Limitations on Corporate Speech: Protection for Shareholders or Abridgement of Expression?

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LIMITATIONS ON CORPORATE SPEECH: PROTECTION FOR SHAREHOLDERS OR ABRIDGMENT OF EXPRESSION?

Alan J. Meese*

I. INTRODUCTION

Limitations on corporate speech are common yet problematic. States cannot limit personal speech, and corporate speech is just the speech of real persons associated in a business. So why may states curtail the combination of speech and business? Several justifications are offered for such limits. ¹

One such justification focuses on the corporate role in the political process—a role many see as inordinate. Several scholars have argued that the substantial wealth associated with the modern corporation provides firms with the opportunity to influence unduly the political process by presenting the public with too much of one point of view. ² According to this line of thinking, limiting or regulating corporate political speech, as

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² See, e.g., Mastro et al., supra note 1; Shockley, supra note 1, at 388-90; Content Regulation and the Dimensions of Free Expression, supra note 1, at 1871 n.95; Marlene Arnold Nicholson, The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures, 65 CORNELL L. REV. 945, 994-99 (1980). See also Allen K. Easley, Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns, 17 GA. L. REV. 675 (1983) (state should counteract "undue influence" by, inter alia, subsidizing "under-represented" speech).
well as other large-scale speech, merely protects the integrity of public
debate by restoring the balance between competing points of view.\(^3\)

A second justification is concerned with the corruption, or appearance
thereof, that purportedly results from corporate speech during political
elections. Specifically, many contend that corporate expenditures in support
of political candidates create the possibility or at least the appearance of
a quid pro quo between corporations and the candidates they help elect.\(^4\)
Under this approach, limiting corporate speech enhances public confidence
in the electoral process and thus promotes individual participation in the
democratic system.\(^5\)

This Article explores a different justification, a justification based not
upon protection of the political process, but instead upon the regulation of
internal corporate governance. Limiting corporate speech, it is said, both
prevents wasteful speech and ensures that corporations do not compel
shareholders to subsidize otherwise profit-maximizing speech that they
may oppose.\(^6\) Such limits leave shareholders free to support speech by
contributing to so-called segregated funds.\(^7\) Because such contributions
would be voluntary, the resulting speech would reflect the actual support
for the views expressed.\(^8\) In this way, some have argued, curtailing
corporate speech can protect the associational rights of shareholders and
prevent the theft of shareholder assets via wasteful speech.\(^9\)

Support for this rationale is not limited to the law reviews; politicians
have been offering such a justification for limiting corporate speech since
the turn of the century.\(^10\) As a result, several states and the federal
government have enacted laws restricting various forms of corporate
speech and sought to justify those laws by invoking what this Article calls

\(^3\) See, e.g., Shockley, supra note 1, at 388-90; Nicholson, supra note 2, at 994-99.
\(^4\) See, e.g., Nicholson, supra note 2, at 988-94. See also Shockley, supra note 1, at
383-88 (arguing that “corruption” rationale justifies restricting large scale speech even
when no possibility of “quid pro quo” is present).
\(^5\) See, e.g., Shockley, supra note 1, at 383-88.
\(^6\) See Victor Brudney, Business Corporations and Stockholders’ Rights Under the First
Amendment, 91 Yale L.J. 235 (1981) (suggesting unanimous consent requirement for
corporate speech); The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 173-74 (1978);
Shockley, supra note 1, at 421 (suggesting majority or unanimous consent requirements
for corporate speech); Nicholson, supra note 2, at 1005. There is no substantive difference
between an outright ban and an unanimous consent requirement. See infra notes 120-28
and accompanying text.
\(^7\) See Brudney, supra note 6, at 257, 263-64; Shockley, supra note 1, at 421 nn.163-64;
Nicholson, supra note 2, at 999-1002.
\(^8\) E.g., Nicholson, supra note 2, at 1005.
\(^9\) E.g., Brudney, supra note 6, at 247.
\(^10\) See infra notes 24-28 and accompanying text.
the "shareholder protection rationale." The Supreme Court has avoided\textsuperscript{11} and then obliquely confronted the first amendment question presented by this rationale in \textit{First National Bank of Boston v. Bellotti},\textsuperscript{12} \textit{Federal Election Commission v. Massachusetts Citizens For Life},\textsuperscript{13} and \textit{Austin v. Michigan Chamber of Commerce}.\textsuperscript{14} In \textit{First National Bank}, the Court rejected the shareholder protection rationale because the law at issue was both under- and over-inclusive with respect to its stated goal, leaving open the possibility that a properly constructed scheme would survive constitutional scrutiny.\textsuperscript{15} Next, in \textit{MCFL}, the Court invalidated a shareholder protection scheme as applied to a non-profit, non-stock corporation.\textsuperscript{16} Finally, in \textit{Michigan Chamber of Commerce}, a majority of the Court avoided the issue, sustaining restrictions on corporate speech on other grounds.\textsuperscript{17} Justice Brennan, concurring, embraced this rationale,\textsuperscript{18} which three dissenters rejected.\textsuperscript{19}

The Court's ultimate resolution of the first amendment issue presented by shareholder protection schemes will have important ramifications for corporate speech insofar as the shareholder protection rationale justifies limitation of a wider variety of corporate speech than current law under either the "undue influence" or "quid pro quo" rationale. The Court has largely rejected the "undue influence" rationale for limiting speech of any variety.\textsuperscript{20} Further, while the "quid pro quo" rationale will support the restriction of corporate speech connected with candidate elections, it will not support restriction of corporate speech during public debate over proposed referenda.\textsuperscript{21} By contrast, the shareholder protection rationale will support the restriction of \textit{any} corporate speech, whether or not such speech "unduly influences" the political process or creates the appearance of a quid pro quo between corporation and candidate. Moreover, the rationale allows states to regulate corporate speech while ignoring other forms of speech that pose the same perceived threats to the political process that would justify regulation under the "undue influence" or "quid pro quo" rationale. Thus, judicial approval of the shareholder protection rationale

\textsuperscript{11} Cort v. Ash, 422 U.S. 66 (1975).
\textsuperscript{12} 435 U.S. 765 (1978).
\textsuperscript{13} 479 U.S. 238 (1986) [hereinafter \textit{MCFL}].
\textsuperscript{14} 494 U.S. 652 (1990).
\textsuperscript{15} \textit{First Nat'l Bank}, 435 U.S. at 792-95.
\textsuperscript{16} \textit{MCFL}, 479 U.S. at 256-65.
\textsuperscript{17} \textit{Michigan Chamber of Commerce}, 494 U.S. at 654-69.
\textsuperscript{18} \textit{Id.} at 669-78 (Brennan, J., concurring).
\textsuperscript{19} \textit{Id.} at 685-87 (Scalia, J., dissenting), 707-11 (Kennedy, J., dissenting, joined by O'Connor & Scalia, JJ.).
\textsuperscript{21} \textit{See} Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299 & n.6 (1981); \textit{First Nat'l Bank}, 435 U.S. at 790.
would give state and federal governments a freer hand in regulating corporate political speech.

This Article argues that the shareholder protection rationale does not justify the blanket restriction of corporate speech, even though such restriction leaves corporations free to "speak" via segregated funds. Because corporate speech is a collective good, voluntary contributions to segregated funds for its provision will far understate the actual support by shareholders for the views expressed. The magnitude of speech financed by such funds will not reflect actual preferences for such expression since shareholders will have an incentive to "free ride" off the contributions of others. Hence, a shareholder protection scheme does more than eliminate wasteful speech; it also prevents corporations from overcoming free rider problems and producing an optimal quantity of such speech.

Such a substantial burden on corporate speech is not narrowly tailored to serve the admittedly compelling state interest in preventing wasteful speech. The image of a helpless shareholder, whose property is embezzled by management and used to subsidize wasteful speech, is only one characterization of the relationship between shareholders and management. This relationship may also be characterized as a contractual one in which shareholders delegate to management the right to spend retained earnings on speech. Banning such contractual or consensual speech certainly offends the First Amendment. The choice between these two characterizations of the corporate relationship depends on an assessment of the agency costs that result from the separation of ownership and control that attends the corporate form. Such an empirical judgment, however, is not necessary to the evaluation of shareholder protection schemes. While mechanisms that reduce agency costs are by no means perfect, they likely ensure that a substantial amount of corporate speech is profit-maximizing and hence consensual. Indeed, those scholars and judges that advocate limiting speech to prevent corporations from unduly influencing the political process argue that corporations engage in too much profit-maximizing speech. Thus, limiting all corporate speech, without regard to its relation to corporate success, is far too blunt an instrument for the delicate task of rooting out wasteful speech.

Further, a blanket ban on corporate speech is not justified as an attempt to protect shareholders from supporting profit-maximizing speech that they find offensive. There is no support in economic theory for the suggestion that corporations have coerced shareholders into supporting such speech by means of "bundling" two distinct items, i.e., the purchase of stock and an agreement to support corporate political speech via retained

22 See infra notes 190-94 and accompanying text.
Given the free rider problem, providing such products separately would entail significant costs; thus, the fact that such items are offered in a package may simply suggest that their joint provision is more economical than "unbundling." In any event, no firm possesses economic power in capital markets sufficient to "coerce" prospective shareholders into accepting an unwanted bundling arrangement. Thus, the presence of bundling suggests a non-coercive, possibly wealth-enhancing rationale for such an arrangement.

An exploration of these issues will follow a brief review of the history of the shareholder protection rationale.

II. BACKGROUND AND RATIONALE

In 1905 President Theodore Roosevelt proposed limits on corporate campaign contributions, with two ostensible goals in mind: (1) to prevent directors from "us[ing] stockholders' money for such purposes"; and (2) to "stop[] the evils aimed at in corrupt practices acts." The remarks of one member of Congress exemplify the first, "shareholder protection" rationale: "no manager of a corporation has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered." In 1907, Congress adopted the President's proposal, passing into law prohibitions on corporate campaign contributions, limitations that survive to this day.

Several amendments have expanded the scope of the 1907 Act, such that federal law now prohibits contributions and independent expenditures, including expenditures for speech, by corporations, as well as contributions and expenditures by labor unions, where such expenditures and contributions are in support of a candidate for federal

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23 See infra notes 205-20 and accompanying text.
24 One commentator hypothesizes that Roosevelt's real goal was the protection of his own party from big contributors on Wall Street. John R. Bolton, Constitutional Limitations on Restricting Corporate and Union Political Speech, 22 ARIZ. L. REV. 373, 376 n.14 (1980).
25 40 CONG. REC. 96 (1905) (emphasis added). The following discussion owes much to Bolton, supra note 24.
26 Hearings on Contributions to Political Committees in Presidential and Other Campaigns before the House Committee on the Election of the President, 59th Cong., 1st Sess. 76 (1906) (remarks of Congressman Williams).
Hence, as federal law now stands, neither a corporation nor a labor union may, for instance, place advertisements in the media supporting particular candidates for federal office. However, the law allows such entities to set up so-called segregated funds to solicit contributions for such speech from interested parties. Despite the apparent interference with political speech, the Supreme Court has thus far avoided passing on the constitutionality of the prohibition as applied to for-profit corporations.

However, as explained further below, the Court has evaluated similar state legislation, albeit without considering directly the shareholder protection rationale.

Those who advocate curtailing speech to protect shareholders adopt an approach similar to that taken by President Roosevelt. Claiming that all corporations require shareholders to support political speech as a condition of purchasing stock, these commentators conclude that shareholders are coerced into subsidizing corporate speech. Because widely dispersed shareholders have no control over management speech decisions, the resulting speech will ordinarily reflect the tastes of managers and not shareholders.

Management's use of corporate assets to express its political preferences, social views, or opinions need bear little correlation with the political or social views of stockholders. Both in theory and in practice, [i.e., because stockholders exercise little control over management]

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29 See Bolton, supra note 24, at 378-79. Of course, federal law leaves corporations free to speak during state elections and ballot referenda, as well as in connection with issues of national import not connected to federal elections.

30 See United States v. International UAW-CIO, 352 U.S. 567 (1957) (sustaining, under former 18 U.S.C. § 610, an indictment of union officials for "sponsor[ing] commercial television broadcasts designed to influence the electorate to select certain candidates for Congress . . .").


32 However, the Court has construed the statute narrowly as applied to labor unions to avoid constitutional difficulties. United States v. CIO, 335 U.S. 106 (1948).


34 See, e.g., Brudney, supra note 6, at 264, 270.

management is substantially free to use corporate assets to urge any political or social view it sees fit, so long as it can establish a plausible connection between those expenditures and a long term commercial benefit to the corporation [given the lax business judgment rule].

Further, even where such speech is in the economic interest of the corporation, certain shareholders may disagree with the views expressed. Hence, commentators claim that such speech is really the compelled subsidization of management views by shareholders.

Shareholders have no choice but to support a corporation's political speech as a condition of purchasing stock. Prohibiting the use of general corporate funds for speech, or imposing unanimous consent requirements, while allowing firms to solicit voluntary contributions, will ensure that the resulting amount of speech reflects the actual preferences of shareholders. Further, such a regulatory regime will reduce the cost of capital by ensuring that potential shareholders are not deterred from purchasing stock by the prospect of supporting political speech they may oppose.

Several states have passed prohibitions similar to those in the 1907 Act. In addition, many states regulate corporate expenditures in connection with ballot referenda. Although the Court has passed on such statutes several times in recent years, the current constitutional validity of the shareholder protection rationale is not clear. The Court skirted the issue in Cort v. Ash. There, a shareholder of Bethlehem Steel brought suit under 18 U.S.C. § 610, the criminal provision implementing the 1907 Act, alleging a violation of that statute by the firm's directors. The Justices refused to imply a private right of action under the section asserting that "the legislative history of the 1907 Act . . . demonstrates that the

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36 Brudney, supra note 6, at 257-58 (citations omitted).
37 Id. at 252-54.
38 See, e.g., Nicholson, supra note 2, at 999; Schneider, supra note 35, at 1266-67; Brudney, supra note 6, at 257 n.79.
39 Brudney, supra note 6, at 270.
40 See Nicholson, supra note 2, at 1005.
41 Brudney, supra note 6, at 235-36.
42 See, e.g., WISC. STAT. ANN. § 11.38(1)(a) (West 1986); MICH. COMP. LAWS ANN. § 169.254(1) (West 1989).
43 See Easley, supra note 2, at 680 n.33 (collecting statutes regulating corporate spending in referenda campaigns).
44 422 U.S. 66 (1975).
protection of ordinary stockholders was at best a secondary concern.\textsuperscript{46} The Court observed, however, that protection of minority union members was a concern when Congress expanded the Act to apply to unions, and opined that this distinction might make sense, because shareholders suffer far less "coercion" than workers who are forced, upon penalty of losing their jobs, to pay union dues.\textsuperscript{47}

In \textit{First National Bank of Boston v. Bellotti},\textsuperscript{48} the Court obliquely addressed the constitutional implications of a shareholder protection scheme.\textsuperscript{49} There the Justices evaluated a Massachusetts statute\textsuperscript{50} limiting expenditures on speech by business corporations in connection with state referenda when the issue on the referendum did not "materially affect" a corporation's business.\textsuperscript{51} At issue was the State's attempt to prevent several corporations from expressing their views concerning a proposed constitutional amendment that would have permitted the legislature to impose a graduated income tax. Although it would seem that such expenditures are material to a corporation's business,\textsuperscript{52} the state legislature had specifically defined such expenditures as immaterial.\textsuperscript{53}

The Court rejected the State's argument that the threat of undue corporate influence justified the limitation.\textsuperscript{54} However, the Justices avoided a full-scale evaluation of the shareholder protection rationale and instead invalidated the statute because it was both over- and under-inclusive in terms of this purported goal, indicating that the legislature's true goal was the suppression of unpopular speech.\textsuperscript{55} Moreover, in a footnote, the Court suggested in dictum that even a properly drawn shareholder protection scheme would not pass constitutional muster, insofar as the asserted state interest would not justify the resulting burden on speech.\textsuperscript{56} In this vein, the Court questioned whether many shareholders actually desired protection, since none had joined the State's appeal.\textsuperscript{57} Also, the Court observed that

\textsuperscript{46} Cort, 422 U.S. at 81.
\textsuperscript{47} Id. at 81 n.13. Cf. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 710 (Kennedy, J., dissenting) (noting that "[o]ne need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living").
\textsuperscript{48} 435 U.S. 765 (1978).
\textsuperscript{49} MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1991).
\textsuperscript{50} Id.
\textsuperscript{51} \textit{First Nat'l Bank}, 435 U.S. at 765.
\textsuperscript{52} ROBERT C. CLARK, CORPORATE LAW 683 n.13 (1986).
\textsuperscript{53} 1975 Mass. Acts ch. 151, § 8; see also \textit{First Nat'l Bank}, 435 U.S. at 769 n.3.
\textsuperscript{54} \textit{First Nat'l Bank}, 435 U.S. at 789-90.
\textsuperscript{55} Id. at 793-95.
\textsuperscript{56} Id. at 795.
\textsuperscript{57} This absence of shareholder support seems especially telling. The appellants were large, publicly-held corporations: First National Bank of Boston, New England Merchants National Bank, Gillette Co., Digital Equipment Corp., and Wyman Gordon Co. See id. at 768 n.1.
each shareholder purchased stock "of his own volition." Finally, the Court suggested that corporate democracy could protect shareholder interests.

Justice White dissented, arguing that the statute was valid as a shareholder protection measure. As he saw things, the State had a compelling interest in assuring that investors were "not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities." In so arguing, he repeatedly emphasized that the statute only prohibited speech unconnected with the corporation's business.

Next, in *Federal Election Commission v. Massachusetts Citizens For Life*, the Court assessed the constitutionality of the 1907 Federal Act as applied to a non-stock, non-profit corporation. There the Federal Election Commission ("FEC") sought to prohibit the expenditure of general corporate funds by a small advocacy organization, arguing that the Act required such expenditures to be made from segregated funds. The Court held that such a prohibition constituted an impermissible burden on speech. In an opinion by Justice Brennan, who had joined Justice White's dissent in *First National Bank*, the Court rejected, inter alia, the FEC's suggestion that such a requirement was necessary to protect members of the organization from being compelled to subsidize the propagation of ideas with which they disagreed. In dictum, however, the Court, without citation of *First National Bank*, suggested that such a rationale might support the restriction of speech by for-profit corporations.

Finally, in *Austin v. Michigan Chamber of Commerce*, the Court evaluated a statute prohibiting corporations from using general funds to make independent campaign expenditures, including expenditures on

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58 *Id.* at 794 n.34.
59 *Id.* at 794-95.
60 *Id.* at 812-21 (White, J., dissenting).
61 *Id.* at 818 (White, J., dissenting).
62 *Id.* at 807-08, 812 (White, J., dissenting). Unfortunately, the Justice did not explain why this limitation was logical in light of the statute's purported purpose. After all, some shareholders could object to their corporation's speech whether or not it is profit-maximizing. *See infra* notes 205-220 and accompanying text.
63 479 U.S. 238 (1986).
64 *Id.* at 238.
65 *Id.* at 252.
66 *Id.* at 252-56.
67 *Id.* at 260-62.
68 *Id.* at 261.
speech, in connection with state candidate elections. At issue was Michigan’s attempt to prevent the State’s Chamber of Commerce from running an advertisement in support of a candidate for state office who supported various forms of regulatory relief. Like the 1907 Federal Act, the law allowed firms to set up segregated funds that could solicit contributions from employees, shareholders, and the like. Unlike the statute at issue in First National Bank, however, the Michigan law made no distinction between material and non-material expenditures. Instead, all such speech in support of a candidate was prohibited.

The Court did not examine the shareholder protection rationale. Instead, the Justices sustained the measure on grounds that reflected a “hybrid” between the “undue influence” and “quid pro quo” rationales for limiting corporate speech. First, the Court held that Michigan had a valid interest in ensuring that corporations did not use their special economic advantages to dominate the political process. Second, the Justices found an equally valid interest in preventing the appearance of “corruption” resulting from corporate expenditures in support of individual candidates, an interest accentuated by the purported lack of correlation between the magnitude of corporate speech and popular support for the views expressed. Unfortunately, the Court did not indicate whether either of these interests, standing alone, would have justified the Michigan statute.

In a concurrence, Justice Brennan agreed with the majority. He went further, however, and found that the statute was also valid as a shareholder protection measure. He agreed with the majority that “[t]he resources available to [a PAC or segregated fund], as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.” Unlike Justice White’s dissent in First National Bank, which emphasized that the speech at issue there was not material to corporate success, Justice Brennan emphasized the supposed coercive nature of corporate expenditures on political matters—regardless of the materiality of the expenditure in question. Apparently characterizing all corporate political speech as a form of theft, he stated:

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71 Michigan Chamber of Commerce, 494 U.S. at 652.
72 Id. at 713 (Kennedy, J., dissenting) (reproducing proposed advertisement). The advertisement, inter alia, called attention to Michigan’s high workers’ compensation insurance premiums and high personal income tax rates. Id.
74 Michigan Chamber of Commerce, 494 U.S. at 659-60.
75 Id.
76 Id. at 673-75 (Brennan, J., concurring).
77 Id. at 670 (Brennan, J., concurring) (quoting Federal Election Comm’n v. Massachusetts Citizens for Life, 479 U.S. 238, 258 (1986)).
78 See id. at 672-75 (Brennan, J., concurring).
The State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to [its] political message. "A’s right to receive information [from B] does not require the state to permit B to steal from C the funds that alone will enable B to make the communication." 79

Indeed, Justice Brennan analogized the "coercion" suffered by shareholders to the sort of coercion endured by individuals forced by the State to join and support financially a union as a condition of employment. 80 Thus, he continued, in the same way that state-compelled support of union speech constitutes a burden on an individual’s right not to speak, so too does corporate coercion of shareholders constitute a burden, the elimination of which constitutes a compelling state interest. 81 Given this characterization of corporate speech, Justice Brennan believed it entirely appropriate for a state to outlaw corporate speech that is not channeled through segregated funds. 82 Such action, he asserted, was consistent with the historic role of state corporate law in protecting shareholders and would reduce the cost of capital facing corporations. 83 Finally, responding to Justice Scalia’s suggestion that shareholders agree to such "coercion," 84 Justice Brennan stated that "[g]iven the extensive state regulation of corporations, shareholder expectations are always a function of state law. It is circular to say, as does Justice SCALIA, that if

79 Id. at 675 (Brennan, J., concurring) (quoting Brudney, supra note 6, at 247). See also id. at 678 n.8 (Brennan, J., concurring) (referring twice to expenditures as "their [stockholders’] money").
80 Id. at 670-78 (Brennan, J., concurring).
81 Id. (Brennan, J., concurring).
82 Id. at 678 n.8 (Brennan, J., concurring).
83 Id. at 675-78 & n.8 (Brennan, J., concurring). Curiously, neither Justice Brennan nor any other Justice realized or found it relevant that the law at issue was not a corporate law that applied only to Michigan corporations, but rather a law that apparently prevented any corporation, wherever chartered, from expending corporate funds on speech. Given this broad coverage, the suggestion that the law was designed as a corporate governance measure seems hollow. Indeed, any attempt to regulate the corporate governance mechanisms of corporations chartered outside a state may raise substantial questions under the so-called negative commerce clause. Cf. CTS v. Dynamics Corp., 481 U.S. 69, 89-90 (1987) (American "free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the state of its incorporation.").
84 Michigan Chamber of Commerce, 494 U.S. at 686 (Scalia, J., dissenting) ("Thus, in joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes . . . . That is the deal.").
a State did not protect shareholders, they would have no expectation of
being protected . . . .”

According to Justice Brennan, then, failure to “protect” shareholders
allows corporations to “coerce” shareholders by conditioning the
ownership of stock on consent to the use of “shareholder assets” to
support speech a shareholder may oppose. Apparently the Justice agrees
with Professor Brudney, who suggests that, insofar as all corporations
“bundle” stock ownership with an agreement that retained earnings may
be used to support corporate speech, potential shareholders have no real
choice but to acquiesce in such an arrangement. Thus, according to
Justice Brennan, it is permissible for states to require corporations to
“unbundle” the ownership of stock and support for corporate political
speech, to protect shareholders from supporting ideas they may oppose.
The premise that allowing corporations to speak—or decide not to—coerces
shareholders in the same way that prohibiting all corporate speech does is
a controversial one, which will be explored below.

The constitutional status of shareholder protection schemes, then, is
unclear. At first glance, their status is moot; in *Michigan Chamber of
Commerce*, the Court sustained a ban on corporate speech that is not
channeled through segregated funds. But the rationale of *Michigan
Chamber of Commerce*—that states may prohibit corporate speech to protect
the electoral process from the appearance of corruption accentuated by
state-conferred economic power—only justifies limiting corporate speech
that supports a candidate during a political campaign. The rationale does
not justify limiting speech of the sort involved in *First National Bank*, that
is, speech concerning ballot referenda, since such speech does not present
the appearance of any quid pro quo. As explained earlier, however, the
logic of the shareholder protection rationale applies with equal force to all
corporate political speech, including speech related to ballot referenda.

Several states have regulated corporate speech during referenda
campaigns. The Supreme Court invalidated direct prohibitions of such
speech in *First National Bank*, albeit without directly considering the
shareholder protection rationale. Further, well before *Michigan Chamber
of Commerce, at least two states determined that limits on corporate speech in connection with ballot referenda would not pass constitutional muster and thus refused to enforce such limits enacted by their legislatures.\(^9\)

Neither state, however, considered the shareholder rationale as a justification for limiting the speech in question.\(^9\) Thus, the suggestion by some commentators that certain "broad language" in *Michigan Chamber of Commerce* would support the restriction of corporate speech concerning referenda,\(^9\) as well as Justice Brennan's attempt to rehabilitate the shareholder protection rationale, may well result in a renewed interest in limiting such speech. Indeed, subsequent to *Michigan Chamber of Commerce*, at least one state has enacted prohibitions on independent corporate expenditures in connection with ballot referenda,\(^9\)—prohibitions that have since been struck down by a federal district court despite the court's speculation that "the logical extension of *Michigan Chamber of Commerce* may eventually emasculate or overrule *First National Bank*."\(^9\) It is therefore likely that the Court will ultimately be forced to evaluate squarely the shareholder protection rationale.

### III. UNDERESTIMATING THE BURDEN ON SPEECH

Support for schemes that protect shareholders by limiting corporate speech rests upon a balance of the burdens imposed by such restrictions against the benefits of eliminating wasteful speech and protecting the negative associational rights of shareholders. Formally, courts ask whether limits on corporate speech burden first amendment rights, and if so,
whether such a burden is narrowly tailored to advance a compelling state interest.95

Two aspects of the burden created by shareholder protection schemes are apparent. First, the requirement that firms speak through a segregated fund imposes administrative costs of various types. Such funds must have a separate director, keep separate books, actively solicit funds from interested parties, and meet various administrative reporting requirements.96 Second, firms will not be able to use funds from the corporate treasury to speak. It may seem that this second burden is irrelevant, given the rationale for the prohibition. Prohibiting the use of general funds, while permitting the solicitation of voluntary contributions, simply assures that the resources devoted to speech will reflect the true wishes of shareholders and others concerned.97 Such an analysis, however, ignores a third sort of burden: the limits that such statutes place on the ability of the corporation to overcome free rider and collective action problems.98

A. Hampering Collective Action

Economists define something that provides benefits to two or more people simultaneously as a "collective" or "public" good.99 No one can reap all the benefits of investment in such a good, because he or she is unable to exclude others from its enjoyment.100 Some goods, such as national defense, are pure collective goods; it is impossible to exclude one's fellow citizens from the benefits of their production. Other impure collective goods are characterized by imperfect excludability. Individuals or firms can appropriate some, but not all, benefits of investment in such

95 See Michigan Chamber of Commerce, 494 U.S. at 657.
96 See id. at 657-58 ("These hurdles 'impose[d] administrative costs that many small entities [might] be unable to bear . . . . '") (quoting Federal Election Comm'n v. Massachusetts Citizens For Life, 479 U.S. 238, 254 (1987) (plurality opinion)) (alterations in original).
97 See id. at 659-60; Nicholson, supra note 2, at 1005.
goods to themselves. Research and development exemplifies the impure collective good; a firm that creates a new product or production process reaps some, but usually not all, of the benefits of that creation. Private or voluntary production of such goods will fall far below the socially optimal level: just how far depends largely on the extent of non-excludability.

The production of collective goods, whether pure or imperfect, is characterized by "free riding." Assume that one is a member of a group that would benefit from the collective production of a particular good. Whether or not the group is able to exclude "outsiders" from enjoyment of the fruits of its investments, a member may conclude that, if everyone else contributes to that investment, his or her own contribution will have a negligible effect on the ultimate provision of the good. Or, he or she may conclude that, if no one else contributes, only a negligible amount of the good will be produced. Such calculus may lead an individual to conclude that he or she is better off, no matter what others do, if he or she makes no contribution. Such strategic behavior, known as free riding, will cause voluntary contributions for collective goods to understate the actual support for their production. Indeed, as a matter of theory, no rational member of a diffuse group would contribute to the provision of a collective good.

Political speech is a collective good. Citizens and interest groups are not able to exclude others from the benefits of such speech, and they have an incentive to free ride off of the efforts of their fellows. This is no less true when such speech is on behalf of corporations. If one firm speaks, other firms, as well as shareholders, are likely to benefit. Here again, one would expect that free riding by corporations would hamper the production of corporate speech.

It has not. To begin with, the free rider problem is not equally acute in all circumstances. Sometimes incentives may be such that firms can at

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101 CORNES & SANDLER, supra note 100, at 7.
102 Id. at 6-7; DAVIS & MEYER, supra note 99, at 51.
104 DAVIS & MEYER, supra note 99, at 51; OLSON, supra note 103, at 16, 28.
105 DAVIS & MEYER, supra note 99, at 51; OLSON, supra note 103, at 16, 28.
106 OLSON, supra note 103, at 27 ("Normally, the provision of the collective good will be strikingly suboptimal . . . ."); DAVIS & MEYER, supra note 99, at 50-51.
107 OLSON, supra note 103, at 28 ("[T]here is a tendency for large groups to fail to provide themselves with any collective good at all . . . .").
109 See generally Stigler, supra note 100.
least partially overcome the problem, either individually or collectively.\footnote{For instance, where the speech at issue relates solely to a particular industry dominated by a few firms, an individual firm might appropriate a significant portion of its investment in speech. In addition, such conditions may facilitate agreements between firms to engage in speech collectively. \textit{Cf.} Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Sherman Act does not forbid agreements to petition the government).} Moreover, firms often mitigate free rider problems through the agency of trade associations.\footnote{\textit{OLSON}, supra note 103, at 145.} Associations, such as the Michigan Chamber of Commerce, provide non-collective goods to their members in return for annual membership dues.\footnote{\textit{See Austin v. Michigan Chamber of Commerce}, 494 U.S. 652, 656 (1990) (describing various services provided by the Michigan Chamber of Commerce to its members).} By charging dues that exceed the cost of providing non-collective goods, associations are able to raise funds for the provision of collective goods.\footnote{\textit{See OLSON}, supra note 103; at 145 (suggesting that such arrangements are essentially "bundling" or "tying" arrangements).} Such dues, of course, are not solicited from individual shareholders; they instead are paid directly from the corporate treasury. By using retained earnings to pay such dues and thus support speech, firms are able to overcome the free rider problems inherent in a system of voluntary contributions.

Requiring firms and trade associations to speak only through segregated funds nullifies arrangements that mitigate free rider problems. If one shareholder contributes to a segregated fund, all shareholders stand to reap the benefits. Even if the speaking shareholder could collect all the benefits of his or her actions, he or she might still choose not to speak, hoping that others will do so. Thus, requiring firms to solicit funds voluntarily leaves shareholders in a position to free ride off of the efforts of their fellow shareholders, ensuring that voluntary contributions for speech understate actual shareholder support, while at the same time leaving those shareholders who refuse to contribute unfairly enriched as they reap the benefits produced by the contributions of others.\footnote{\textit{See Romano}, supra note 98; \textit{Grossberg}, supra note 98, at 155.}

B. Size of the Burden

It is difficult, if not impossible, to estimate the extent to which voluntary contributions to segregated funds will understate the true support of shareholders for speech. Professor Brudney claims that "[i]n theory, the free rider cost to the majority is trivial compared to the cost of forcing the
minority to speak against its will. On a practical level pressures of group membership may dilute free rider costs.” Brudney does not identify the “theory” supporting his calculus. One wonders whether he would agree with the paraphrase: the free rider cost to the majority of a voluntary system of contribution to the provision of national defense, which some find abhorrent for religious reasons, is trivial compared to the cost of forcing individuals to support such payments against their will.

In fact, several factors combine to suggest that the free rider problem is especially acute among shareholders. First, the “pressures of group membership” that attenuate free riding in some contexts is utterly absent where shareholders are concerned. Unlike union members, for instance, shareholders do not know one another; they are thus incapable of subjecting each other to the sort of social “coercion” that can mitigate free riding. Indeed, the very dispersion that proponents of shareholder protection regimes emphasize as a source of shareholder weakness is the same dispersion that makes it virtually impossible for shareholders to monitor each other. Second, free rider problems are most severe when, as in the case of corporations and their shareholders, “the number of beneficiaries is large, and the effect of any one person’s contribution is small.” Third, shareholders are unlikely to have any emotional, altruistic, or moral attachment to their firm. While such attachments may attenuate the problem in labor and eleemosynary organizations, it is not likely to have much effect in the corporate context.

C. Mitigating the Burden by Means of Consent Requirements

Of course, protecting shareholders by means of a total ban goes a bit far. After all, some corporate speech might be acceptable to all shareholders, and no one needs protection from speech to which he or she consents. Thus, some scholars have advocated “unanimous consent” requirements instead of blanket prohibitions. Instead of preventing speech outright,

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115 Brudney, supra note 6, at 259.
116 OLSON, supra note 103, at 60-62; see also Brudney, supra note 6, at 259 n.85 (arguing that peer pressure will dilute free rider costs, especially in the union context); Grossberg, supra note 98, at 155 n.47 (peer pressure and “covert coercion” may mitigate free rider effect in the union context).
117 See OLSON, supra note 103, at 62 ("[S]ocial pressure and social incentives operate only in groups of smaller size, in the groups so small that the members can have face-to-face contact with one another.").
118 DAVIS & MEYER, supra note 99, at 33. See also OLSON, supra note 103, at 35.
119 Grossberg, supra note 98, at 155 n.47 (non-economic attachment to a union may dilute the free rider effect).
120 See, e.g., Brudney, supra note 6, at 235; Shockley, supra note 1, at 421.
states could require a firm to obtain the unanimous consent of its shareholders before speaking out on any given topic. Formally, such arrangements are less onerous than direct bans. After all, they leave firms free to speak. In reality, however, unanimous consent requirements will have the same effect as a total prohibition.

Such requirements will protect each and every shareholder from offensive speech decisions in the same way that requiring a unanimous referendum vote for each government decision would prevent each citizen from supporting any action that offends him or her. The cost of such protection is high. It is a basic rule of collective choice theory that, as the proportion of a body necessary to reach a decision increases, so too does the cost of reaching that decision. First, the actual costs of deliberation and bargaining increase. Such costs include out-of-pocket expenses, the opportunity costs of such bargaining, and the costs of the delay that ensues. Second, as larger and larger majorities are required to reach a decision, minorities—some of whom may actually support the proposed action—will be able to appropriate a greater share of the benefits of the proposed action by holding out and seeking compensation for their votes, thereby further increasing the costs of bargaining. Such factors have the potential to paralyze corporate attempts at speech. This problem is likely to be most acute in the corporate arena, where shareholders can purchase shares solely for the purpose of engaging in such strategic behavior.

In deciding what proportion of members is necessary to make a collective decision, organizations should choose the proportion that minimizes the expected costs of imposing unwanted policies upon members and the expected costs of reaching decisions. In the political context, unanimous consent requirements are unheard of; indeed, even supermajority requirements are often criticized as unduly onerous. This same logic should apply even more strongly in the corporate context where both the threat of shareholder exit and other market mechanisms provide additional protection against excesses of majority rule. In the same way

122 Id. at 68; DAVIS & MEYER, supra note 99, at 52-54.
123 OLSON, supra note 103, at 41; BUCHANAN & TULLOCK, supra note 121, at 68-69.
125 BUCHANAN & TULLOCK, supra note 121, at 69-72.
127 See infra notes 168-79 and accompanying text.
that onerous administrative requirements are treated as burdens on speech, so too should unanimity requirements be treated as direct abridgments.\textsuperscript{128}

At any rate, a discussion of unanimous consent requirements is academic. No state has adopted this method of mitigating the free rider problem.

D. Ignoring the Burden on Speech

In \textit{Abood v. Detroit Board of Education},\textsuperscript{129} the Court explicitly recognized the free rider problem in the union shop context.\textsuperscript{130} There and elsewhere, the Court has held that the amelioration of free riding is a compelling state interest of the sort that will justify requiring non-union workers to support financially an association—a union—they do not otherwise wish to join.\textsuperscript{131} A close reading of the corporate speech cases, however, suggests that the Court has ignored the free rider problem and thus undervalued the burden on speech imposed by bans on corporate speech. For instance, in \textit{MCFL}\textsuperscript{132} the Court focused almost exclusively on the various administrative costs that would attend the formation of the separate political funds not affected by the law at issue.\textsuperscript{133} The Court fully discussed such burdens, noting that they included the cost of maintaining a separate treasurer, keeping detailed records of contributions, filing statements of organization with state authorities, and the like.\textsuperscript{134} Justice Brennan described the effects of such requirements in painstaking detail, noting, for instance, that the provisions would impose the cost of ensuring that purchasers at garage sales were in fact among the class of individuals not prohibited by law from contributing to the segregated fund.\textsuperscript{135} \textit{Austin v. Michigan Chamber of Commerce}\textsuperscript{136} largely appropriated this discussion from \textit{MCFL}, and only mentioned in passing the limitation upon expenditures from the general corporate treasury, without providing any

\begin{footnotes}
\item[128] See \textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652, 658 (1990) (describing burden imposed by onerous procedural requirements). Professor Brudney would ameliorate the unanimous consent requirement by allowing objecting shareholders simply to obtain a refund instead of conferring any veto power upon them. Brudney, \textit{supra} note 6, at 263 n.99. However, as one scholar has noted, such a system would not appreciably ameliorate the free rider problem. See Romano, \textit{supra} note 98, at 994 n.217.
\item[130] \textit{Id.} at 221-22.
\item[131] \textit{Lehnert v. Ferris Faculty Ass’n}, 111 S. Ct. 1950, 1957-58 (1991); \textit{Abood}, 431 U.S. at 209.
\item[132] 479 U.S. 238 (1986).
\item[133] \textit{Id.}
\item[134] \textit{Id.} at 254-55.
\item[135] \textit{Id.} at 255.
\end{footnotes}
analysis of the potential effect of this limit. Indeed, the Court assumed that a voluntary contribution system would assure that contributions reflected actual support for the ideas expressed.

Concurring in *Michigan Chamber of Commerce*, Justice Brennan agreed that the resources contributed to a segregated fund would reflect actual support for the ideas expressed. He went further than the majority, however, and claimed that "'[t]he segregated fund requirement . . . has not burdened significantly the Chamber's speech [because the Chamber has been able to solicit large contributions for speech]." Like those of the majority, these statements indicate a lack of appreciation of the free rider effect. By definition, voluntary support of collective goods reflects actual support for the ideas expressed. However, such contributions do not reflect the true, total support for such views. Instead, as explained earlier, voluntary contributions for the provision of collective goods will understate the true preferences of contributors. Further, contrary to Justice Brennan's suggestion, the gross volume of contributions solicited reveals nothing about the burden on speech wrought by a prohibition on corporate speech. It merely begs the question "compared to what?" A charity that solicits large contributions in the face of collective action problems could solicit even larger contributions absent such problems. Similarly, a segregated fund may amass significant resources; absent free riding, the same fund would receive a larger, optimal amount of contributions. The size of the burden on speech would equal the difference between the optimal and sub-optimal collections. As shown earlier, this difference represents a substantial quantity of speech.

IV. How Compelling?

Forcing firms to fund speech via individual contributions will burden corporate expression significantly. In order to justify such a large burden on high value speech, therefore, shareholder protection schemes must be "narrowly tailored to serve a compelling state interest." The discussion below shows that such schemes do not pass this test. To be precise, shareholder protection regimes are premised upon a particular, controversial view of the corporation. Adoption of a competing, contractual view eliminates entirely the perceived basis for such limitations. One, however, need not adopt one view or the other to find that such schemes are unconstitutional, since they likely limit a substantial amount of profit-maximizing, i.e., consensual, speech and thus are not narrowly tailored to

137 *Id.* at 657-58.
138 *Id.* at 660-61.
139 *Id.* at 670 (Brennan, J., concurring).
140 *Id.* at 676 n.7 (Brennan, J., concurring).
141 *Id.* at 657; *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).
their purported end. Further, such a burden is not justified as an attempt to protect shareholders from supporting profit-maximizing speech that they find offensive. The prevalence of "bundling" of the purchase of stock with an agreement to support corporate political speech suggests that such bundling creates significant cost savings. At any rate, no firm possesses economic power in capital markets sufficient to exact undesired compliance with a bundling arrangement.

A. Berle and Means

Limiting speech in order to protect shareholders may suffer from a basic flaw, namely, an incorrect assumption about the nature of the corporation. As one scholar has noted, advocates of shareholder protection schemes implicitly adopt the Berle and Means model of the corporation, assuming that directors pay little or no heed to the views of investors with the result that corporate speech mimics the tastes of management.\footnote{Romano, supra note 98, at 994-96 & n.223; see also Schneider, supra note 35, at 1263 (adopting Berle and Means framework).} The discussion below scrutinizes the influence of the Berle and Means hypothesis\footnote{ADOLF BERLE, JR. & GORDON MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).} on the shareholder protection rationale and discusses a competing, contractual model of corporate relations. While the Berle and Means hypothesis may support the large-scale restriction of high value speech, the competing, contractual view does not. As a result, it appears that a constitutional evaluation of shareholder protection measures would require the Court to determine which model of the corporation is more consonant with economic reality. In the abstract, such a choice of form should be guided by substance, i.e., by a determination of the magnitude of agency costs that attend the separation of ownership from control. The section concludes that the evaluation of such schemes does not require such a choice between characterizations. Instead, because several mechanisms align the interests of managers and shareholders, a significant amount of corporate speech is profit-maximizing. Hence, regardless of the ultimate characterization of the corporation, blanket prohibitions on corporate speech are not narrowly tailored to meet the purported interest in protecting shareholders.

1. Form

The Berle and Means hypothesis is a familiar one. The corporation is characterized by the separation of ownership and control.\footnote{BERLE & MEANS, supra note 143, at 1-9, 122-25.} Shareholders "hold title" to the corporation's assets, while managers and directors have
dominion and control. Shareholders could rise up any day and vote directors out, but never do, because managers control the proxy system. This image, powerless shareholders and all-powerful managers, is often used to justify and encourage corporate activities—charitable contributions and the like—that do not maximize profits. Ironically, this characterization is also used to portray corporate speech—which also, purportedly, does not maximize profits—as "theft" or "compelled subsidization." Recall Justice Brennan's words from Austin v. Michigan Chamber of Commerce: "I believe it [is] entirely proper for a State to decide to promote the ability of investors to purchase stock in corporations without fear that their money will be used to support political candidates with whom they do not agree." Under this characterization, restriction of corporate speech merely prevents theft and increases corporate profits at the expense of the information provided to the public via corporate speech. Further, by "unbundling" the choice to purchase stock from the decision to support political speech, curtailing corporate speech both protects the minority rights of shareholders and reduces the cost of capital.

This is but one characterization of the formal corporate arrangement. According to some, a corporation is not an artificial entity with property, owners, and custodians. Instead, what we call a corporation is a nexus of complex explicit and implicit contracts governing a bundle of agency relations. Creditors and shareholders contribute capital voluntarily, while workers and directors provide expertise. State law provides off-the-rack default terms, which the "corporation" may often change at will. Under this view of the corporation, no one, a priori, owns the corporation.

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145 Id.
146 "[T]he 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity." BERLE & MEANS, supra note 143, at 356.
147 CLARK, supra note 52, at 683 (noting this irony); Romano, supra note 98, at 994-96 (same).
148 494 U.S. 652, 677 n.8 (1990) (emphasis added); see also id. at 675 (characterizing such speech as theft).
149 See also Brudney, supra note 6, at 257 n.79 ("[I]t is not unreasonable for government to conclude that management should not have access to stockholders' assets to urge its views on society . . . ."); Nicholson, supra note 2, at 999 (same).
152 Eugene F. Fama, Agency Problems and the Theory of the Firm, 88 J. POL. ECON.
Instead, one's rights and duties depend upon the terms of the particular contract into which the individual has entered. As Professor Fama has stated:

> However, ownership of capital should not be confused with ownership of the firm. Each factor in a firm is owned by somebody. The firm is just the set of contracts covering the way the inputs are joined to create outputs and the way receipts from outputs are shared among inputs.

This revised view of the formal relationship between shareholders and the corporation has powerful implications for the shareholder protection rationale. According to this view, shareholders have no "ownership rights" in the retained earnings of the firm. Instead, they have voluntarily associated with an organization that delegates to management the authority to use cash flow for a variety of purposes—including political speech; their claim is to the residual. Therefore, corporate political speech is by no means coercive; it does not entail "forced subsidization." Shareholders have chosen to supply capital to an entity subject to certain terms. They cannot later cry "foul" when the firm provides information to the public which shareholders find distasteful. Although they may suffer some sort of psychic injury resulting from their attenuated association with the views expressed, prevention of such psychic harm is not the sort of interest that will support a large burden on high value speech. Instead of relying on the

288, 289 (1980) (abandoning the traditional "presumption that a corporation has owners in any meaningful sense").

153 Jonathon R. Macey, Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes, 1989 DUKE L.J. 173, 175, 179-80. Cf. Frank H. Easterbrook & Daniel R. Fischel, Voting in Corporate Law, 26 J. LAW & ECON. 395, 396 (1983) ("Shareholders are no more the 'owners' of the firm than are bondholders, other creditors, and employees (including managers) who devote specialized resources to the enterprise . . . .")

154 Fama, supra note 152, at 290. See also Macey supra note 153, at 175:

Indeed, contrary to popular belief, it is not particularly useful to think of corporations in terms of property rights, since the modern theory of the firm tells us that, while each participant in the corporate enterprise owns certain inputs (labor, capital, machinery, inventory), the firm itself is nothing but a web of contractual relationships among these various production factors.

Id.

155 Cf. Romano, supra note 98, at 992 ("Few commentators adopt a contract approach, which would ascribe the shareholders' rights of political association to their corporate agents.").


state to prohibit speech they find offensive, individuals must take affirmative steps to avoid it.\(^{158}\) This is simply a restatement of the harm principle: states may regulate speech only in order to protect the sort of interests legally redressable at common law.\(^{159}\) Since shareholders do not own the retained earnings of the firm, they have no legally-protected interest. They are instead "insiders" who have voluntarily consented to any attenuated psychic harm that results.\(^{160}\)

2. *What Form: A Question of Substance*

A finding that shareholder protection is a compelling state interest, then, involves a choice between the contractual and the Berle and Means portrayal of the nature of the corporation. Or, as Professor Emerson argued nearly three decades ago, the propriety of state regulation of the speech of private associations depends on the degree of control that such organizations exert over their members.\(^{161}\) Is corporate speech the result of a contract by means of which investors appoint managers to act in their interests? Or, is it simply the use by management of retained earnings to promote its personal political agenda, contrary to the interests and wishes of shareholders?

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\(^{160}\) *Cf. Laurence H. Tribe,* American Constitutional Law 1268-69 (1988) (arguing that the state may not compel vaccinations over religious objection to protect the objector from harm); Richard L. Cupp, Jr., Comment, Religious Torts: Applying the Consent Doctrine as Definitional Balancing, 19 U.C. Davis L. Rev. 949 (1986).

This is simply a restatement of the old agency cost problem. The separation of ownership and control creates divergent interests between principal (shareholder) and agent (manager). Proponents of shareholder protection schemes continually highlight these costs, emphasizing the ineffectiveness of shareholder democracy and the laxity of the business judgment rule. Managers, who write the contracts into which investors enter, have no incentive to provide terms beneficial to shareholders. Hence, shareholders have little, if any, input into the “contracts” they enter; the agreements are best viewed as contracts of adhesion. As a result, contracts provide management with absolute discretion over corporate speech, i.e., they require shareholders to support political speech as a condition of purchasing stocks. In the same way that union or bar association democracy does not prevent such organizations from coercing their members into financially supporting ideas the members oppose, corporate democracy does not prevent corporations from coercing shareholders into supporting ideas they oppose. It must be this sort of reasoning that underlies Justice Brennan’s remarkable statement, discussed earlier, that failure to outlaw corporate speech is indistinguishable, in terms of its coercive effect upon shareholder expectations, from outlawing corporate speech altogether.

This view ignores the informal, market-oriented mechanisms that align the interests of managers and shareholders. Specifically, product, labor, capital, and takeover markets all operate to align these interests, reducing

162 See generally Romano, supra note 98, at 994-95.
163 EASTERBROOK & FISCHEL, CORPORATE LAW, supra note 150, at 9-11, 14-15; Jensen & Meckling, supra note 150; Fama, supra note 152; Steven Shavell, Risk sharing and incentives in the principal agent relationship, 10 BELL J. ECON. 57-73 (1979).
164 See Brudney, supra note 6, at 261 n.90 (discussing management control of the proxy system); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 674 n.5 (1990) (Brennan, J., concurring); Schneider, supra note 35, at 1263-64 (“The usual fact of corporate life is that management runs the corporation . . . .”); see also Shiffrin, supra note 35, at 1246. See CLARK, supra note 52, at 123-40 (discussing business judgment rule).
165 Victor Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 COLUM. L. REV. 1403, 1412 (1985) (“It stretches the concept ‘contract’ beyond recognition to use it to describe either the process of bargaining or the arrangement[] between investors of publicly held corporations and either theoretical owners first going public or corporate management.”).
166 See Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Keller v. State Bar of Cal., 496 U.S. 1 (1990); Emerson, supra note 161, at 951 (as private organizations tend toward monopoly, internal processes are less likely to protect minority rights).
167 See supra note 85.
Managers hold large quantities of their firm's stock and devise compensation schemes, such as stock options, that tie remuneration to firm performance, further reducing these costs.\textsuperscript{169} The ease of shareholder exit facilitates the operation of these mechanisms. Unlike the union member in a closed shop state, or the attorney who must join the bar in order to practice his or her chosen profession, shareholders may terminate their association with one firm and join another with little pain, a factor that militates against regulation in and of itself.\textsuperscript{170} Firms that engage in conduct that does not maximize profits, such as wasteful speech, will be penalized as shareholders sell their stock, raising the cost of capital,\textsuperscript{172} reducing the wealth of management, and increasing the threat of takeover. In a world where sophisticated analysts watch every corporate move, nothing is more likely to draw attention to a frolicking management team than newspaper advertisements supporting political causes unrelated to the interests of the corporation.

Some supporters of shareholder protection schemes suggest that such exit will be ineffective, because it is difficult for some shareholders to monitor the conduct of their firms.\textsuperscript{173} This view ignores the tools available to the modern investor. Shareholders need not gather information about a firm themselves; they may instead rely upon the price set by a market filled with sophisticated investors that constantly monitor the performance

\textsuperscript{169} Easterbrook & Fischel, Corporate Law, supra note 150, at 91-92; Butler, supra note 150, at 120-29; see also Oliver D. Hart, The market mechanism as an incentive scheme, 14 Bell J. Econ. 366 (1983) (product markets); Fama, supra note 152, at 292-95 (labor markets); Daniel R. Fischel, The Corporate Governance Movement, 35 Vand. L. Rev. 1259, 1264 (1982) (capital markets); Henry G. Manne, Mergers and the Market for Corporate Control, 73 J. Pol. Econ. 110 (1965) (market for corporate control).


\textsuperscript{171} Emerson, supra note 161, at 951 ("[Whether the state should intervene to protect minority interests] will depend [in part] upon whether conditions are such that a multiplicity of organizations can exist in the area affected, or whether circumstances drive toward . . . monopoly."). See also Cort v. Ash, 422 U.S. 66, 81 n.13 (1975); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting) ("One need not become a member of the Michigan Chamber of Commerce or the Sierra Club . . . to earn a living.").

\textsuperscript{172} Brudney, supra note 6, at 262; Schneider, supra note 35, at 1266 & n.133. See also First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 818 (1978) (White, J., dissenting) (prohibiting objectionable speech will ease raising of capital); Michigan Chamber of Commerce, 494 U.S. at 674 n.5 (Brennan, J., adumbrating same point).

\textsuperscript{173} See Michigan Chamber of Commerce, 494 U.S. at 674 n.5 (Brennan, J., concurring); Brudney, supra note 6, at 264-65.
and activities of corporations. Market activity by these individuals will ensure that share prices reflect the true value of a firm and thus guarantee that very public actions, such as wasteful speech, will be reflected in the price of a firm’s securities. Indeed, in the context of private actions under the federal securities laws, courts ordinarily presume that a stock’s present price reflects all publicly available information about it, with the result that a plaintiff is presumed to have relied on a misstatement—whether he or she was aware of it—when he or she purchased the security in question. There is no reason to adopt a different theory regarding the operation of capital markets when evaluating shareholder protection legislation.

In any event, absent reliance on the efficient market, individuals can still gather information with relative ease, relying on sophisticated financial intermediaries, i.e., mutual funds or securities analysts. Such sources do more than provide information about the “bottom line” of a firm’s operations; many also focus on the social effects. These mechanisms, when combined with the incentives firms have to provide information to the public, facilitate monitoring of management behavior and thus reduce agency costs.

The various market mechanisms discussed above are not perfect; they do not guarantee that managers will not misuse corporate funds in one of many ways, including objectionable speech. As a general matter, a decision whether to characterize the corporation as a nexus of contracts depends on an empirical judgment about just how (im)perfect these

176 It is of no moment that certain shareholders, such as those who hold stock via pension funds, are “locked in” to their investments. Cf. Federal Election Comm’n v. Massachusetts Citizens For Life, 479 U.S. 238, 264 (1980) (describing purported economic disincentive for shareholders to disassociate with their firm). So long as corporations are not able to discriminate against shareholders—i.e., pay lower dividends to some than others—the presence of a significant number of shareholders who are not “locked in” will protect those who are. See infra note 217.
177 Easterbrook & Fischel, Mandatory Disclosure, supra note 174, at 695.
179 Easterbrook & Fischel, Mandatory Disclosure, supra note 174, at 687-91; see also S.J. Grossman & O.D. Hart, Disclosure Laws and Takeover Bids, 35 J. FIN. 323 (1980) (explaining that firms have strong incentives to disclose optimal amounts of information).
mechanisms are.\textsuperscript{181} The efficacy of such mechanisms, however, is the subject of some dispute.\textsuperscript{182} It seems, then, that the constitutional status of shareholder protection schemes depends on an assessment of the effectiveness of markets at reducing agency costs.

3. Narrow Tailoring

Given the current state of first amendment jurisprudence, particularly the requirement of narrow tailoring, one need not conduct a full blown assessment of the magnitude of agency costs in order to evaluate the constitutional propriety of limiting all corporate speech to prevent wasteful speech. For, as the Court has stated, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted [the] regulation."\textsuperscript{183} A blanket ban on all corporate speech, imposed for the purpose of rooting out wasteful speech, cannot pass constitutional muster if such a ban squelches a non-trivial amount of profit-maximizing speech and less intrusive means will adequately protect shareholders against wasteful speech.

Although an exhaustive study is beyond the scope of this Article, several factors suggest that a significant proportion of corporate speech is profit-maximizing. Political action committees are more prevalent in industries that are heavily regulated, thus giving rise to the inference that corporate political activity—including speech—is a vehicle for advancing the interests of shareholders, not the ideological preferences of management.\textsuperscript{184} Indeed, one scholar laments that corporate PACs are not ideological at all; they simply seek to pilot their members through the “web of federal legislation”\textsuperscript{185} and "work with the regulatory system to create a climate in which legislation is more unlikely to hurt their interests."\textsuperscript{186}

\textsuperscript{181} Brudney, Corporate Governance, supra note 165, at 1411-12; Romano, supra note 98, at 923.


\textsuperscript{183} Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 265 (1986); Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965) (Brennan, J., concurring) (“[I]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.”). See also Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (same test in free exercise context).

\textsuperscript{184} Romano, supra note 98, at 995-96 (and citations therein); Bernadette Budde, Business Political Action Committees, in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 9, 11 (Michael J. Malbin, ed., 1980) (“[T]he more regulated an industry and the more obvious an industry is as a congressional target, the more likely it is to have a political action committee . . . .”).
subsidies, federal taxes and federal regulations in which they are ensnared. Also, heavy corporate spending during referenda campaigns appears to be correlated with the threat that such referenda will have an adverse effect on corporate profits. A study of twenty-five California ballot referenda is instructive; corporations that participated in such campaigns always had a direct financial stake in the outcome. Other studies yield similar results. These observations, plus others, suggest that market mechanisms induce managers to engage in a non-trivial amount of profit-maximizing speech.

Perhaps most telling in this regard, however, is the body of scholarship premised upon the assumption that corporations engage in too much profit-maximizing speech. As observed earlier, several scholars have argued that corporate speech should be limited for the purpose of protecting the political process by ensuring that corporations do not exercise "undue influence" over the political debate. One of these scholars, after providing several examples of such "undue influence," observes that "such spending was a prudent, sensible way to protect livelihood and

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185 William T. Mayton, Politics, Money, Coercion, and the Problem with Corporate PACs, 29 EMORY L.J. 375, 381-82 (1980).
186 Romano, supra note 98, at 996-97; see also Easley, supra note 2 (discussing opposition by various interested groups to recycling legislation).
187 Lowenstein, supra note 108. For instance, in discussing an initiative restricting the construction of nuclear power plants, Professor Lowenstein observes "[t]he largest contributors and spenders...had direct interests at stake. Thus, the following companies contributed or spent over $100,000 each: Bechtel Corporation, General Electric, Southern California Edison Company, and Westinghouse Electric Corporation." Id. at 526 n.75. See also, e.g., id. at 529 ("Most of the opponents [of an initiative instituting land-use planning for the California coast] funds came from oil, utility, and developer interests."); id. at 533 (describing opposition to a gas tax initiative by "major oil companies, auto clubs, teamsters, truckers, and road builders"); id. at 537 (noting that "five major tobacco companies and their trade association, the Tobacco Institute, were responsible for...over 98% of the total" spent in opposition to an anti-smoking proposition).
188 See, e.g., Mastro et al. supra note 1, at 321-23.
189 See, e.g., Robert A. Prentice, Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech, 16 TULSA L.J. 599, 636 passim (collecting manifold examples of profit-maximizing speech); see also Robert B. Holt, Jr., Comment, Corporate Advocacy Advertising: When Business' Right to Speak Threatens the Administration of Justice, 1979 DET. C.L. REV. 623 (1979) (discussing insurance company advertising campaign decrying large jury verdicts). See generally Easley, supra note 2 (discussing examples).
190 See supra note 2 and accompanying text.
Profits." Opponents of corporate political speech, then, argue at cross-purposes; proof that corporations "unduly influence" the political process is also proof that a substantial amount of corporate speech is profit-maximizing, thereby severely damaging the rationale for shareholder protection schemes.

Such internal inconsistency is not limited to academia, however. As noted earlier, in *Michigan Chamber of Commerce*, the Court held that Michigan had a compelling interest that supported the restriction of corporate speech in connection with electoral campaigns. Apparently the Justices were concerned that the state-created corporate form allowed the Michigan Chamber of Commerce and its members too much weight in the debate over Michigan's workers' compensation policy, an issue that touches the heart of corporate profitability. Remarkably, one Justice who joined that majority opinion also authored a concurrence arguing that Michigan had an equally compelling interest in preventing corporate speech because such speech would not benefit shareholders! Ultimately, the Court cannot have it both ways; the Justices cannot assume that corporations engage in too much profit-maximizing speech while at the same time arguing that all corporate speech is wasteful.

If, as it seems, corporations do engage in a significant amount of profit-maximizing speech, a blanket ban—or its equivalent—on corporate speech does not meet the narrow tailoring requirement. In the words of Justice Frankfurter written in another first amendment context, "'[s]urely this is to burn the house to roast the pig.'" More narrowly tailored alternatives, such as a stricter business judgment rule and disclosure requirements, are available to deter wasteful speech without prohibiting that which is protected. It may be that such alternatives will not eliminate all wasteful corporate speech. Yet, the Federal Communications Commission may not prohibit all "dial-a-porn" in order to keep such material from enterprising youngsters; nor may a state prohibit all sales of material that tend to corrupt youth to ensure that no such material ever enters the hands of youngsters.

192 Shockley, supra note 1, at 380-81 nn.8-9.
194 Id. at 669-78 (Brennan, J., concurring).
195 Butler v. Michigan, 352 U.S. 380, 383 (1957) (the Court itself did not reach the constitutional issue), quoted in Sable Communications v. FCC, 492 U.S. 115, 127. Prohibiting union speech in order to protect dissenters is, indeed, burning down the house to roast the pig.
196 See Shockley, supra note 1, at 419-21 (recommending disclosure requirements).
197 Sable Communications, 492 U.S. at 130-31 (blanket ban on dial-a-porn unconstitutional, even though less restrictive alternatives may leave a few youngsters able to secure access to such material).
reaches children. Surely states may not prohibit a large volume of high value speech in order to make doubly sure that no manager ever abuses his or her office.

Put another way, failure to outlaw all corporate speech does create the possibility of wasteful speech. Thus, states may certainly act to foster the legitimate expectation, articulated by Justice Brennan, that managers will not "embezzle" funds via wasteful speech. They, however, may not do so in a way that entirely prevents individuals from voluntarily speaking collectively through the corporate structure. Any such blanket prohibition is far "too blunt an instrument for such a delicate task."

This is not necessarily to say that a state may adopt a "strict" business judgment rule for corporate decisions concerning speech, while retaining a lax one for other decisions. Insofar as agency costs exist with respect to all corporate behavior, much of which is potentially offensive one way or another to shareholders, there is no reason to treat speech differently from any other corporate decision. Indeed, tightening the business judgment rule solely with respect to corporate speech seems perverse, since several other corporate decisions, such as those governing executive compensation and responses to takeover bids, are characterized by inherent conflicts between the interests of shareholders and management and thus higher agency costs. The under-inclusiveness of such a change would suggest that the legislature sought to suppress speech and not to reduce agency costs, with the result that the asserted interest would not be "compelling." Only a uniform tightening of the business judgment rule would ensure that such a tightening had the purpose of reducing agency costs and not suppressing speech.

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198 Butler, 352 U.S. at 383-84.
199 See Bolger v. Young Drug Stores, Inc., 463 U.S. 60, 73 (1982) (invalidating blanket prohibition on the mailing of contraceptives although such prohibition was marginally more effective than less restrictive alternatives).
200 See supra note 85.
202 Nor could a state prohibit certain varieties of wasteful speech while leaving others unmolested. See R.A.V. v. City of St. Paul, Minn., 112 S. Ct. 2538 (1992) (state cannot draw content-based distinctions even where speech is otherwise unprotected).
204 See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233-34 (1993) (an interest is not "compelling" where the government fails to regulate other, non-protected conduct that poses the same "threat"). See also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 674-75 (1990) (Brennan, J., concurring) (and cites therein).
B. Offensive, Yet Profitable, Speech

Still, the fact that a substantial proportion of corporate speech is profit-maximizing may not be sufficient to prove that all shareholders consent to such speech. Instead, many shareholders might strongly disagree with what their corporation is saying, even where the message advances the economic interests of the corporation and thus shareholders. Mechanisms that reduce agency costs will not protect these shareholders. Indeed, by ensuring that corporate speech is profit-maximizing, these mechanisms may actually exacerbate the ideological harm. Thus, even if a significant amount of speech is profit-maximizing, a blanket ban on all corporate speech might be necessary to ensure that shareholders are not forced to support profit-maximizing yet offensive speech. Just as the Constitution prevents states from coercing individuals to support a union’s political speech, even where such speech might redound to the benefit of all employees, so too may states prevent corporations from coercing shareholders into supporting otherwise profit-maximizing speech that they oppose.\textsuperscript{205} Such a ban, in the form of a requirement that corporations speak through segregated funds, simply requires corporations to unbundle two theoretically distinct items: the ownership of stock and the “subsidization” of corporate speech. Indeed, Professor Brudney goes so far as to suggest that preventing entirely private activity—corporate speech—enhances the minority’s “freedom of speech.”\textsuperscript{206}

This view rests upon a miscalculation of the costs of such unbundling as well as a misunderstanding of the economic characteristics of capital

\textsuperscript{205} See Brudney, supra note 6, at 268-70. Cf. Michigan Chamber of Commerce, 494 U.S. at 676-78 & n.8 (Brennan, J., concurring) (recognizing interests of shareholders unwillingly forced to subsidize such corporate speech).

\textsuperscript{206} Brudney, supra note 6, at 256. Indeed, Professor Brudney appears to suggest that, insofar as state involvement is necessary to create corporations, minority shareholders are at the mercy of corporations, with the result that state intervention is appropriate. It may be that state action is a sine qua non of what we call a publicly held corporation, although the most oft-cited example, limited liability, is in some sense inaction. See Easterbrook & Fischel, Corporate Law, supra note 150, at 42-43 (absent limited liability, capital markets, and thus corporations, could not function). Indeed, some form of state involvement is a necessary condition of many activities we ordinarily deem “private.” See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). However, this fact, without more, does not render all such activities “coercive” such that a compelling state interest is present. Chartering a corporation in 1800 may well have created the opportunity for some type of private coercion, insofar as such charters often granted their recipients a monopoly. However, given the advent of general incorporation acts, no such opportunity for coercion results from the creation of a modern corporation, for reasons stated, infra. See also Herbert Hovenkamp, Enterprise and American Law 1836-1937, at 36-39 (1991) (describing Jacksonian movement toward general incorporation acts).
markets. As courts have recognized in the antitrust context, the pervasiveness of bundling or tying two theoretically separable items does not automatically indicate that sellers of the products are using economic power to coerce undesired acceptance of both items. Instead, such bundling is only coercive where (1) it is economically feasible to supply the two items separately, and (2) the seller or sellers have economic power over one of the items sufficient to impose such bundling.\(^{207}\)

There are various judicial tests for determining whether two items are separate products in the antitrust context. The Supreme Court has stated that separateness is present where there is sufficient consumer demand such that it is efficient for a firm to provide the two products separately.\(^{208}\) Other jurists have argued that two theoretically distinct items do not constitute separate products if there are substantial efficiencies resulting from the joint provision of the two items.\(^{209}\) Neither of these tests suggests that stock ownership and support of corporate political speech are separate products. Professor Brudney argues that few, if any, corporations offer such products separately.\(^{210}\) This argument suggests that there is insufficient consumer demand to support such an offering.\(^{211}\) Further, contrary to Professor Brudney's suggestion,\(^{212}\) there are significant joint economies that result from linking the purchase of stock with support for corporate political speech. As explained earlier, "unbundling" such "products" entails significant administrative costs, as well as the costs that result from the free rider problems that attend the reliance on segregated funds.\(^{213}\)

Unfortunately, it is not possible to measure directly the cost savings resulting from the joint production of stock ownership and support for speech. Further, reliance on the absence of "unbundling" as evidence of the efficiency of bundling is a bit circular: such evidence, by itself, is equally consistent with the assertion that such bundling is imposed against a shareholder's wishes. This impasse suggests an examination of the second element necessary to coercive bundling, that is, economic power.


\(^{209}\) Jefferson Parish, 466 U.S. at 38 (O'Connor, J., concurring in the judgment); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 703-04 (7th Cir. 1984) (Posner, J.).

\(^{210}\) Brudney, supra note 6, at 270.

\(^{211}\) Id.

\(^{212}\) Id. at 264-65.

\(^{213}\) See supra notes 99-114 and accompanying text. Indeed, when discussing the costs of unbundling, Professor Brudney does not mention free rider problems. See Brudney, supra note 6, at 264-65.
No corporation possesses the "economic power" necessary to compel potential shareholders to purchase stock on non-competitive terms.\textsuperscript{214} The New York Stock Exchange alone lists over 2,500 publicly traded corporations, none of which accounts for more than a minuscule portion of the outstanding equity of the companies traded on the exchange.\textsuperscript{215} Absent a massive conspiracy among major corporations, no firm has economic power over potential shareholders.\textsuperscript{216} Absent such market power, bundling must be presumed to be pro-competitive, not coercive.\textsuperscript{217}

More specifically, the pervasiveness of bundling suggests one of two non-insidious explanations for such bundling. First, it may be that no significant number of shareholders is willing to pay a positive price for such unbundling; if such shareholders existed, firms could reduce their cost of capital by unbundling voluntarily. Second, even if a significant number of shareholders is willing to pay some positive price for unbundling, it may be that this price is less than the costs associated with it. In other words, by bundling stock ownership with an agreement to contribute to speech, firms may create wealth that is used to pay otherwise offended shareholders higher returns, thereby inducing these shareholders to put aside any ideological objections.\textsuperscript{218}

Neither explanation for the existence of bundling requires a conclusion that all shareholders approve of all corporate political speech. Instead,

\begin{itemize}
\item \textsuperscript{214} It may be, however, that certain trade associations possess economic power vis à vis their member corporations, thus raising the specter that speech funded via the bundling of "contributions" for non-collective and collective goods is coercive. See supra note 112 and accompanying text. However, as just explained in the text, the presence of such bundling is equally consistent with the conclusion that the collective and non-collective goods are not really separate products.
\item \textsuperscript{215} See Robert Steiner, Big Board Seeks to Loosen Rules on Holder Voting, WALL ST. J., June 10, 1992, at C2; Edmund Faltermayer, The Fortune 500 Largest Industrial Corporations, FORTUNE, April 19, 1993, at 184 (Exxon, the industrial company with the highest valued outstanding equity, accounts for less than five percent of the outstanding equity of the Fortune 500 industrial corporations).
\item \textsuperscript{216} See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26-29 (1984) (thirty percent share of relevant market insufficient to show necessary economic power in tying context).
\item \textsuperscript{217} \textit{Id.} at 37 (O'Connor, J., concurring in the judgment). Some have suggested that, absent market power, tying arrangements can promote fraud where unsophisticated consumers possess little information about the product involved. See Richard Craswell, Tying Requirements in Competitive Markets, 62 B.U. L. REV. 661 (1982). Yet, absent price discrimination, such fraud cannot occur in markets, such as capital markets, where a substantial number of sophisticated consumers are present. See Town Sound and Custom Tops v. Chrysler Motors, 959 F.2d 468, 489 (3d Cir. 1992) (en banc).
\item \textsuperscript{218} See Roy W. Kenney & Benjamin Klein, The Economics of Block Booking, 26 J.L. & ECON. 497 (1983) (suggesting that practice of bundling several products together creates efficiencies that induce customers to purchase from the bundling firm).
\end{itemize}
shareholders that might have objected have either avoided such concerns in one of several ways\textsuperscript{219} or decided that the benefits of owning stock outweigh the harm associated with supporting views with which they disagree. This situation is hardly analogous—either qualitatively or as a matter of degree—to the actual, state-enforced coercion facing a union member or attorney who must join a state-sponsored association as a condition of employment. Thus, such a ban cannot be characterized as an enhancement of the minority’s “freedom” of speech.\textsuperscript{220} Instead, such a ban leaves the minority “free” to refuse to contribute to segregated funds while at the same time reaping the benefits that inure to the corporation as a result of suboptimal expenditures by segregated funds on corporate speech that are supported by those shareholders who do contribute.

V. CONCLUSION

Prohibiting corporate speech leaves shareholders and other interested parties free to form independent organizations that solicit contributions in order to espouse ideas. Advocates of shareholder protection schemes claim that such a regulatory system ensures that the magnitude of corporate speech reflects voluntary support for the ideas expressed. This conclusion is correct, but irrelevant. Because corporate speech is a collective good, voluntary contributions for its provision will far understate the actual preferences of shareholders for such speech. Far from assuring that speech will reflect the actual desires of shareholders, such a system creates substantial free rider problems and thus imposes a substantial burden on high value speech. Supporters of such schemes claim that they prevent wasteful speech and protect shareholders from a scheme of “bundling” that results in compelled subsidization of a point of view.

This Article has argued that such schemes cannot survive constitutional scrutiny. The rationale for shareholder protection schemes may suffer from a basic flaw—a mischaracterization of the corporate relationship. Retained earnings are only shareholder property—and corporate speech theft—if one adopts that so-called Berle and Means view of the corporate relationship. If, however, one adopts the contractual theory, such earnings are the property of no one, and the use of such earnings by management for speech presents no problem of “compelled subsidization.” Instead, the

\textsuperscript{219} For instance, shareholders who would otherwise object may have invested in corporations that are not likely to engage in speech offensive to them. An environmentalist, for instance, could invest in companies that assist in environmental clean-up. See Stephen Advokat, \textit{A Mutual Interest In Cleaning Up}, CHIC. TRIB., May 7, 1990, at C5 (discussing various mutual funds that invest in environmental firms).

\textsuperscript{220} See HAYEK, supra note 159, at 16-17 (discussing various definitions of “freedom” and noting confusion by some of “liberty” with power).
corporate contract, which shareholders enter willingly, allows management to deploy such earnings in ways beneficial to the firm, including political speech. The choice between these competing theories of the corporation determines the strength of the state interest supporting the significant burden on speech that shareholder protection schemes involve.

Such a choice is not to be made a priori. Instead, it must be based upon an empirical assessment of the agency costs created by the specialization of function that characterizes the corporate form. More specifically, one wants to know how much corporate speech is profit-maximizing. It may be true that formal mechanisms have little disciplining effect upon management decisions, including those concerning speech. However, many other informal mechanisms ensure that managers will internalize the effects upon firm profitability of such decisions.

Fortunately, one need not take sides in the empirical debate over agency costs in order to evaluate the strength of the state interests asserted. Instead, one need only determine whether a non-trivial amount of corporate speech is indeed profit-maximizing. The data seem to indicate that, in fact, a substantial amount of corporate speech is profit-maximizing. Further, the scholarly case in favor of limiting corporate speech to protect the electoral process is itself premised upon a belief that corporations engage in too much profit-maximizing speech. If the data and these scholars are correct as an empirical matter, shareholder protection schemes cannot survive first amendment scrutiny.

Of course, even when speech is profit-maximizing, some shareholders might object to the corporate message on ideological grounds. This possibility has led some to suggest that states should restrict such speech to ensure that such shareholders are not coerced into supporting speech they oppose. However, as shown earlier, no corporation possesses the economic power sufficient to coerce shareholders into supporting speech they would otherwise oppose. Further, "unbundling" the purchase of stock from an agreement to support political speech creates substantial costs, including the costs associated with free riding. Thus, the pervasiveness of bundling suggests either that (1) the costs of unbundling outweigh the benefits associated with it, or (2) shareholders are unwilling to pay a positive price to obtain such unbundling. Neither explanation justifies the suppression of a substantial quantity of high-value, profit-maximizing speech.