See Strine & Walter, *supra* note 64, at 342 (stating that *Citizens United* “undermines conservative corporate theory’s reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally”); see also Yosifon, *The Public Choice Problem*, *supra* note 10, at 1198; Kesten, *supra* note 92, at 505-07.

⁴⁷⁰

After *Citizens United*, the very success of the corporate form as a wealth-generating tool is in tension with conservative corporate theory because if the wealth impounded in corporations can be used in unlimited amounts to influence who is elected to the offices that determine the ‘rules of the game,’ the range of policy options is likely to move in a direction where there is greater danger of externality risk.

Strine & Walter, *supra* note 64, at 342 (emphasis added).

acquisitions of Connecticut corporations.⁴⁷¹ Section 100 of that act defined the duties of directors, including a fairly standard recitation of the duty of care.⁴⁷² Subsection 100(d) of the legislation, however, contained a provision that was then and has since remained unique in the annals of American corporate law: a mandatory corporate constituency statute.⁴⁷³ The operative language required that a director

shall consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation.⁴⁷⁴

By using the mandatory “shall” rather than the discretionary “may” found in other state constituency statutes,⁴⁷⁵ the Connecticut statute as enacted in 1994 imposed an affirmative obligation on directors to consider the nonshareholder constituencies that are identified in the statute.

In 2010,⁴⁷⁶ the Connecticut legislature amended Connecticut's constituency statute to bring it into alignment with those of other states, changing the word “shall” to “may” and thereby making the statute discretionary rather than mandatory.⁴⁷⁷ The reason offered for the change was that, as the

⁴⁷¹ See 1994 Conn. Legis. Serv. 94-186 (West).

⁴⁷² See *id.* § 100(a) (“A director shall discharge his duties as a director, including his duties as a member of a committee: (1) In good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation.”).

⁴⁷³ See *id.* § 100(d).

⁴⁷⁴ *Id.* (emphasis added).

⁴⁷⁵ See 15 PA. CONS. STAT. ANN. § 1715 (2015) (providing that directors, in discharging their duties, “may, in considering the best interests of the corporation, consider to the extent they deem appropriate” the effect of their actions on groups other than shareholders, including “employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located” (emphasis added)); McCall, *supra* note 265, at 563 n.276.

⁴⁷⁶ Ironically, the statute's amendment took place in the February 2010 Regular Session of the Connecticut state legislature, immediately after the Supreme Court decided *Citizens United* in January 2010, but we are not aware of any connection between the two events.

⁴⁷⁷ See 2010 Conn. Legis. Serv. 10-35 (West); McCall, *supra* note 265, at 563 n.276 (describing the legislative history of the change of the word “shall” to “may” in 2010).

only state with a mandatory constituency statute, Connecticut was imposing a burden on corporate directors that directors in other states did not face.⁴⁷⁸ Whatever the merits of that argument at the time, the recent (and growing) recognition of the potential pernicious impact of *Citizens United* and *Hobby Lobby* on corporate constituencies other than shareholders justifies a reexamination of the merits of mandatory constituency statutes by state legislatures. If, as commentators are increasingly recognizing, the corporate political spending permitted by *Citizens United* (and, as we believe, the corporate religious expression permitted by *Hobby Lobby*) presents a risk of harm to “non-stockholder constituencies and society generally,”⁴⁷⁹ then it seems to us to make eminent sense that state legislatures should act to minimize that risk by imposing an affirmative duty on corporate directors to consider the effects of their actions on those constituencies and society at large.

Furthermore, we suggest going beyond the scope of the original Connecticut mandatory constituency statute as enacted in 1994. The 1994 Connecticut statute is most frequently referenced in passing as the only mandatory state constituency statute, with no further examination of its provisions and application. What is seldom mentioned is that, by its terms, the 1994 Connecticut statute applied only to directors of publicly traded companies⁴⁸⁰ and to certain director actions relating to acquisitions or mergers of public companies incorporated in Connecticut.⁴⁸¹ These limitations made sense for a statute enacted

⁴⁷⁸ See also McCall, *supra* note 265, at 563 n.276 (“In 2010, the legislature, noticing that changes to the statute would ‘make Connecticut more attractive for public corporations considering whether to organize under Connecticut Law . . . Connecticut is the only state that requires rather than permits directors to consider . . . other constituencies . . . [which] imposes a burden on directors of Connecticut corporations that directors of corporations . . . under other state laws do not face.’” (quoting CONN. J. FAV. COMM. REP., H.B. 5530, AN ACT CONCERNING THE CONNECTICUT BUSINESS CORPORATION ACT (2010))).

⁴⁷⁹ See Strine & Walter, *supra* note 64, at 342.

⁴⁸⁰ See 1994 Conn. Legis. Serv. 94-186 (West) (limiting application of the mandatory constituency provision to directors of companies with a class of voting stock registered pursuant to the Securities Exchange Act of 1934); see also McCall, *supra* note 265, at 563 n.276 (referencing “public corporations” in describing the 2010 amendment of the Connecticut statute). The constituency statutes of other states are not limited in application to directors of public companies. See, e.g., 15 PA. CONS. STAT. ANN. § 1715 (2015).

⁴⁸¹ See 1994 Conn. Legis. Serv. 94-186 (limiting application of the mandatory constituency provision to director actions pertaining to sections 134, 139, 140, 142, and 145 of the new act, provisions that would make it more difficult to implement a change in control of a Connecticut public company). The constituency statutes of most other states are not limited in application to directors’ decisions concerning takeover attempts (although, as discussed *supra* in note 462, it is widely recognized that constituency statutes were initially conceived as an antitakeover measure). See, e.g., 15 PA. CONS. STAT. ANN. § 1715 (2015).

as part of a comprehensive revamping of a state's corporate code that obviously was intended to make takeovers of Connecticut public companies more difficult for "corporate raiders" that might then close plants and fire employees within the state. In fact, viewed in this light, the mandatory provision of the 1994 constituency statute also makes sense, as a discretionary provision would have provided less protection against unwelcome acquisitions of Connecticut companies.⁴⁸² We think that the risks to other constituencies posed by *Citizens United* and *Hobby Lobby* justify the enactment of new mandatory constituency statutes by state legislatures, but these new statutes should not be limited in application to publicly traded companies or to director decisions relating to takeover attempts.

Instead, we propose that state legislatures respond to *Citizens United* and *Hobby Lobby* by enacting mandatory constituency statutes that will apply to all corporations incorporated in their state—whether public, private, or closely held.⁴⁸³ As Justice Ginsburg pointed out in her *Hobby Lobby* dissent, privately held companies can be huge, with billions of dollars in assets and thousands of employees.⁴⁸⁴ Those companies obviously present the same externality risks as large public companies, so they too should be subject to the mandatory constituency statutes that we propose. As to closely held companies, the *Hobby Lobby* case itself illustrates how even small companies like Conestoga and Mardel⁴⁸⁵ can adopt policies that

(applying to action by boards, directors, and board committees "[i]n discharging the duties of their respective positions").

⁴⁸² We are aware, of course, that Delaware law had essentially followed the opposite course, with no constituency statute and cases like *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986), *Grand Metropolitan Public Limited Co. v. Pillsbury Co.*, 588 A.2d 1049 (Del. Ch. 1988), and their progeny requiring that directors give precedence to the short-term financial interests of corporate shareholders in change-of-control situations. Connecticut was not alone in taking a different approach in 1994 with its mandatory constituency statute, one that sought to protect the interests of constituencies other than shareholders in change-of-control situations. See, e.g., 15 PA. CONS. STAT. ANN. § 1715 (commentary) (rejecting Delaware approach).

⁴⁸³ For a description of the differences between publicly traded companies, privately held companies, and closely held companies, see *supra* note 263 and accompanying text.

⁴⁸⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 n.19 (2014) (discussing Cargill, Inc., which is this country's largest privately held company, and the candy and confections giant, Mars, Inc.).

⁴⁸⁵ As explained in notes 260-61, *supra*, we question whether Hobby Lobby Stores, Inc., is in fact a closely held corporation, rather than (as we believe may be the case) a privately held corporation with nonvoting common shareholders. Conestoga and Mardel, however, are closely held companies, and even though the dollar amounts at stake may be smaller, the holding in *Hobby Lobby* resulted in shifting health care costs from those companies to the federal government. Subsequent cases may involve other

may harm the interests of their employees and other constituent groups. These groups are no less entitled to protection because the stock of the companies for which they work is not publicly traded, even if it is closely held.

Moreover, the application of mandatory constituency statutes should not be limited to decisions relating to takeover attempts or any other circumscribed area of corporate activity; they should apply to all actions and decisions of corporate directors that the business judgment rule has historically protected.⁴⁸⁶ Otherwise, employees, creditors, and other nonshareholder constituency groups have no legal protection if corporations engage in political spending or adopt religiously motivated policies that harm their interests (or the interests of the general public). To address this problem, we believe that state legislatures should adopt mandatory constituency statutes, applicable to all companies incorporated in their state, to ensure that corporate directors consider the impact on all affected constituencies before they decide to engage in corporate political spending or set corporate policies based upon religious beliefs.⁴⁸⁷

“sincerely held religious beliefs” asserted by closely held corporations, which now must be recognized under *Hobby Lobby*, that will harm employees, customers, or other constituencies of those companies. Without a mandatory constituency statute the directors of those companies have no legal duty to consider the harm to those constituencies when making decisions.

⁴⁸⁶ For an alternative methodology to determine which decisions should be governed by a mandatory constituency statute, see Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 13 (2002) (describing the “existence of a boundary within which the firm’s decision maker [(the board of directors)] has power to exercise fiat”).

⁴⁸⁷ We recognize that present case law applying corporate constituency statutes does not assure that nonshareholder constituencies would have standing to sue under a mandatory constituency statute. See Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW. (ABA) 1355, 1375 (1991) (concluding that Connecticut’s mandatory constituency statute arguably provided stakeholders standing to sue corporate directors); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 108 (“Although only four states specify that [nonshareholders] lack enforceable rights, in all other states, consideration of constituent interests is discretionary, and it is unlikely that courts would imply standing under a discretionary statute.” (footnote omitted)). This is not surprising, of course, as Connecticut is the only state ever to adopt a mandatory constituency statute, and no cases were decided during the time that statute was in effect addressing the standing issue for nonshareholder constituencies. Cf. *In re Picard*, 339 Bankr. 542, 552 n.8 (Conn. Bankr. 2006) (citing a 1909 Connecticut case, but not referencing the Connecticut mandatory constituency statute then in effect, for the proposition that “[s]ince 1909, Connecticut courts have recognized that at times a director of a corporation may assume fiduciary duties to other persons beyond the corporation and its shareholders” (citing *Baldwin v. Wolff*, 74 A. 948 (1909)); *Thames River Recycling, Inc. v. Gallo*, 720 A.2d 242, 253 (Conn. App. 1998) (holding that a director of a corporation occupies a fiduciary relationship to both the corporation and its stockholders and has a duty to act in good faith). We do not, however, see this uncertainty as a crippling impediment to the efficacy of a mandatory constituency

We expect that this proposal will be met with heated objections. Staunch defenders of shareholder primacy will argue that this kind of constituency statute will leave corporate boards in an untenable position of having to weigh the interests of, and choose among, diverse corporate constituencies without any guidance as to priorities, where the shareholder primacy rule provides boards with clear guidance as to which interest must prevail in corporate decisionmaking. While perhaps superficially appealing, we think that this argument is overblown and ignores both (1) the important effect of *Citizens United* and *Hobby Lobby* on the shareholder primacy model and (2) the fact that the states already differ markedly in the extent to which boards can weigh the interests of constituency groups other than shareholders. Delaware has no constituency statute and in general requires boards to maximize shareholder financial interests when making decisions.⁴⁸⁸ Pennsylvania and other states have discretionary constituency statutes that permit boards, if they wish to do so, to take into account the interests of other constituencies without “regard[ing] any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor”—both in takeover situations and otherwise.⁴⁸⁹ If state corporate law regimes with this degree of variation can coexist in our legal system, we do not see why those state legislatures that choose to do so cannot go a step further by enacting mandatory constituency statutes.⁴⁹⁰

We cannot respond fully to all anticipated objections to our mandatory constituency statutes proposal in this already-too-lengthy article. We would like to note briefly, however, one additional important reason we believe that continued knee-

statute, because we expect that in cases where a corporation engages in aberrant political spending or adopts religiously motivated policies that harm corporate constituencies, at least some shareholders will object and would have standing to bring suit claiming that the corporation’s directors had not complied with the mandatory constituency statute.

⁴⁸⁸ See McCall, *supra* note 265, at 563 & n.275.

⁴⁸⁹ 15 PA. CONS. STAT. ANN. § 1715 (2015). The commentary to the Pennsylvania constituency statute makes clear that the Pennsylvania legislature rejected the Delaware approach that “the current or short-term interests of shareholders overwhelm the interests of the corporation or of all other corporate constituencies in a possible change-of-control context or any other context, or that directors are required to maximize current share value at any particular time.” *Id.* at 1990 committee cmt. (emphasis added).

⁴⁹⁰ We do not view the 2010 repeal of the mandatory provision of Connecticut’s constituency statute, see *supra* note 465 and accompanying text, as undercutting our argument for mandatory constituency statutes in any way. All the developments described in this article have occurred since Connecticut changed its law, and the gravity and import of those developments are more than adequate reason for state legislatures to reconsider the merits of a mandatory constituency statute.

jerk obeisance to the shareholder primacy model is misplaced after *Citizens United* and *Hobby Lobby*. As discussed above, the business judgment rule is the linchpin that supports American corporate law. Integral to the business judgment rule is the requirement that in taking a corporate action a director “rationally believes that the business judgment is in the best interests of the corporation.”⁴⁹¹ The other two requirements for business judgment rule protection are that the director is informed and “is not interested in the subject of the business judgment” (which means the director’s decision is not based on self-interest or any other conflict of interest).⁴⁹²

The holdings of *Citizens United* and *Hobby Lobby*, if left unchecked, threaten to eviscerate the business judgment rule. If corporate managers are given unfettered latitude to make “business” decisions based upon their personal religious beliefs, as an expansive interpretation of *Hobby Lobby* would permit, then the business judgment rule requirements of acting disinterestedly and in the best interests of the corporation have effectively been discarded. Similarly, *Citizens United* gives corporations a new constitutional right to spend shareholders’ money for political purposes, and shareholders are left with the heavy burden of proving that such expenditures are not in the best interests of the corporation or are not disinterested.⁴⁹³ Corporate expenditures of this nature were not permitted in the decades during which the business judgment rule evolved, and the business judgment rule is simply not up to the task of constraining this new constitutionally protected corporate conduct. For this reason alone, mandatory constituency statutes that require directors to weigh carefully and be responsible for the effects of their actions on all corporate constituencies are essential in the strange new corporate law world that *Citizens United* and *Hobby Lobby* have created.

3. A Proposal for Enhanced State Law Disclosure Requirements

As in the case of mandatory constituency statutes, we have legislative precedent to draw on in advocating for enhanced disclosure requirements at the state level. A Maryland law

⁴⁹¹ See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c), at 133 (AM. LAW INST. 1994).

⁴⁹² See *id.*

⁴⁹³ See *id.* § 4.01(d), at 133 (“A person challenging the conduct of a director or officer under this Section has the burden of proving a breach of the duty of care, including inapplicability of [the business judgment rule] . . .”).

requiring reporting of independent expenditures took effect January 1, 2015.⁴⁹⁴ The law requires reporting of independent political expenditures in excess of \$10,000 in any four-year Maryland election cycle.⁴⁹⁵ It is noteworthy that the Maryland independent expenditure reporting requirement applies to corporations,⁴⁹⁶ but what is most significant is a provision in the Maryland law that requires corporations to make the required independent expenditures report available to shareholders on the corporation's website within 24 hours after the report is made public and keep the information available on the website until the end of the election cycle in which the independent expenditure report was filed.⁴⁹⁷

So far as we are aware, Maryland is to date the only state that has responded to *Citizens United* by enacting an enhanced independent expenditure disclosure statute that requires corporations to inform their shareholders (and when disclosed on a corporation's website, also the general public) of the corporation's independent political expenditures.⁴⁹⁸ We believe that this is an important innovation in election law generally and especially for enhancing the transparency of corporate political spending post-*Citizens United*. While it may be theoretically possible for corporate shareholders to piece together the political-spending activities of a corporation in which they own shares by searching state and federal⁴⁹⁹ websites and databases by company name, the difficulty of that task and the lack of uniform reporting

⁴⁹⁴ See MD. CODE ANN., ELEC. LAW § 13-306 (West 2015). The law also required reporting of electioneering communications. See *id.* § 13-307.

⁴⁹⁵ See *id.* § 13-306; see also ROBERT M. STERN, CORPORATE REFORM COALITION, SUNLIGHT STATE BY STATE AFTER *CITIZENS UNITED* 18 (2012), <https://www.citizen.org/documents/sunlight-state-by-state-report.pdf> [<http://perma.cc/HGT7-RYUB>] (summarizing Maryland law).

⁴⁹⁶ See MD. CODE ANN., ELEC. LAW § 13-306 (“‘Person’ includes an individual, a partnership, a committee, an association, a corporation, a labor organization, or any other organization or group of persons.”); see also *id.* § 13-306(a)(5)(ii) (providing that a “[p]erson” as defined above “does not include a campaign finance entity organized” under Maryland law).

⁴⁹⁷ See *id.* § 13-306(j). If the corporation does not maintain a website, the same information must be disclosed to shareholders in the regular periodic report for the time period in which the disclosure obligation takes effect. See *id.* The same disclosure requirements are imposed for electioneering communications by corporations. See *id.* § 13-307(j).

⁴⁹⁸ Cf. STERN, *supra* note 495, at 1 (describing the Maryland law as among the “most creative provisions adopted by the states” after *Citizens United* and the only one to “require that shareholders be informed of corporate political spending directly”).

⁴⁹⁹ As of the time of this writing, the FEC was still in the process of implementing federal independent expenditure reporting requirements for corporations and labor unions. See Independent Expenditures and Electioneering Communications by Corporations and Labor Association, 79 Fed. Reg. 62,797 (Oct. 21, 2014) (to be codified at 11 C.F.R. pts. 104 and 114).

requirements among the states⁵⁰⁰ make it unlikely that many shareholders could successfully determine the amount and extent of their company's independent political expenditures. And even when that might be done, the effort required is so burdensome that it is likely to deter all but the most determined shareholders from obtaining the information.⁵⁰¹ A state law that makes this information directly available to shareholders and imposes an affirmative duty on corporations to post the information on their websites represents a major step forward in transparency of corporate political activity.⁵⁰² There should be no doubt, even post-*Citizens United*, that states have the authority to require this reporting of corporate independent expenditures in state elections, as Maryland has done, under the states' general election law regulation powers.

⁵⁰⁰ Cf. NAT'L CONFERENCE OF STATE LEGISLATURES, STATES' INDEPENDENT EXPENDITURE REPORTING 2014 (2014), http://www.ncsl.org/Portals/1/documents/legismgt/2014_Independent_Expenditures_Chart.pdf [<http://perma.cc/ME5L-VWCN>] (summarizing the many different state reporting requirements for independent expenditures as of July 2014).

⁵⁰¹ Shareholders are not the only constituency that will want access to information about corporate political spending. Institutional investors such as state retirement funds will also want access to information about political spending by corporations in which they invest. For example, in 2013, the New York State Common Retirement Fund (the third largest institutional investor in the nation, with over \$150 billion of assets under management) filed a "books and records" lawsuit in Delaware against Qualcomm, Inc., seeking access to information about Qualcomm's political spending. See *New York State Common Ret. Fund v. Qualcomm Inc.*, No. 8170-CS (Del. Ch. Jan. 2, 2013). The lawsuit stated that the fund was seeking "to determine whether Qualcomm's political expenditures have been consistent with the objective of enhancing stockholder value, rather than simply furthering the particular political beliefs and causes of Qualcomm's board members or senior management." See *id.* at 4. The lawsuit was settled the following month when Qualcomm agreed to implement a new disclosure policy to "provide stockholders with comprehensive information regarding its corporate political spending." See Press Release, N.Y. State Comptroller, Qualcomm Implements Industry-Leading Political Spending Disclosure Policy; DiNapoli Commends Action (Feb. 22, 2013), <http://osc.state.ny.us/press/releases/feb13/022213.htm> [<http://perma.cc/U74G-XWCK>]. Later in 2013, the New York State Comptroller issued a press release praising Qualcomm for achieving the highest score among publicly traded companies in the United States in a national ranking of public accountability and disclosure. See Press Release, N.Y. State Comptroller, DiNapoli Statement on Qualcomm Leading CPA-Zicklin Index of Corporate Political Spending Disclosure (Sept. 25, 2013), <http://www.osc.state.ny.us/press/releases/sept13/092513a.htm> [<http://perma.cc/KHA3-8SQU>].

⁵⁰² Furthermore, it is not clear that all large corporations would oppose a state law requirement for greater transparency in reporting of political expenditures. The Complaint in the New York Common Retirement Fund's lawsuit against Qualcomm, Inc., alleged that "dozens of major public companies . . . voluntarily disclose their use of corporate funds for political purposes." See *New York State Common Ret. Fund*, No. 8170-CS, at 2 & app. A. We would hope that most responsible companies would recognize the benefits of the greater transparency afforded by voluntarily disclosing their political spending on their company websites, and we note that such disclosure would be consistent with the call for "prompt disclosure" of corporate political spending in the Supreme Court's *Citizens United* majority opinion. *Citizens United v. FEC*, 558 U.S. 310, 370-72 (2010); see also *infra* note 505 and accompanying text (quoting the *Citizens United* majority opinion).

While we applaud what Maryland has done, we believe that state legislatures should go further if they wish to protect the integrity of the political process now that *Citizens United* has given corporations a constitutional right to make unlimited independent political expenditures. We suggest that state legislatures consider enacting new disclosure statutes, modeled on the Maryland statute described above, but extending their reach to require direct reporting to corporate shareholders of *all* independent expenditures within that state in any state or federal election.⁵⁰³ In other words, if a corporation wishes to spend its shareholders' money on independent political expenditures *in* a state, then that state should require the corporation to disclose the spending to its shareholders—whether or not the corporation is incorporated in that state or the expenditures are intended to influence state or federal elections.

We expect this proposal will encounter significant resistance—from First Amendment absolutists who will argue that it burdens constitutionally protected corporate speech, from division of powers purists who will argue that it violates preemption doctrine under the Supremacy Clause, from corporate law traditionalists who will argue that it goes beyond the power of states to regulate the internal affairs of “foreign” corporations that are incorporated in another state, and probably from others whose arguments in opposition we have not anticipated. While all these expected attacks raise legitimate legal issues, we think that the better interpretation of the law is that the kind of state statute we propose is constitutional and within the legitimate regulatory power of the states. Each of these issues could in itself comprise a lengthy law review article—and we welcome that kind of thorough analysis and criticism in response to our proposal—

⁵⁰³ We recognize, of course, that this proposal would not capture corporate funding of “dark money” political spending by nonprofit organizations within a state, because even if state or federal law requires disclosure of political expenditures by nonprofit organizations, nonprofit organizations are not required under current law to disclose the identity of their contributors, whether individuals or corporations. Similarly, our proposal would not cover corporate-funded Super PAC spending within a state. While we applaud efforts to propose comprehensive political spending disclosure regimes (see, for example, JOHN WONDERLICH, SUNLIGHT FOUNDATION, A COMPREHENSIVE DISCLOSURE REGIME IN THE WAKE OF THE SUPREME COURT'S DECISION IN *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*, http://assets.sunlightfoundation.com/pdf/policy/sunlightfoundation_policy_citizens_united.pdf [<http://perma.cc/KHP2-TTJV>] (last visited June 7, 2016)), as of yet neither federal nor state lawmakers have been willing to enact such regimes. We offer a more modest and we hope more politically attainable proposal, but as with our other proposals, we welcome suggestions to build upon or supplement our proposed state law disclosure requirement to achieve more complete transparency and greater accountability for corporate political spending.

but here we limit ourselves to a brief rebuttal of the principal opposition arguments that we anticipate.

a. A State Disclosure Law Should Survive a First Amendment Challenge

First, a state law requiring only disclosure of corporate independent political expenditures should not run afoul of the First Amendment. Since *Buckley v. Valeo*, the Supreme Court has consistently recognized that disclosure can reduce the risk of corruption in the political system,⁵⁰⁴ and the *Citizens United* majority opinion itself contains a ringing endorsement of the benefits of “prompt disclosure” of corporate expenditures.

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 money 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.⁵⁰⁵

As this quote should make clear, calling for state statutes that require disclosure of all corporate independent political expenditures, directly to shareholders and by means of the Internet whenever possible, is exactly what the *Citizens United* majority opinion anticipated would follow in the wake of its holding; therefore, those state statutes should withstand First Amendment challenges. Moreover, the *Citizens United* majority opinion recognized that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”⁵⁰⁶

⁵⁰⁴ See *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

⁵⁰⁵ *Citizens United*, 558 U.S. at 370-71 (emphasis added) (citations omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003)). We note that the portion of this quote we have italicized suggests that the majority in *Citizens United* expected that corporations would engage in political expenditures to “advance[] the corporation’s interest in making profits,” thus explicitly inviting the dangers to the traditional model of corporate governance that have been identified by Professors Yosifon and Kesten, see *supra*, Section II.A.1, and by Delaware Chief Justice Leo Strine and Nicholas Walter, see *supra*, Part IV, which our proposal for mandatory constituency statutes attempts to address in Part V, *infra*.

⁵⁰⁶ See *Citizens United*, 558 U.S. at 369. *Citizens United* made clear that disclosure requirements “‘impose no ceiling on campaign-related activities’ and ‘do not prevent anyone from speaking’” and therefore are subject to “exacting scrutiny” (not the strict scrutiny applicable to laws burdening political speech), which requires only a “substantial relation”

b. A State Disclosure Law Should Survive a Preemption Challenge

The state disclosure statutes we propose should also survive a preemption challenge. While the Federal Election Campaign Act does contain an express preemption provision,⁵⁰⁷ the FEC has promulgated a regulation that defines more precisely the reach of the preemption by listing the three areas where federal law supersedes state law: “(1) [o]rganization and registration of political committees supporting Federal candidates; (2) [d]isclosure of receipts and expenditures *by Federal candidates and political committees*; and (3) [l]imitation on contributions and expenditures regarding Federal candidates and political committees.”⁵⁰⁸ Disclosure of independent expenditures, whether made by individuals, corporations, or other groups or entities, does not come within any these three areas, although we acknowledge that it also does not come within the areas of state law that the regulation identifies as not preempted by federal law,⁵⁰⁹ and therefore the regulation on its face does not conclusively dispose of the issue. We note two reasons, however, why the regulation supports our view that the state disclosure statutes we are suggesting should not be preempted. First, although *Citizens United* dramatically changed federal election law by permitting independent expenditures by corporations, independent expenditures by individuals were permitted prior to *Citizens United*, and the preemption regulation, which has been in place since 1980, has never treated disclosure of individual independent expenditures as preempted by federal law. If disclosure of independent expenditures by individuals is not preempted, it is

between the disclosure requirement and a “sufficiently important” governmental interest. *See id.* at 366 (citation omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). “[A] governmental interest in ‘providing the electorate with information’ about the sources of election-related spending” can satisfy this requirement. *See id.* (quoting *Buckley*, 424 U.S. at 66). Accordingly, we believe that the enhanced disclosure requirement that we propose should survive post-*Citizens United* First Amendment scrutiny. *Cf. Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 598-99 (8th Cir. 2013) (holding unconstitutional under the First Amendment an Iowa disclosure requirement providing that “after a group makes a single independent expenditure, it must continually disclose funds it raises over \$1,000—regardless of the group’s purpose, and *regardless of whether it ever uses those funds to make an independent expenditure*” (emphasis added)); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876-77 (8th Cir. 2012) (finding unconstitutional a Minnesota statute’s corporate independent expenditure “ongoing reporting requirement,” but suggesting that initial reporting requirement is constitutional).

⁵⁰⁷ 52 U.S.C. § 30143 (2012).

⁵⁰⁸ *See* 11 C.F.R. § 108.7(b) (2014).

⁵⁰⁹ *See id.* § 108.7(c).

difficult to see why disclosure of corporate independent expenditures should be treated differently. To the contrary, in fact, the language of the *Citizens United* majority opinion quoted above suggests that such state disclosure requirements should be permitted. That is our second, and we believe most powerful, argument against interpreting the regulation in favor of preemption—the *Citizens United* majority clearly preferred more disclosure of independent expenditures, not less.

c. States Have Authority to Regulate Activity of “Foreign” Corporations Within Their Borders

Finally, as to the argument that states lack the regulatory authority to require “foreign” corporations (those that are incorporated in other states) to disclose independent political expenditures, that argument would have merit only if a state sought to regulate activity outside its borders. So long as the activity that is subject to the disclosure requirement—here, spending money to influence an election (whether state or federal)—occurs within a state’s borders, the state has authority to require disclosure of that activity. In fact, the disclosure requirements we propose are much less burdensome than almost all the regulatory requirements that are routinely imposed on foreign corporations doing business within a state—environmental regulations, labor and employment relations, health and safety regulations, etc.⁵¹⁰ In short, if a corporation chooses to spend money in a state to influence the outcome of an election, that state should have the power to require disclosure of that spending, particularly since the Supreme Court has expressed strong support for disclosure of political spending.

For all these reasons, we believe that states should consider following the model provided by the Maryland statute, but expanding it to encompass independent expenditures in both state and federal elections and requiring corporations to disclose that spending promptly and directly to their shareholders. Statutes imposing this disclosure requirement will increase transparency and reduce the possibility of corruption in the

⁵¹⁰ Certainly a state may regulate all manner of corporate activities inside that state. For example, a state or local zoning regulation regarding the placement of billboards would be upheld so long as it does not impose too great a burden on speech. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); Daniel R. Mandelker, *The Free Speech Revolution in Land Use Control*, 60 CHI.-KENT. L. REV. 51 (1984).

political process, while staying within the vision of political expression set out by the majority opinion in *Citizens United*.⁵¹¹

B. How Constituency Statutes and Disclosure Statutes May Work Together to Promote a Race to the Top

Our proposals for mandatory constituency statutes and increased political spending disclosure at the state level are both complementary and mutually reinforcing. For all the reasons described above, we believe that increasing the accountability of corporate boards to encompass nonshareholder constituencies such as workers and communities is essential. As a practical matter, statutory enactments at the state level can best achieve this increased accountability, as state law continues to be the legal regime that governs the creation and the internal affairs of business corporations (and this remains the case notwithstanding the ever-growing body of federal corporate and securities law that for the most part applies only to publicly traded corporations).

These proposals would result in both more accountability and more transparency as corporations exercise the new rights bestowed upon them by *Citizens United* and *Hobby Lobby*. While both are needed, from our communitarian perspective, increased accountability is of paramount importance, and it is increased accountability that is most responsive to the “externality risk” that *Citizens United* created. Greater accountability to other constituencies can be achieved only if those constituencies have access to timely and complete information about corporate actions, however, so the increased disclosure we propose is necessary to effectuate the enhanced accountability that mandatory constituency statutes can provide.

We recognize that our proposals are unlikely to be adopted in some states. Delaware, for example, would almost certainly never adopt a mandatory constituency statute given that state’s strong shareholder primacy jurisprudence. Nonetheless, we think that these proposals are worthy of serious consideration in light of the growth in corporate political spending since *Citizens United* and the potential for this greater corporate political spending to tilt the regulatory political playing field in favor of corporations.

⁵¹¹ We rely on the *Citizens United* majority opinion, despite having criticized it extensively, because it is now the law (whether or not we agree with it), and also because we believe that the reform we are proposing, enhanced state law disclosure requirements for corporate independent expenditures, will help cure what we believe is one of the most critical deficiencies in the opinion—the reliance on existing state law “procedures of corporate democracy” to curb abuses of the new corporate political spending the opinion permits.

Add to this the potential created by *Hobby Lobby* for corporations to assert religious exercise rights that, whether by design or chance, result in shifting costs and social burdens from private corporations to government and society as a whole, and the combined result cries out for regulatory and policy reforms. Our proposals are two modest attempts to “tame the monster” that was created when *Citizens United* and *Hobby Lobby* gave corporations new rights without any requirement that these new rights be exercised in a socially responsible manner.

We hope that state legislatures will consider acting on our proposals, and even where state legislatures do not act, we hope that some corporations will act unilaterally to implement them. For example, in states like Pennsylvania that already have nonmandatory constituency statutes, nothing precludes corporate boards from fully and fairly considering the way their companies’ actions will affect nonshareholder constituencies. Some corporate boards might welcome the opportunity to unshackle themselves from a regime of shareholder primacy. Similarly, nothing prevents corporations that wish to increase the transparency of their political spending from posting on their corporate websites complete and accurate information concerning the companies’ political spending. Whether state-by-state or company-by-company, our proposals can make corporations more communitarian, and in doing so, can help avoid the problems created by *Citizens United* and *Hobby Lobby*.

C. *Communitarian Implications of These Measures*

Both of the above proposals are, indeed, communitarian in nature. “Other constituency” statutes recognize that corporate conduct has implications well beyond shareholder enrichment. The statutes appeal to the “brother’s keeper” aspect of communitarianism, acknowledging that corporations cannot and should not exist as atomized, senseless “monsters” and that they owe their very existence to the notion that a variety of participants—investors, managers, employees, customers, suppliers, and supporting communities—are required to achieve a corporate purpose. Disclosure statutes allow for effective participation of shareholders and other groups. They provide a means to jettison misplaced allusions to corporate democracy and embrace the possibility of informed participation by shareholders and other interested constituencies.

We have no illusions that the measures we propose will solve the problem of externality risk. The enactment of constituency statutes and disclosure measures will not prevent

corporations from engaging in regulatory capture. But mandatory constituency statutes will require that corporate managers give more than lip service to the interests of broader constituencies,⁵¹² and disclosure requirements will bring an essential element of transparency to corporate political spending. “Sunlight is said to be the best of disinfectants,”⁵¹³ and corporations might well be discouraged from harmful behavior if these two types of measures come to be enacted.

CONCLUSION

Most human beings’ drive for material gain is tempered by altruistic concerns: a healthy regard for the environment, benevolence toward the weak and infirm, and fairness toward workers, to cite a few examples. A corporation, in contrast, has “no soul to be damned and no body to be kicked.”⁵¹⁴ For those subscribing to the traditional value-maximizing role of the corporation, there is nothing to temper the relentless drive for profit, no sense of altruism, no human soul. Corporate directors and managers feel obliged to provide maximum return to the shareholders, whatever their personal altruistic tendencies. Under such a regime, a corporation permitted to make political expenditures will make only those expenditures calculated to maximize corporate profits—expenditures for politicians and programs favoring deregulation of business and less protection for workers, the environment, and affected communities. *Citizens United* allows corporations to make political expenditures as if they were people, while lacking the human constraints of real people. And while *Hobby Lobby* allows corporations to act upon religious beliefs, it allows them to do so without regard to external consequences and as if the owners’ beliefs are the only ones that matter.

It is only when corporations are allowed, and even required, to adopt a more communitarian view—one that does not see profit maximization as the corporation’s sole *raison d’être* and

⁵¹² We do not address the issue of whether enactment of a mandatory constituency statute would give nonshareholder constituencies the same standing and litigation rights that corporate shareholders have traditionally enjoyed, but we note that in a mandatory-constituency-statute jurisdiction, corporate shareholders sympathetic to the interests of another, nonshareholder constituency presumably could bring suit if corporate directors violated the statute by ignoring the interests of that nonshareholder constituency.

⁵¹³ Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WKLY., Dec. 20, 1913, at 10.

⁵¹⁴ William A. Cohn, *How Does a Corporation Speak?*, INFO. CLEARING HOUSE (Feb. 18, 2010), <http://www.informationclearinghouse.info/article24758.htm> [<http://perma.cc/ZW92-VELY>] (quoting Edward, 1st Baron Thurlow, English jurist and Lord Chancellor (1731-1803)).

the owners as the only people that matter—that corporate activity, whether in the form of charitable works, regard for workers, the environment, the community, or even political expenditures, can take on a less rapacious, more humane form. And it is only when light is shed on their activities that most corporations will be sufficiently motivated to take humane considerations into account. It is in that spirit that we have proposed the reforms outlined above, and welcome others.