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Franklin A. Gevurtz
University of the Pacific, McGeorge School of Law, fgevurtz@pacific.edu

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THE COMPLEX DUALISMS OF CORPORATIONS AND DEMOCRACY

*By Franklin A. Gevurtz**

* Distinguished Professor of Law, University of the Pacific, McGeorge School of Law. I wish to thank participants in various workshops at which I presented this article, most especially Elizabeth Pollman and Jarrod Wong, for their helpful comments.

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Abstract

These are perilous times for American democracy. Among the threats, many point to the power of corporations. This article examines that threat by considering a series of dualisms characterizing the relationship between corporations and democracy.

This begins with a look at the anti- as well as the pro-democratic impacts of the earliest corporations and the paradoxes with respect to democracy created during the evolution of corporate law. The article then looks at internal corporate governance (so-called "corporate" or "shareholder democracy") to show how, on the one hand, it contains features addressing some of the greatest current threats to American democracy, while, on the other hand, it operates as a fundamentally undemocratic vote buying system. This dualism in internal corporate governance, in turn, reflects a clash in the purpose for corporate or shareholder democracy: Is the purpose economic efficiency, or is it democratic legitimacy for those controlling the often-vast power of the corporation?

Finally, this article addresses the dualism in the internal and external aspects of the relationship between corporations and democracy by situating the governance and impact of corporations within the broader democratic governance of society. Specifically, individuals in charge of corporations lack democratic consent and accountability for their decisions unless either internal corporate governance is consistent with democratic values; persons without a voice through internal corporate governance can avoid the impact of such decisions by not dealing with the corporation; or democratically elected federal, state, and local governments can intervene when externalities and market failures render refusal to deal unrealistic. This, in turn, suggests the need to limit excessive political influence by those in charge of corporations or to reform the anti-democratic aspects of internal corporate governance.

INTRODUCTION

I confess to being a fan of science fiction portraying dystopian futures. A common trope in such fiction has powerful corporations controlling or even constituting the government while shadowy schemers or rich elites control the corporations.[1] As with all such fiction, this vision of the future reflects present fears. Numerous writings both in academic[2] and mainstream[3] publications address the perceived danger that powerful corporations pose to democracy.[4]

Unfortunately, these writings often remind one of the parable of the blind men describing an elephant in which each description, while accurate in its own way, misses the mark in picturing the beast as a whole. Similarly, writings about corporations and democracy tend to look at pieces of the topic but, in doing so, can miss the bigger picture.

Some writers, particularly those reacting to the *Citizens United* decision,[5] focus on the external to the corporation. They address corporate influence over democratically elected governments and the clash between

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1 *E.g.*, *Incorporated (TV series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Incorporated_(TV_series) (last visited Mar. 1, 2022) ("The series takes place in a dystopian Milwaukee in the year 2074, where many countries have gone bankrupt due to a number of crises and climate change. In the absence of effective government, powerful multinational corporations have become de facto governments, controlling areas called Green Zones."); *Continuum (TV series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Continuum_(TV_series) (last visited Mar. 1, 2022) (stating that the program begins "in 2077-era Vancouver under the corporatocratic and oligarchic dystopia of the North American Union and its Corporate Congress").

2 *E.g.*, CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017); Jens Dammann & Horst Eidenmueller, *Codetermination and the Democratic State*, 2022 U. ILL. L. REV. (forthcoming 2022), http://ssrn.com/abstract_id=3680769; Luigi Zingales, *Towards a Political Theory of the Firm*, J. ECON. PERSPS., Summer 2017, at 113, 113–14; Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 432 (2016).

3 *E.g.*, SHELDON WHITEHOUSE WITH MELANIE WACHTELL STINNETT, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY (2017); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

4 This fear goes back to the founding of the republic. *E.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 894–96 (2016) (quoting early American sources, including Thomas Jefferson, expressing concern regarding the "aristocracy of our monied corporations which dare already to challenge our government").

5 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

government efforts to control corporations and the assertion by corporations of free speech rights normally associated with individuals.[6] As far as the internal governance of the corporation, it may as well be a black box in which an artificial intelligence (A.I.) commands decisions designed to increase corporate profits at the public's expense.[7]

Other writers focus on the internal governance of the corporation. Starting with the fact that the individuals legally in charge of corporations—the members of the board of directors—are normally elected in an ostensibly democratic process,[8] these writers address to what extent such "corporate" or "shareholder democracy" is consistent with democratic norms, and, if not, what, if anything, should be done about it.[9] Typically unaddressed is the impact of this issue on the broader question of whether corporations promote or threaten democratic governance of society more generally.

Some writers address facets of the interplay between the external impact of corporations on democracy and internal corporate governance.[10]

6 *E.g.*, Corporations and American Democracy, *supra* note 2; Strine, *supra* note 2; Zingales, *supra* note 2; Daniel J.H. Greenwood, *Person, State, or Not: The Place of Business Corporations in Our Constitutional Order*, 87 U. Colo. L. Rev. 351, 361–62 (2016); Justin Levitt, *Confronting the Impact of* Citizens United, 29 Yale L. & Pol'y Rev. 217, 223 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 Cardozo L. Rev. 2365 (2010).

7 A number of writers implicitly attempt to justify this approach by invoking the so-called "shareholder primacy" norm. The argument is that we can look past the actual wishes of the human beings making decisions for corporations because the law commands them to focus on profits for the shareholders and nothing else. *See, e.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 Cornell L. Rev. 335, 347–48 (2015) (explaining the shareholder primacy norm and its impact on the use of corporate power after *Citizens United*). Except in the most extreme case, however, the law in practice does not constrain directors in their discretion to balance shareholder profits versus other impacts of corporate activities. *E.g.*, Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. Davis L. Rev. 645, 651–52 (2002).

8 *E.g.*, Franklin A. Gevurtz, Corporation Law 181 (3d ed. 2021).

9 *E.g.*, Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. Rev. 2419, 2430 (2020); Sung Eun (Summer) Kim, *De-Democratization of Firms: A Case Study of Publicly-Listed Private Equity Firms*, 9 Harv. Bus. L. Rev. 323, 329 (2019); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675 (2007); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 Wash. & Lee L. Rev. 1389 (2006).

10 *E.g.*, Dammann & Eidenmueller, *supra* note 2 (manuscript at 5, 39) (advocating worker election of some corporate directors to limit through "checks and balances" the threat corporations pose to democracy); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 Vand. L. Rev. 639, 665 (2016) (discussing the challenges for internal corporate governance in deciding whether corporations should assert First Amendment rights); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social*

Yet, even these writers can miss the total picture.

In fact, the interaction of the external and internal relationship between corporations and democracy is one of a series of dualisms in the degree to which the governance of corporations, as well as the impact of corporations on the governance of society, advance or threaten democratic values. Among the dualisms are pro- and anti-democratic impacts of corporations, conflicts between utilitarian economic goals and pursuing democratic values, and the ever-present prospect for unintended consequences.

These dualisms began with the earliest business corporations, which engaged in tyrannical governance on the Indian subcontinent on the one hand,[11] but planted the seeds for democratic government in the United States on the other.[12] They extend through a paradoxical corporate law evolution in which efforts to democratize the use of corporations by making them easy to establish had the impact of turning corporations into the dominant and oft-feared form for conducting large businesses.[13] At the same time, the fear of highly successful and hence powerful corporations has collided with the desire both for the economic growth such corporations bring, as well as to avoid the economic dislocations caused by failed corporations.[14]

Further dualism exists between pro- and anti-democratic aspects of corporate or shareholder democracy. On the pro side, the enforcement of corporate law by judges outside of the body politic of any individual corporation allows corporate law to contain rules that mitigate some of the greatest current threats to democratic elections generally.[15] Yet, shareholder democracy operates under a fundamentally anti-democratic pay-to-play system.[16] This, in turn, reflects a dualism as to the purpose for shareholder voting: Does it exist to establish democratic legitimacy for those controlling the often-vast wealth and power of the corporation, or is it simply a tool to incentivize economically efficient business decisions even at the expense of democratic values?[17]

This leads to the overriding dualism created by the interactions

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Responsibility After Citizens United, 89 N.C. L. Rev. 1197, 1197 (2011) (advocating stakeholder representation on corporate boards—albeit not necessarily elected by the stakeholders—in order to protect the interests of corporate stakeholders who governments fail to protect because of corporate lobbying).

11 *See infra* text accompanying notes 28–33.

12 *See infra* text accompanying notes 41–50.

13 *See infra* text accompanying notes 54–66.

14 *See infra* text accompanying notes 76–82.

15 *See infra* text accompanying notes 93–124.

16 *See infra* text accompanying notes 152–63.

17 *See infra* text accompanying notes 164–98.

between the internal and the external regarding the governance and impact of corporations. A corporation—or more precisely a business corporation—is one of a number of types of institutions or associations that compose any society and impact the lives of individuals in the society. If the essence of democracy is the consent of,[18] or accountability to,[19] the governed, one must ask what provides that consent or accountability for those in charge of corporations—or, indeed, those in charge of other institutions and associations. To seek an answer, one must look not just at the internal governance of corporations or at the external constraints placed upon corporations, but at the interactions between both.

Consent or accountability does not exist unless those impacted by the decisions of the individuals in charge of corporations either have a voice through participation in the democratic election of those in charge, can realistically refuse to associate with the corporation and its activities—thereby denying consent or enforcing accountability through exit[20]—or can count on the prospect for democratically elected governments intervening when market failure or externalities render non-association into an inadequate protection. This means that excessive political influence by those in charge of corporations—the broad policy issue overhanging *Citizens United*—can upset this balance for achieving democratic accountability. This, in turn, suggests that democratic values may call for limiting the political influence of those in charge of corporations or rethinking the basic structure of corporate governance.

The tour through the dualisms which lead to this conclusion will proceed as follows: Part I of this article looks at the historical dualisms in the relationship between corporations and democracy. Part II then focuses on the internal by examining the dualisms underlying so-called corporate or shareholder democracy. Part III expands the discussion to explore the interactions between the internal governance of the corporation and the impact of corporations on the broader democratic governance of society and outlines the implications of this analysis.

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18 *E.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776); VIRGINIA DECLARATION OF RIGHTS §§ 2–3 (1776).

19 *E.g.*, José María Maravall, *Accountability and Manipulation*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 154, 186 (Adam Przeworski et al. eds.1999).

20 *See, e.g.*, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

I. The Dualisms of Corporations and Democracy in History

From the beginning, the interactions between corporations and democratic governance exhibited the dualisms underlying this topic.

A. *Territorial Governance by Early Corporations*

While the science fiction visions of government by or under the control of powerful corporations, either in some far-off quadrant of space or in a dystopian future Earth, might seem farfetched,[21] it matches the early history of the corporation. This history captures both the prospect for corporations to serve as a source of despotic rule or as a source for instituting democratic government. The former involves the English East India Company, while the later involves the companies set up to establish colonies in what would become the United States.

1. The Anti-Democratic History of the East India Company

The East India Company received its charter from England's first Queen Elizabeth at the start of the seventeenth century.[22] This company, along with its Dutch competitor, played an important role in the development of what became known as a joint stock company—what we now call a business corporation in which numerous investors purchase transferable shares of ownership in a firm conducting a large-scale business thereby becoming shareholders or stockholders.[23] This model for conducting business has contributed considerably to economic growth.[24] In terms of political history, however, the East India Company's impact was far more negative.

From its outset, the East India Company reflected a hazy line between private enterprise and public function. While illustrative that the early corporate charters were granted in order to carry out some public function beyond simply profits for shareholders,[25] the public function of

21 *But see* Taylor Locke, *Elon Musk on Planning for Mars: 'The City Has to Survive if the Resupply Ships Stop Coming from Earth*,' CNBC (Mar. 9, 2020) (updated Jan. 12, 2021), https://www.cnbc.com/2020/03/09/spacex-plans-how-elon-musk-see-life-on-mars.html (discussing Elon Musk's proposal for a colony on Mars undertaken by his Space X corporation).

22 *E.g.*, George Cawston & A.H. Keane, The Early Chartered Companies (A.D. 1296-1858) 87–90, 99 (London & New York, Edward Arnold 1896).

23 *E.g.*, Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J.L. Econ. & Org. 193, 195–99 (2017).

24 *Id.*

25 *See, e.g.*, Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5

the East India Company was not that noble. Among the powers listed in its charter was "to wage war" and the company's trading fleet included warships.[26] While the movies might suggest a focus on pirates, the wars initially waged were against traders from other European powers—who were using these ventures to engage in wars by proxy.[27]

In the eighteenth century, the East India Company raised an army and engaged in wars of conquest against the Mughal empire in India.[28] Military success allowed the company to pillage the Bengal treasury—from whence the Hindustani term for pillage, "loot," entered the English language.[29] The company also forced an agreement on the local ruler for the company to supplant the Bengali government's role in collecting taxes—which the company's agents often accomplished through the use of torture.[30] Heavy taxation and the company's prohibition on local traders maintaining rice reserves to deal with crop failure combined with a drought a few years later to trigger a famine in which one out of three Bengalis—more than 10 million people—died of starvation.[31] Despite such costs on the local population, by early in the nineteenth century, the company controlled the Indian subcontinent with a private force twice the size of the British army.[32] It would not be until the second half of the nineteenth century, after the company brutally put down a revolt by its own private army—hanging tens of thousands of suspected rebels in the process—that the English government decided to replace the Company's rule of India.[33]

The company's human rights violations were not limited to India. When China tried to prevent sales by the company of opium produced in Bengal, the result was the Opium Wars—China's defeat in which prevented China from seeking to protect its population against addiction.[34]

The anti-democratic impact of the East India Company extended to England itself. Showing that wealthy corporations can gain influence

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J. Econ. Hist. 1, 22 (1945) (explaining that early corporations were created to carry out some social function of the state).

26 *E.g.*, William Dalrymple, *The East India Company: The Original Corporate Raiders*, Guardian (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders.

27 *E.g.*, *East India - Company*, Theodora, https://theodora.com/encyclopedia/e/east_india_company.html (Sept. 29, 2018).

28 *E.g.*, Dalrymple, *supra* note 26.

29 *Id.*

30 *Id.*

31 *E.g.*, Zingales, *supra* note 2, at 116.

32 *E.g.*, Dalrymple, *supra* note 26.

33 *Id.*

34 *See* Soutik Biswas, *How Britain's Opium Trade Impoverished Indians*, BBC (Sept. 5, 2019), https://www.bbc.com/news/world-asia-india-49404024.

without engaging in expensive modern political campaigns featuring TV advertisements, the East India Company held considerable sway over the English Parliament—one quarter of whose members at various points owned stock in the company.[35] This proved handy when, a few years after its stock price soared by virtue of the pillage of the Bengal treasury, a dramatic shortfall in company revenues from Bengal resulted from ruinous taxation and famine in the province. This threatened the ability of the company to pay its debts, and, in turn, led to the collapse of banks across Europe. A government bailout followed.[36]

2. The Democratic Legacy of the American Colonial Companies

Before dismissing corporations as having had an entirely negative impact on democratic governance, it is worthwhile to look at American history and ask where some of our democratic traditions originated. In fact, more than half of the thirteen colonies that became the original United States began as corporations.[37] While the operations of these corporations often included egregious violations of human rights,[38] these corporations also laid a foundation for democratic government in the United States.

One component of democratic governance in the United States is the existence of a written constitution.[39] Scholars recognize that the experience with written corporate charters, which outlined the governance structure for companies establishing colonies in North America, played a central role in the American penchant for written constitutions.[40]

More broadly, the corporations that created the American colonies played a significant role in the establishment of representative democracy in this country. The familiar version of U.S. history points to the Virginia House of Burgesses called in 1619 as the first example of representative government among the colonists in what would become the United States.[41]

35 *E.g.*, Dalrymple, *supra* note 26.

36 *Id.*

37 *E.g.*, Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1407 (2019).

38 Enslavement and the theft of land from the indigenous population.

39 Of course, England's development into a democracy based upon norms and traditions forming an unwritten constitution, coupled with the existence of numerous autocratic regimes established under written constitutions, raise the question as to how much a written constitution really contributes to democracy.

40 Bowie, *supra* note 37, at 1407; William C. Morey, *The Genesis of a Written Constitution*, 1 ANN. AM. ACAD. POL. & SOC. SCI. 529, 535 (1891).

41 *E.g.*, Joshua J. Mark, *House of Burgesses*, WORLD HIST. ENCYCLOPEDIA (Feb. 24, 2021), https://www.worldhistory.org/House_of_Burgesses/.

This development, however, occurred within the context of the governance of the corporations establishing the Virginia and other colonies in North America.

Early in the 1600s, James I granted charters for two companies to establish colonies in what would become the United States: in the south, what was known as the London or Virginia Company, and in the north, the Plymouth Company.[42] The original charter of the London Company departed from the normal governance model for chartered companies insofar as James attempted to preserve power for himself to appoint the governing councils for the company—one in London and a local one in Virginia. This was soon supplanted by a charter establishing the more customary corporate governance model of periodic assemblies by the members of the company—those who we would now refer to as shareholders—who elected a governor and a board of assistants (what we would now refer to as a board of directors).[43]

This more democratic governance, however, occurred only in England, leaving the actual colony in Virginia under the control of a governor appointed by the shareholders in England rather than the colonists in Virginia. Tensions set off by this scheme resulted in the company establishing the House of Burgesses consisting of representatives sent from the plantations and towns in Virginia. The company codified this into a permanent arrangement in an ordinance the company adopted in 1621.[44] Views vary as to whether the company based this representative scheme on the English Parliament or on its own governing structure with its elected board.[45] In either event, representative democracy in the United States gets it start in decisions by a corporation.

The corporate origins of American democracy took a somewhat different route in the north. As a result of various machinations, the Plymouth Company granted to a group forming the Massachusetts Bay Company some of the Plymouth Company's land.[46] The charter forming the Massachusetts Bay Company incorporated the same essential governance structure as the London Company and other chartered companies—periodic assemblies of the members to elect a board of assistants (directors) and a governor.[47]

42 *E.g.*, 2 John P. Davis, Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to Authority of the State 158–59 (1905). London and Plymouth referred to where the organizers of the companies were from.

43 *E.g.*, *id.*; Morey, *supra* note 40, at 538–41.

44 *E.g.*, Morey, *supra* note 40, at 541–42.

45 *Id.* at 543.

46 *E.g.*, Bowie, *supra* note 37, at 1413–14.

47 *E.g.*, Morey, *supra* note 40, at 549.

There was one critical difference: The charter did not require the assemblies of the membership and the elected assistants to be in England. Accordingly, the members of the Massachusetts Bay Company—who were using the company structure to further a religious and political agenda and accordingly consisted of members in the Puritan church—met in Massachusetts.[48] As a result, the elected governing board of the Massachusetts Bay Company became, in effect, the Massachusetts colonial legislature.

The corporate charter for the Massachusetts Bay Company remained the governing constitution for the Massachusetts colony until 1691, when a new royal charter for the colony replaced the Massachusetts Bay Company's corporate charter. The 1691 charter, however, preserved the existing governance structure, except that the king thereafter appointed the colony's governor.[49] While James dissolved the London Company in 1624, the governance structure in Virginia established by the company's 1621 ordinance remained and later served as a model for other colonies in Maryland and the Carolinas. The governance structure established by the Massachusetts Bay Company's 1628 charter provided a model for other colonies in Connecticut, Rhode Island, and New Hampshire.[50]

3. Finding the Difference in the Internal versus the External

While it might be tempting to see the difference between the East India Company versus the London and Massachusetts Bay Companies as simply showing that the managers of some companies are evil and others are more well behaved, there is a more useful way to look at this. All of these companies followed an elected governance structure providing democratic accountability to their members. The difference arose in democratic accountability to those who had not invested in the companies.

While the East India Company's management was accountable to the shareholders in England through the shareholders' right to elect the company's governing board,[51] there was no such accountability to those governed by the company in India or impacted by the company's activities in China. By contrast, a key moment for democracy in what would become the United States was the London and Massachusetts Bay Companies' export of their own elected governance structure for use by the colonists in

48 *E.g.*, Bowie, *supra* note 37, at 1418–20.

49 *E.g.*, Morey, *supra* note 40, at 550.

50 *Id.* at 544, 550, 552.

51 *See, e.g.*, CAWSTON & KEANE, *supra* note 22, at 87 (describing governance provisions in the East India Company charter).

North America.[52] No doubt, the identity of the colonists in North America as English was critical to this different treatment.[53] All told, the examples of territorial governance by early corporations illustrate the dualism inherent in the internal and external aspects of the relationship between corporations and democracy.

B. *A Pair of Incorporation Paradoxes*

1. The Easy Formation Paradox

The evolution of corporate law illustrates further dualism regarding the relationships between corporations and democracy. To begin with, one might ask why, if corporations pose such a potential threat to democracy, they are so easy to form. In fact, this is the result of a legal evolution designed to promote democratic values.

The earlier discussion of the East India Company and of the companies forming colonies in America referred to charters granted by Elizabeth I and James I, which established these corporations. This is because, for most of their history, corporations came into existence through a one-off act of the sovereign (decree by the monarch or bill enacted by the legislature) which granted a charter to establish each specific proposed corporation.[54] The charter would indicate generally what the corporation was to do, the powers it would have, and how it was to be governed.[55]

The discretionary authority to establish, or not, every corporation under this system gives the government (whether represented by the monarch or legislature) significant potential power to control corporations. The government can refuse to create the corporation unless convinced there is some good for the economy and society to come from doing so—indeed, business corporations were relatively scarce in England, let alone America,

52 It should be mentioned that these representative institutions reflected the cramped view of democracy of their time: The Virginia House of Burgesses was elected by property owning white men, and membership in the Massachusetts Bay Company was only for members of the Puritan church.

53 Charters of the Massachusetts Bay and other colonial companies commonly contained clauses granting British people living under the corporation's jurisdiction "all liberties and immunities of free and natural subjects" to reassure potential emigrants that living overseas would not make their families' legal status any worse than if they stayed at home. *See, e.g.*, Bowie, *supra* note 37, at 1417–18.

54 *E.g.*, Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 Wash. L. Rev. 475, 483 (2011).

55 James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, at 15–16 (1970).

under this system.[56] The refusal to grant charters to prospective competitors, especially when coupled with charters that gave exclusive privileges (monopolies), meant the government could control the economy by picking winners and losers (Elizabethan socialism). Unfortunately, the potential for corruption and entrenching the privileged of society (crony capitalism) is rife under such a system.[57]

Since the individual chartering system bespoke of royal prerogatives and tended to favor those with influence (the aristocracy), it is not surprising that the French revolutionary government seems to have pioneered the adoption of a law allowing anyone to form a corporation by complying with statutory formalities—in other words, replacing special chartering with what has come to be known as a general incorporation statute.[58] Because the French experiment was short-lived and forgotten, New York likes to claim credit for pioneering general incorporation with its 1811 statute, which allowed the formation of manufacturing corporations by compliance with statutory formalities rather than obtaining special legislation.[59]

The New York effort took hold and in the ensuing decades, state after state in the United States,[60] as well as other nations,[61] adopted general incorporation statutes. In substantial part, the motive in the United States remained similar to the French revolutionary law. Even if dealing with elected state legislatures rather than a monarchy, the special chartering system was perceived as anti-democratic by favoring the well-connected instead of being equally available to all.[62] Still, the early general incorporation laws in the United States were often highly restrictive and thus many individuals desiring to establish corporations went to state legislatures for special charters.[63] Gradually during the course of the 1800s, the combined effect of liberalized

56 *E.g.*, Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 792–94 (2013).

57 *E.g.*, Eric Hilt, *Early American Corporations and the State*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 37, 71 ("Legislative authority over access to corporate charters was one of the principal mechanisms by which wealthy and politically connected elites protected their interests.").

58 *E.g.*, Gevurtz, *supra* note 54, at 483.

59 *See, e.g.*, Hilt, *supra* note 57, at 54 (explaining that general incorporation for business corporations started with manufacturing, because this was less controversial than general incorporation in more politically sensitive fields such as banking).

60 *E.g.*, Steven A. Bank & Ajay K. Mehrotra, *Corporate Taxation and the Regulation of Early Twentieth-Century American Business*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 177, 188–98.

61 *E.g.*, Gevurtz, *supra* note 54, at 484–85.

62 *E.g.*, Naomi R. Lamoreaux & William J. Novak, *Corporations and American Democracy: An Introduction*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 1, 2–3.

63 *Id.* at 12–13.

general incorporation statutes and the enactment of state constitutional provisions curbing the legislatures' power to grant special charters, ended the use of specially chartered corporations instead of formation under the general incorporation statutes in the United States.[64]

The irony, of course, is that this effort to democratize corporations by making them an easily available form for conducting business meant that corporations proliferated.[65] This, in turn, allowed corporations to become the dominant form for conducting larger businesses[66] and leads us to the subject matter of this article: the fear that they pose a threat to democracy.

2. The Success Paradox

The fact that corporations are easy to form does not in itself, however, account for their popularity—after all, partnerships are even easier to form.[67] Instead, several attributes make corporations an attractive form particularly for conducting larger businesses.

The first of these attributes—embodied in the very term "corporation"—is the concept of a legal person able to own property, enter contracts, and survive the coming and going of individuals benefitting from and carrying out its activities. This corporate attribute long predates the business corporation and reflects the need to use property in various communal activities—be this the common land or gathering hall used by a town or the cathedral used by a church. Ownership of the property by the individual inhabitants of the town or officials of the church creates an obvious problem as the individuals die or otherwise cease involvement with the community activity. Hence, medieval Europeans, picking up terminology and concepts from Roman law, sought and received charters from their kings, creating town, church, and other corporations able to own property.[68] The charters for the early business corporations, such as the East India Company, picked up this attribute by referring to the company as a body corporate and empowering the company to own property and the like.[69]

The earlier discussion of the East India Company already mentioned its pioneering role in establishing what is referred to as a joint stock company.

64 GEVURTZ, *supra* note 8, at 26.
65 *See, e.g.*, LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 2–3 (2010) (pointing to data showing that far more corporations than other forms of businesses, excluding sole proprietorships, have filed income tax returns in the United States).
66 *E.g.*, GEVURTZ, *supra* note 8, at 1.
67 *See, e.g.*, Holmes v. Lerner, 88 Cal. Rptr. 2d 130, 138–39 (1999) (partnership formed without the parties apparently realizing that they had done so).
68 *E.g.*, Blair, *supra* note 56, at 788–90.
69 *See, e.g.*, CAWSTON & KEANE, *supra* note 22, at 87.

Indeed, much of the world refers to what we in the United States call a corporation as a "stock company" or some variant thereof.[70] This reflects a second attribute of the business corporation—ownership through freely transferable fungible shares of stock.

The English East India Company was part of a metamorphosis from so-called regulated companies—essentially guilds whose membership consisted of merchants conducting independent operations under the company's exclusive government-granted franchise—into joint stock companies in which voting power and economic return came from investing in the capital funding the company's business (the joint stock) in exchange for fungible shares in the joint stock (thereby making one a shareholder or stockholder).[71] The Dutch (or United) East India Company—chartered a couple of years after the English company—took this arrangement a critical step further by making the shares fully transferable to any buyer.[72] The liquidity this provided meant that investors in the Dutch company did not have to wait literally for their "ships to come in" to obtain any money. The buying and selling of freely tradeable stock first by the Dutch and then others led to the organization of stock markets.[73]

The third attribute making the corporate form of business attractive is limited liability for the shareholders—meaning the shareholders are not personally liable for the company's debts. While modern discussions of business form often treat this as the most important advantage for the corporation over other business forms,[74] limited liability is the most recent attribute to arrive on the scene—for example, not being part of California's corporate law until 1931.[75]

While these attributes make the corporate form attractive, especially for operating large, capital-intensive businesses, they create another paradox from the standpoint of corporations and democracy. The ability of corporations to hold property as the company's owners come and go, and to raise capital from large numbers of investors who retain liquidity by being able to resell their shares in stock markets and who are not deterred from

70 FRANKLIN A. GEVURTZ, GLOBAL ISSUES IN CORPORATE LAW 4 (2006)

71 *E.g.*, 1 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 155–58 (1912); M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74 (1939).

72 *E.g.*, Dari-Mattiacci et al., *supra* note 23, at 196.

73 *E.g.*, LODEWIJK PETRAM, THE WORLD'S FIRST STOCK EXCHANGE (Lynne Richards trans., 2014).

74 *E.g.*, JAMES D. COX & THOMAS L. HAZEN, BUSINESS ORGANIZATIONS LAW 7 (4th ed. 2016) ("A primary advantage is the shareholders' limited liability.").

75 *E.g.*, Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 597–98 (1986).

investing by fear of personal liability, all combine to make the corporation a highly efficient vehicle for conducting large scale economic activities contributing to economic growth.[76] Success in these activities increases the wealth held by the corporation. This success and accumulation of corporate wealth, however, creates potential political influence and the fear that wealthy and powerful corporations can become a threat to democracy.[77]

Early corporate statutes in the United States reflected this fear by imposing limits designed to curb corporate wealth and power. Early general incorporation statutes often set a maximum capital that the corporation could raise.[78] In addition, nineteenth century court opinions held it was beyond the power of a corporation to own stock in other corporations,[79] thereby limiting the growth of the powerful corporate groups operating in diverse fields that we see today. This changed after the Civil War. State corporate law limits on corporate power collapsed as a result of competition between states seeking revenue from in-state incorporation.[80] Moreover, many opinion makers were inclined to see economic concentration as both inevitable and desirable—a source of economic prosperity, rather than something to be feared.[81]

The history of corporations and corporate law also showed that corporate failure provided as much ground for fear as did corporate success. Specifically, limited liability means leaving creditors of failed corporations unpaid.[82] More importantly, the Dutch invention of transferable stock and stock markets has led to a never-ending boom and bust cycle with economic downturns following stock market crashes[83]—as most dramatically illustrated by the Great Depression following the 1929 crash. All told, we end up with a "Goldilocks problem": We seem to want corporations to be successful, but not too successful.

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76 *E.g.*, John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea, at xv (2005); Ralph Gomory & Richard Sylla, *The American Corporation*, Daedalus, Spring 2013, at 102, 102.

77 *See* Zingales, *supra* note 2, at 113.

78 *E.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550–54 (1933) (Brandeis, J., dissenting).

79 *E.g.*, Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business 323 (1977).

80 *Liggett*, 288 U.S. at 557–60 (Brandeis, J., dissenting).

81 *E.g.*, Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 190–97 (1985).

82 It is debatable, however, whether there would be less negative economic consequences to the economy if the shareholders had to pay these debts.

83 *E.g.*, Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 Conn. L. Rev. 393, 403–17 (2006).

II. The Dualisms of Corporate or Shareholder Democracy

Another common attribute of corporations is governance under the ultimate authority of a board of directors elected by the shareholders.[84] While the presence of numerous shareholders with freely tradable stock creates the need for central management—in other words, it makes direct management by all of the shareholders impractical—the notion that this central management should take the more democratic form of representatives elected by the shareholders, rather than following a more autocratic structure, is not inherent. Indeed, there are businesses in which persons invest in which they do not elect the managers.[85] While it is common to refer to the elected corporate governance structure as corporate or shareholder democracy,[86] the degree to which either the actualities of this structure or the rationales behind it reflect democratic values exhibits the dualism running throughout the relationship between corporations and democracy.

A. *Corporate or Shareholder Democracy as a Shining City on a Hill*

Events in recent years have suggested that the potential threat to democracy posed by corporate influence may pale in comparison to a couple of other threats: (1) efforts to game districting and election mechanics for political advantage (gerrymandering and voter suppression); and (2) the proliferation of ever more brazen false or misleading statements from political leaders and their allies. Corporate law contains rules attacking these sorts of threats when they involve corporate elections. Such rules, however, are probably infeasible for non-corporate elections. Hence, corporate or shareholder democracy starts off with a significant advantage.

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84 *See supra* note 8.

85 As is commonly the case with a limited partnership. *See, e.g.*, Unif. Ltd. P'ship Act, Prefatory Note (Unif. L. Comm'n 2013) (purpose of the new Uniform Limited Partnership Act is to provide a form of business for people who want strong central management, strongly entrenched, and passive investors with little control).

86 *E.g.*, Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 Wash. & Lee L. Rev. 1347, 1363 (2006) (referring to "shareholder democracy"); David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 Cornell L. Rev. 1, 55 (1970) (referring to "corporate democracy").

1. Judicial Intervention against Gaming Corporate Elections

While gerrymandering or otherwise gaming the mechanics of non-corporate elections is as old as the republic,[87] recent events have focused renewed attention on the dangers such practices pose to democracy.[88]

Legal limits in the United States on such conduct are often indirect. For many years, the most promising line of attack commonly has been to characterize the districting or other conduct as racial discrimination violating the Voting Rights Act of 1965.[89] The problem with this approach occurs when the racial discriminatory aspect of the action is incidental to a partisan purpose. In other words, the Jim Crow laws sought to disenfranchise Black people because they were Black, regardless of how they would vote.[90] By contrast, efforts to suppress the vote of those likely to support an opposition political party only establish an issue of racial discrimination insofar as partisan affiliations correlate with racial identity. But this raises the question of whether motive or effect is to be the test,[91] and, if effect is to be the test,[92] then how much of an effect is necessary.[93]

Even beyond claims of racial discrimination, judicial intervention against gaming non-corporate elections often requires fitting the challenged conduct into a framework focused on equal rights and the like for individual voters, which can miss the real issues presented by electoral tactics designed to frustrate democratic accountability.[94]

87 *See* Elmer C. Griffith, The Rise and Development of the Gerrymander (1907) (discussing gerrymanders early in American history).

88 *E.g.*, Sheldon H. Jacobson, *Gerrymandering and Restricting Voting Rights: Flip Sides of the Same Coin*, Hill (July 1, 2021), https://thehill.com/opinion/campaign/560995-gerrymandering-and-restricting-voting-rights-flip-sides-of-the-same-coin; David Daley, *Inside the Republican Plot for Permanent Minority Rule*, New Republic (Oct. 15, 2020), https://newrepublic.com/article/159755/republican-voter-suppression-2020-election.

89 52 U.S.C. § 10301. Whether this will change after the Supreme Court's decision in Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021), remains to be seen.

90 *E.g.*, Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act 12, 23 (2007); Malia Brink, *Fines, Fees, and the Right to Vote*, A.B.A. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/fines--fees--and-the-right-to-vote/ ("In 1890, Mississippi held a state constitutional convention. The president of the convention declared its purpose plainly: 'We came here to exclude the N***o.'").

91 *E.g.*, City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) (holding that the Voting Rights Act was not violated by discriminatory effect without discriminatory motive).

92 § 10301(b) (as amended) (overturning *Bolden*).

93 *See, e.g.*, *Brnovich*, 141 U.S. 2321 (substantially constricting the degree to which racially discriminatory impact establishes a violation of the Voting Rights Act).

94 *E.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the*

By contrast, Delaware courts have developed a much more direct doctrine allowing judicial intervention to prevent incumbents from gaming the system to gain advantages in corporate elections. This began with the Delaware Supreme Court's decision in *Schnell v. Chris–Craft Industries, Inc.*[95]

Schnell arose out of a contested election for positions on Chris-Craft Industries' board of directors.[96] The incumbent directors learned that a dissident group of shareholders intended to solicit their fellow shareholders to grant proxies—elections of directors for publicly held corporations normally taking place through voting by proxies[97]—for an alternate slate to replace the incumbents at the next annual shareholders meeting.[98] The incumbents responded by amending Chris-Craft's bylaws to advance the date of the annual meeting by approximately a month.[99] At the same time, the board stalled giving the dissident group access to the corporation's list of shareholders (making it difficult to know whom to solicit for proxies).[100] The combined impact was to dramatically undercut the challengers' chances of unseating the incumbents at the annual meeting.

The Delaware Supreme Court held that the change in meeting date should be enjoined.[101] In doing so, the court explained that even though the corporation's bylaws and Delaware's corporation statute authorized the directors to change the meeting date, courts have the power to prevent incumbents from using such authority to gain an inequitable advantage in an election.[102] *Schnell* thus created a foundation for judicial intervention against inequitable actions by incumbents to game corporate election contests.

Condemning actions in corporate election contests because they are "inequitable" does not exactly give much guidance for determining what is condemned. It was the Delaware Chancery (trial) Court's decision in *Blasius Industries, Inc. v. Atlas Corp*. that provided a standard, thus gaining for the lower court naming rights over the resulting doctrine.[103] Specifically, the court in *Blasius* adopted a rule requiring the directors to meet a heavy burden of demonstrating a compelling justification for any action taken to interfere with the shareholders' ability to select the directors.[104] The court held that

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Doctrinal Interregnum, 153 U. PA. L. REV. 503 (2004).

95 285 A.2d 437 (Del. 1971).

96 *Id.* at 439.

97 *See infra* text accompanying note 126.

98 *Schnell*, 285 A.2d at 439.

99 *Id.*

100 *Id.* at 438.

101 *Id.* at 440.

102 *Id.* at 439–40.

103 564 A.2d 651 (Del. Ch. 1988).

104 The board amended the corporation's bylaws to increase the board's size to the

even the good faith fear of harmful consequences for the corporation from the action proposed by a shareholder seeking to have its nominees become a majority of the board[105] was not such a justification. While *Blasius* was only a decision by the Delaware Chancery Court, the Delaware Supreme Court subsequently followed *Blasius'* compelling justification test.[106]

2. The Ban on False or Misleading Communication in Corporate Elections

In campaigns involving federal, state, and local elections, charges and countercharges between candidates, and for and against various ballot propositions, which, if not outright false, are at least misleading, have long seemed to be the norm. The remedy for those in the arena is to respond with denials and perhaps by hurling more scurrilous charges at one's opponent in retaliation. A hope has been that news media could set some boundaries by exposing the worst lies.[107] Unfortunately, studies report mixed results on media fact checking,[108] and opinion polls often seemingly support the sad insight of Goebbels and Orwell that, for many, the big lie, frequently repeated in simple language, can trump the facts.[109]

By contrast, corporate law has long prohibited directors and others from making false or misleading statements in soliciting votes from shareholders. This prohibition exists in both state[110] and federal law. The federal prohibition stems from Section 14(a) of the 1934 Securities Exchange

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maximum number allowed by the company's certificate of incorporation and filled the vacancies. This "board packing" scheme preempted the ability of a dissident shareholder to have the shareholders expand the board and fill the vacancies with the dissident's nominees. *Id.*

105 The plaintiff shareholder proposed a large distribution of money from the corporation to its shareholders. *Id.*

106 MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1128 (Del. 2003).

107 *See, e.g.*, Darrell M. West, *How to Combat Fake News and Disinformation*, Brookings (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/ ("It is important for news organizations to call out fake news and disinformation without legitimizing them.").

108 *E.g.*, Alexander Agadjanian et al., *Counting the Pinocchios: The Effect of Summary Fact-Checking Data on Perceived Accuracy and Favorability of Politicians*, Rsch. & Pol., July–Sept. 2019, at 1, https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/5/2293/files/2021/03/summary-fact-checking.pdf.

109 *E.g.*, Chris Cillizza, *1 in 3 Americans Believe the 'Big Lie,'* CNN , https://www.cnn.com/2021/06/21/politics/biden-voter-fraud-big-lie-monmouth-poll/index.html (June 21, 2021) (discussing opinion polls showing that 32% of those polled believe unfounded claims by Trump and his allies that Biden's victory in the 2020 presidential election was the result of massive fraud).

110 *E.g.*, Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1977).

Act.[111]

The Securities Exchange Act is part of the New Deal legislation and reflects the traditional view that the 1929 stock market crash triggered the Great Depression. Hence, the Act contains a variety of provisions designed to increase confidence in the stock market and prevent abuses which Congress believed led to the crash.[112] Section 14(a), however, has a bit of a different focus. It responds to the concern that the practical powerlessness of shareholders in the governance of publicly held corporations, in part because of problems with proxy voting, contributed to poor performance by large corporations and, therefore, the country's economic problems.[113] Accordingly, the Section empowers the Securities and Exchange Commission to adopt regulations governing the solicitation of proxies to vote shares in publicly traded corporations.

Among the regulations promulgated by the SEC pursuant to Section 14(a) is Rule 14a–9.[114] Rule 14a-9 prohibits proxy solicitations which contain any false statements as to material facts—in other words, facts a reasonable shareholder would find important in deciding how to vote.[115] It also prohibits proxy solicitations which omit material facts when the omission makes the statements in the solicitation misleading or no longer correct. Solicitations potentially include any communication intended to lead shareholders to grant or withhold a proxy.[116] Violations of Rule 14a-9 trigger a variety of enforcement provisions under the Act.[117] In addition, the Supreme Court has held that shareholders have an implied private right of action against those violating the Rule.[118]

3. Why these Rules Work in Corporate, but not General, Elections

Tempting as it might be to write an article advocating the import of these rules from corporate to non-corporate elections, the bottom line is that this is probably infeasible. For one thing, while Rule 14a-9 presumably falls

111 15 U.S.C. § 78n(a).

112 *See, e.g.*, *id.* at § 78b (statement of necessity for federal regulation of securities markets).

113 *See, e.g.*, Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property (1932) (a highly influential work setting out this thesis not long before the enactment of the Securities Exchange Act).

114 17 C.F.R. § 240.14a-9 (2022).

115 *E.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

116 *E.g.*, Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795–96 (2d Cir. 1985).

117 *E.g.*, Securities Exchange Act of 1934 § 21(d), 15 U.S.C § 78u(d) (empowering the SEC to bring civil actions to enjoin violation of the Act); *id.* § 78ff (criminal liability for those who willfully violate the Act).

118 J.I. Case Co. v. Borak, 377 U.S. 426, 432–33 (1964).

within the doctrine that the First Amendment does not protect untruthful commercial speech,[119] importing a ban on false or misleading speech into the context of non-corporate elections is probably unconstitutional because of the much higher protection accorded to political and public issue speech.[120]

The fundamental problem with importing these corporate law rules into the non-corporate election context, however, is not doctrinal, but practical. Specifically, who will determine whether a statement is false or misleading, or if a party's drawing of district lines or otherwise carrying out election mechanics is inequitable (or interferes with the voters' ability to select their government without compelling justification)?

It is not uncommon for judges to have some partisan leaning, especially given the process of their selection, and, even if they do not, judges must be wary of the perception that their actions are based upon such a leaning.[121] Hence, judges understandably tend to look for clear-cut, objective standards when entering into politically charged litigation involving contested non-corporate elections.[122] Vague standards like inequitably disenfranchise voters, or even interference with the effectiveness of the vote without compelling justification, are not such standards.[123] Even the determination of whether a campaign statement is false or misleading often

119 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (clarifying that to qualify for First Amendment protection, commercial speech must "concern lawful activity and not be misleading"). Actually, the characterization of Rule 14a-9 as addressing commercial speech is debatable. *See, e.g.*, Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. Kan. L. Rev. 163 (1994). The prohibition in the securities laws of false or misleading statements in connection with the purchase or sale of securities squarely falls within the regulation of commercial speech, which normally refers to advertising and the like designed to entice persons into buying goods or services. *See* Larson v. City & Cnty. of S.F., 123 Cal. Rptr. 3d 40, 58–60 (Ct. App. 2011). It seems more difficult to characterize the solicitation of proxies for election to a corporate board as commercial speech, unless one argues that a key attribute of any investment is the personnel who will manage the investment (the directors in the case of a corporation) and so regulating the selection of directors is still regulation of commercial transactions rather than pure speech.

120 *E.g.*, Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After* United States v. Alvarez, 97 Minn. L. Rev. 1047 (2013).

121 *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma: Law and Legitimacy in the Supreme Court*, 132 Harv. L. Rev. 2240 (2019) (book review) (discussing the tension between the Court's desire to maintain legitimacy in the public's eyes through "sociological legitimacy" (results do not consistently favor one ideological or political side over the other) and "legal legitimacy" (results follow a consistently applied legal approach)).

122 *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019) (requiring a "clear, manageable and politically neutral" test for the Court to interfere in legislative redistricting).

123 *See, e.g.*, *id.* (rejecting "fairness" as a test for judicial review of legislative districting).

can be clouded by one's political views.[124]

This problem is largely absent in corporate law because judges presumably have less inherent bias in contests among the shareholders and directors of a particular corporation. In other words, to adopt these corporate law rules for non-corporate elections, we might need to have judges who were not themselves part of the body politic—perhaps aliens from another planet or an A.I. Put more seriously, the normal separation between judges and the corporate body politic creates an inherent advantage for the enforcement of democratic norms in corporate versus non-corporate elections.

B. *The Anti-Democratic Side of Corporate or Shareholder Democracy*

While corporate or shareholder democracy might look good from a distance, closer examination reveals fundamental flaws.

1. Technical Failings

Discussions of anti-democratic aspects of corporate or shareholder democracy often focus on narrow electoral mechanics.[125] A good example involves access to the corporation's solicitation of proxies.

As mentioned earlier, shareholder voting in a publicly held corporation typically will involve the use of proxies. In other words, shareholders—few of whom normally would wish to spend the money or time to travel to a shareholder meeting—will grant authority (a proxy) to vote their stock to someone who will attend. Commonly, this would be a representative selected by those in charge of the corporation. Indeed, those in charge of the corporation typically will have the company solicit the shareholders to grant such proxies, as otherwise not enough shareholders

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124 *See, e.g.*, Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081, 1111–12 (2017) ("[T]he Court has continued to recognize that commercial speech is different [from other speech] in that governments have greater ability to determine the truth or falsity of commercial speech . . . .").

125 *E.g.*, Kim, *supra* note 9, at 335–41 (looking at who can call shareholder meetings; what items shareholders vote on; the ability of shareholders to nominate and remove directors; and the ability of shareholders to bring actions for breach of fiduciary duty); Bebchuk, *supra* note 9, at 696–706 (recommending reforms to provide proxy access, reimbursement of challenger expenses, majority rather than plurality vote to elect directors; and confidential voting).

will be present to have a quorum.[126]

This solicitation, paid for by the corporation, will also typically request that the shareholders grant authority to vote for a list of nominees for election to the board. A committee of the current board typically selects these nominees and thus, not surprisingly, these nominees are mostly the current incumbents.[127] Those wishing to run against the board's nominees normally must solicit proxies on their own dime.[128] Indeed, the form to grant a proxy in the solicitation paid for by the corporation looks a lot like the ballot in old Soviet Union, which listed only the Communist Party's candidate for any given office and provided only the "choice" of voting yes (da) or no (nyet) on the Party's nominee.[129]

In recent years, there have been efforts to change this system so that the names of competing candidates for election to the board appear on the form for granting a proxy distributed by the corporation and to require the person exercising the proxy to vote shares for whichever candidates the shareholders instruct. This is referred to as proxy access.[130] At the urging of institutional and activist shareholders, many public companies have adopted bylaws providing for proxy access.[131] Yet, many of the common limits in these proxy access bylaws, such as preventing the use of proxy access to run a slate of candidates for more than a small fraction of the board,[132] seem to have little basis in democratic norms.

Beyond these private efforts, a provision in the Dodd-Frank Act specifically authorizes the SEC to adopt a proxy access rule.[133] Ironically, in *Business Roundtable v. Securities and Exchange Commission*,[134] the D.C. Circuit

126 *E.g.*, Melvin Aron Eisenberg, The Structure of the Corporation: A Legal Analysis 103 (1976).

127 *E.g.*, *id.* at 112. While stock exchange rules require the board to have a nominating committee consisting of so-called independent directors (N.Y.S.E. Rule 303A), there is no evidence this has led to a substantial change in the practice of renominating incumbents.

128 *See infra* note 136.

129 *See* 17 C.F.R. § 240.14a-4 (the form for granting a proxy must provide a means for the shareholder to indicate whether the shareholder is granting or withholding authority to vote for each director for whom the party soliciting the proxy wishes to vote); Gevurtz, *supra* note 8, at 236.

130 *E.g.*, Holly J. Gregory et al., *The Latest on Proxy Access*, Harv. L. Sch. F. on Corp. Governance (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/.

131 *Id.*

132 *Id.*

133 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376 (2010).

134 647 F.3d 1144, 1154–56 (D.C. Cir. 2011).

Court of Appeals struck down the rule the SEC came up with based upon flaws the court found with the SEC's assessment of the rule's costs versus benefits—an anti-democratic bit of judicial activism which effectively ignored the Congressional mandate.[135]

Anti-democratic election mechanics, such as limited proxy access, can be highly significant in undercutting corporate or shareholder democracy. Indeed, the financial advantage of incumbents in soliciting proxies at corporate expense, while challengers must (at least unless they win[136]) foot the expenses for soliciting their own proxies, explains in part why corporate elections are rarely contested.[137] The lack of contested corporate elections, in turn, means that, as a practical matter, a self-perpetuating oligarchy ends up in control over most of the largest corporations.[138] Yet, the anti-democratic mechanics for carrying out corporate elections might be small potatoes—because it would not require radical change to fix[139]—next to the fundamentally anti-democratic nature of shareholder democracy itself.

135 Curiously, this decision never discusses the fact that the Dodd-Frank Act expressly authorized the SEC to adopt a proxy access rule. *See id.* One might have assumed that this action tells us that Congress concluded the benefits of proxy access as a general matter outweigh its costs. Hence, unless the SEC's rule was so beyond the scope of what Congress envisioned as to call for a reweighing of costs and benefits, that should have settled the matter.

136 Since courts will not order a corporation to reimburse a shareholder's proxy solicitation expenses, Grodetsky v. McCrory Corp., 267 N.Y.S.2d 356 (Sup. Ct.), *aff'd*, 276 N.Y.S.2d 841 (App. Div. (1966) (mem.)), the challengers must normally win control over the board to get the directors to vote to pay their expenses. Even then, however, courts might hold that the corporation cannot reimburse the expenses. *See, e.g.*, Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291 (N.Y. 1955) (suggesting that the corporation cannot reimburse expenses unless the contest involved a policy dispute).

137 *E.g.*, Bebchuk, *supra* note 9, at 682–91 (documenting the infrequency of challenges to incumbent directors and explaining why proxy expenses contribute to this result). This can get worse if corporate bylaws attempt to limit proxy solicitation expenditures challengers are allowed to make even on their own dime. For a discussion and a proposal to import into corporate law the *Buckley* doctrine barring caps on political expenditures, see Andrew A. Schwartz, *Financing Corporate Elections*, 41 J. Corp. L. 863 (2016).

138 *E.g.*, Zingales, *supra* note 2, at 114.

139 *See, e.g.*, Bebchuk, *supra* note 9, at 695–706 (setting out proposals to improve corporate elections).

2. The Anti-Democratic Pay-to-Play Essence of "Shareholder Democracy"

In fact, the most anti-democratic feature of corporate or shareholder democracy is the shareholder part. To see why, it might be helpful to briefly ask what we mean when we say something is democratic or undemocratic.

a. What is democratic?

Determination of what is democratic or anti-democratic or what are democratic values and norms can become quite complicated and contentious. At its most basic, democracy means rule by the people.[140] This, however, begs as many questions as it answers. To begin with, in any sizeable group, having the overall populace make the governing decisions is largely impractical. Hence, democracy commonly becomes equated with a republican system in which the overall populace elects those who are in charge.[141]

This, in turn, leads to a focus on the laws establishing, and the implementation of, procedures for elected government. One simple definition along this line is that a democracy exists if there have been two changes of the government through free and fair elections and there is no realistic threat to democracy from an authoritarian government.[142] Much seems missing in such a definition. For instance, are elections free and fair if those in power control the media and harass efforts by opponents to organize opposition parties? This leads to lists, such as the often-cited lists put together by Robert Dahl: universal suffrage; elected representatives; free, fair, and frequent elections; freedom of expression; alternative sources of independent information; associational autonomy; and inclusive citizenship.[143]

Some social scientists think the focus on elections (the formal procedures of democracy) is too narrow. Presumably going back to the elemental notion that democracy is rule by the people, Charles Tilly suggests defining democracy as "conformity of a state's behavior to its citizens' express demands"—which he measures as the degree that relations between the citizens and the state feature "broad, equal, protected[144] and mutually

140 *E.g.*, Cary J. Coglianese, *Democracy and Its Critics*, 88 Mich. L. Rev. 1662, 1662 (1990) (book review).

141 *E.g*, The Federalist No. 10, 82 (James Madison) (Dover Thrift ed. 2014).

142 Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 267 (1993).

143 Robert A. Dahl, On Democracy 85–86, 93–99 (1997).

144 In the sense that citizens can express views without fear of retaliation.

binding consultation."[145]

For present purposes it is unnecessary to choose between these approaches. Instead, it is sufficient to draw out a pair of core democratic values common to them.

The first goes to who is entitled to vote in elections (in the narrower formulation) or participate in the political process as a citizen (in the broader formulation). Both equate democracy with the breadth of those holding political rights: Dahl's list begins with universal suffrage, while Tilly's first factor is the breadth of the adults enjoying citizenship rights. Of course, many nations that are the forebearers of democracy (including the United States) fell far short of universal suffrage and, indeed, not that long ago many influential voices would have contested the equation of democracy with universal suffrage.[146] Still, since human institutions are inherently imperfect, democracy is commonly a matter of more versus less rather than it is or is not.[147] Seen in this light, a wider franchise is more democratic while a narrower franchise is less democratic.[148] Hence, the history of an expanding right to vote in the United States has been a move from lesser toward greater democracy.[149]

Overlapping with the notion of a broadly held ability to participate as a citizen (vote) is the notion of equality in electoral power among the citizens (voters). This is Tilly's second criteria, while Dahl addresses a book to the topic.[150] For those preferring judicial authority, the Supreme Court recognized this democratic value in its one-person, one-vote decisions: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."[151] Actually, the breadth and equality values are two sides of the same core difference between democracy and other forms of government: Democracy rejects the notion behind all other forms of government that some individuals have a greater claim to decision making power than others (except, of course, insofar as that decision making power traces to democratic election).

145 Charles Tilly, Democracy 13–14 (2007).

146 *E.g.*, *id.* at 9.

147 *E.g.*, *id.* at 10; Robert A. Dahl, On Political Equality, at ix (2006).

148 *E.g.*, Tilly, *supra* note 145, at 14.

149 *E.g.*, *id.*

150 Dahl, *supra* note 147.

151 Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368 (1963)). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (exception for water district). There are a few explanations for the voter equality norm ranging from a human worth or dignity rationale to a belief in the "wisdom of crowds" (i.e., the larger number of individuals are more likely to reach the better decision).

b. Why Shareholder "Democracy" Is Not

Looking at these two central democratic values, shareholder "democracy" misses the mark by a wide margin.[152] The principal features of shareholder democracy are that the franchise is limited to the shareholders and that voting power is based upon how many shares one owns rather than one-person, one-vote.[153] Both the limited franchise and the unequal voting power among shareholders, in turn, are symptomatic of a more fundamental departure of shareholder democracy from democracy. Essentially, shareholder democracy operates under a vote buying system: Persons buy into the franchise by purchasing shares and gain greater voting rights by purchasing more shares.[154]

We can demonstrate how this is the essence of shareholder voting by asking why employees do not get a vote. It is not because employees lack a significant stake in the decisions made by those governing the corporation: The impact of such decisions on employees is commonly greater than the impact on the typical public shareholder.[155] It is not because employees do not contribute to the corporation: The corporation would not make money without them. Instead, it is because employees did not buy stock. In fact, if employees buy stock, they will get a vote.[156]

152 *E.g.*, DAHL, *supra* note 143, at 88–90; Pollman, *supra* note 10, at 675 ("Corporate governance does not meet [Dahl's] standards [for democracy]. Not all corporate participants have voting rights, and those who do have unequal votes.").

153 While one-share, one-vote is the norm and default rule, *e.g.*, Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 447 (2008), articles of incorporation often provide for classes of stock with different voting rights, such as non-voting shares or shares providing more than one vote per share. *Id.* at 471. The impact of such multiple class schemes is typically to further deviate from the democratic value of equality among voters.

154 *See, e.g.*, Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 137 (2009). Admittedly, corporate founders do more than simply buy their stock. Hence, their control rests on a different, even if still not democratic, basis. A further deviation of shareholder democracy from democratic values arises from the ability of various entities—other corporations, investment funds and the like—to own and vote stock, since this means that individuals are making decisions on how to vote stock that they do not even own. The undemocratic nature of shareholder voting is glaring enough without getting into this further deviation from democratic values.

155 *See, e.g.*, Hayden & Bodie, *supra* note 9, at 2484–85.

156 The prospect that employees could get votes in a publicly held corporation by purchasing stock does not provide a realistic mechanism for democratic accountability. Even if purchases of single shares (odd lot purchases) are a realistic option, the one-share, one-vote, rather than one-person, one-vote, norm trivializes the voting impact of employees holding a single share. For employees to purchase larger amounts raises problems both with affordability as well as a dangerous lack of diversification of their investments.

Corporate finance theory also supports the notion that the shareholder franchise is essentially a vote buying system. This is a corollary of the Modigliani and Miller dividend irrelevance theory. This theory holds that, putting aside potential impact on taxes and the like, corporate shareholders benefit equally from dividends or from the rise in the price of their stock as the corporation reinvests its earnings.[157] The deeper implication of this theory is that the economic rights of stock ownership can just as well constitute simply a theoretical claim to a share of corporate earnings that a shareholder never needs to actually receive but can benefit from by someone else purchasing this theoretical claim to earnings, that this person will also never actually receive except by someone else purchasing this claim and on and on. In other words, shareholders can simply have pieces of paper (or a digital equivalent) that says this percentage of a wealth producing enterprise represents their shares, but they never actually need to see any distribution of the wealth produced by the enterprise. Under these circumstances, the only practical right of share ownership becomes the vote.

Yet, the notion that prospective voters should buy their votes is contrary to fundamental democratic values. As the Supreme Court recognized in striking down poll taxes, "wealth or fee paying has . . . no relation to voting qualifications."[158] In fact, shareholder democracy is worse than a poll tax, since the ability to buy more votes by purchasing more shares is the equivalent of having a poll tax in which voting power is proportionate to the amount of tax one is willing and able to pay.

Indeed, there is a certain irony here insofar as a number of state corporate laws traditionally have prohibited so-called "vote buying"—in other words, paying shareholders to vote in an agreed way—in corporate elections.[159] This seemingly mirrors (albeit without the criminal law consequences) the pretty universal rule in general elections in which it is illegal to pay voters to vote in a certain way.[160]

A seeming reconciliation of the vote buying ban in corporate law with the fact that people always buy votes in corporate elections by buying stock, invokes concerns about the motivation for buying the right to vote

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E.g., Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 Stetson L. Rev. 69, 85–86 (2015). Ownership through employee stock ownership plans (ESOPs) or the like does not provide the employees themselves (rather than trustees) the vote. *Id.* at 86–87.

157 Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. Bus. 411, 429 (1961).

158 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

159 *E.g.*, N.Y. Bus. Corp. Law § 609(e) (McKinney 1998); Macht v. Merchs. Mortg. & Credit Co., 194 A. 19, 22 (Del. Ch. 1937). *But see* Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982) (taking a more nuanced approach to vote buying in corporate elections).

160 *E.g.*, 18 U.S.C. § 597.

without buying the stock impacted by how one votes.[161] This rationalization rings rather hollow, however, when one realizes that there are all sorts of arrangements under which persons can gain the right to vote stock and yet are insulated from the consequences to the corporation from their votes—what is sometimes referred to as "empty voting."[162] Moreover, it is not uncommon for corporations to have more than one class (type) of stock in which some classes might lack voting rights, or some classes might possess more than one vote per share—arrangements which are hardly consistent with the rationale that voting power should be proportionate to economic consequences.[163]

C. *Dualism in Thinking about Corporate or Shareholder Democracy*

The dualism in whether corporate or shareholder democracy is democratic parallels a dualism in the rationales advanced for having corporate or shareholder democracy. Specifically, is corporate governance simply about utilitarian economic outcomes or is a goal to provide democratic legitimacy for those with the power to govern large corporations?

1. Economics

The departure of shareholder democracy from core democratic values in large part mirrors a dominant strain in thinking about corporate governance. This views the topic through an instrumentalist lens concerned with economic outcomes rather than what is democratic. Interestingly, this is a common approach both for those rationalizing and promoting shareholder democracy and for those critical of it.

a. The Economic Efficiency Argument for Shareholder Democracy

Large corporations, like other large organizations, involve joint activities organized in pyramidal hierarchies. Economists sometimes explain

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161 *E.g.*, Thompson & Edelman, *supra* note 154, at 162; *see also* Robert Charles Clark, *Vote Buying and Corporate Law*, 29 Case W. Rsrv. L. Rev. 776, 795–97 (1979) (discussing the concern about selling votes to buyers planning to loot the corporation).

162 Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. Cal. L. Rev. 811, 815 (2006) (discussing how the derivatives revolution in finance, combined with the growth of the share lending market, is making the decoupling of economic ownership from voting rights ever easier and cheaper). Indeed, through the ownership of various options or derivatives, it is possible for a person voting stock to profit from its decline in value.

163 *E.g.*, Hayden & Bodie, *supra* note 153, at 480–82.

this as based upon avoiding the transaction costs that would otherwise exist if each and every good or service necessary to produce another good or service came from independent individuals constantly contracting with each other to supply each and every such good or service.[164] The question then becomes who should stand at the pinnacle of the hierarchy. The economic efficiency argument is that this should be the person(s) with the best incentives. Those favoring shareholder democracy on such utilitarian reasoning assert that this is the shareholders.

This argument views shareholders as the so-called residual claimants in the corporation—in other words, they get what is left over after everyone else (employees, suppliers, lenders) gets paid.[165] Since the shareholders stand last in line to obtain assets from the corporation, the first dollar of corporate loss comes out of their pockets. Since the shareholders get everything made by the corporation after paying the other claimants, the last dollar of profit goes into their pockets. Hence, the argument runs, the shareholders' interest matches the wealth maximizing or efficient result for the whole venture: investing until the next possible dollar of gain multiplied by the probability of obtaining it is less than the next possible dollar of loss multiplied by the probability of incurring it.[166]

While, under this view, the shareholders have the best incentives when making overall corporate decisions and monitoring the supervisors at the top of the hierarchy carrying out such decisions, in a publicly held corporation the shareholders are too numerous and rationally disengaged to do this themselves.[167] Therefore, the reasoning continues, shareholders

164 *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–91 (1937); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 784 (1972). There are variations in the precise explanations for the existence of firms but exploring this is unnecessary to the present discussion.

165 Actually, this view of the shareholders being the residual claimants has never been universally accepted. *E.g.*, Sung Eun (Summer) Kim, *A Multi-Criteria Assessment of Corporate Residual Claimants*, SSRN 3 (Mar. 30, 2021), https://ssrn.com/abstract=3816061 (discussing the historical and normative arguments for treating various stakeholders in a business as the residual claimant).

166 *E.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 406 (1983).

167 In other words, it is not worthwhile for any one shareholder with a small stake in a corporation to expend the time necessary to know what is going on in the business since the overwhelming bulk of the benefit from doing so will go to the other shareholders who did not bother to spend the time. Moreover, even if a shareholder did so, attempting to persuade the other shareholders of the merits of what the informed shareholder proposes would take further expenditures by the informed shareholder, as well as by the other shareholders to evaluate the information they receive. *E.g.*, Clark, *supra* note 161, at 779–83.

should elect those (the board of directors) with the ultimate authority to make overall decisions and to monitor and replace, if necessary, the senior supervisors carrying out these decisions. In this manner, the board will be responsive to the interests of the shareholders and pursue the most wealth maximizing actions for the corporation.[168]

Indeed, under this sort of thinking it is even possible to applaud the whole vote buying idea of shareholder democracy. After all, if shareholders are too numerous and rationally disengaged to make overall decisions for, and carefully monitor what is going on at, their corporations, they are also normally too numerous and rationally disengaged to organize opposition seeking to oust underperforming directors and managers. It is easier to follow the so-called "Wall Street rule" of selling your shares if you do not like the management[169]—something that is much less practical for a citizen dissatisfied with his or her government and that further accounts for few corporate elections being contested. On the other hand, this creates the opportunity for those who think they can better manage the corporation to buy enough stock to gain control. Hence, vote buying through the purchase of stock can lead to greater efficiency by replacing poor management with better.[170]

b. Second Thoughts about Shareholder Interests

There has been considerable pushback against the view that giving primacy to shareholder interests, at least as shareholders often perceive their interests, produces the economically optimal decisions for corporations or for society more broadly.

A common example involves the incentives for shareholders when a corporation is at or near insolvency.[171] If a corporation's assets are less than, or even barely in excess of, its debts, then losing further money essentially only harms the creditors and not the shareholders. On the other hand, any earnings in excess of the debts will go to the shareholders. Under this circumstance, high risk investments (like bets at a roulette wheel) make sense from the shareholders' standpoint. This will be true even though such investments have a net negative value (in that the magnitude of the possible

168 *E.g.*, Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301, 311 (1983).

169 *E.g.*, Gevurtz, *supra* note 8, at 236.

170 *E.g.*, Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 265–66 (1967).

171 *E.g.*, Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *34 n.55 (Del. Ch. Dec. 30, 1991).

loss from the investment, multiplied by the probability of the loss, exceeds the magnitude of the possible gain from the investment, multiplied by the probability of the gain) and so the investments are inefficient from an overall economic standpoint.

Examples of poor incentives for shareholders are not confined to nearly insolvent corporations. Many of these examples involve so-called "short-termism"[172] or other myopic decisions that might have an immediately favorable impact on the shareholders of a corporation but can have negative consequences when viewed over a longer-term or broader economic perspective. For example, tales of layoffs and moving plants in search of lower labor costs can discourage employees at all corporations from investing in developing firm-specific human capital (in other words, developing skills which are not completely transferable to another company). This can result in lower corporate efficiency across the economy even though the layoffs and plant moving increased the immediate wealth for the shareholders of the corporation that did it.[173]

More broadly, actions that favor the interests of shareholders over others impacted by corporate activities might not be optimal when viewed from a larger economic or social standpoint. Specifically, maximizing corporate profits for the benefit of shareholders would normally appear to call for lowering costs—including compensation and benefits for employees.[174] It also normally calls for increasing revenues, including by increasing prices charged to consumers.[175] In addition, it would call for taking advantage of externalities, say by lowering expenditures on safety or pollution control unless required by the government.[176] Such actions can have negative consequences in terms of income inequality and sustainability that outweigh the gains to the shareholders when looked at in terms of broader economic and societal consequences.

Not surprisingly, many expressing concern about the negative economic or other consequences of giving primacy to shareholder interests

172 *E.g.*, William Galston, *Against Short-Termism*, DEMOCRACY (2015), https://democracyjournal.org/magazine/38/against-short-termism/; Roger L. Martin, *Yes, Short-Termism Really Is a Problem*, HARV. BUS. REV. (Oct. 9, 2015), https://hbr.org/2015/10/yes-short-termism-really-is-a-problem.

173 *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304–05 (1999).

174 *E.g.*, Bodie, *supra* note 156, at 74.

175 Indeed, diversified shareholders presumably would prefer that corporations in which they hold stock not compete with each other. *E.g.*, Franklin A. Gevurtz, *Saying Yes: Reviewing Board Decisions to Sell or Merge the Corporation*, 44 FLA. ST. U. L. REV. 437, 497 (2017).

176 *E.g.*, Strine & Walter, *supra* note 7, at 380–81.

are then led to express hostility to shareholder democracy[177]—including by opposing reforms such as proxy access.[178] Interestingly, however, few such commentators appear to express opposition to democratic government in general.

2. Legitimacy

While this might be an unfair comparison, both sides of the economic-oriented narrative regarding corporate or shareholder democracy can remind one a bit of the apologists for Mussolini, who said that he "made the trains run on time." Democracy does not necessarily find its justification in utilitarian economic considerations. Admittedly, one could say that business is all about economics. Yet, there is a democracy for its own sake threaded in corporate governance thinking.

a. The Original Purpose for Elected Corporate Boards

Indeed, this corporate democracy for its own sake notion is far older than the focus on economic outcomes. As mentioned earlier,[179] the joint-stock companies, like the East India Company, which are the forebears of the modern corporation, evolved out of so-called regulated companies. The regulated companies were little more than merchant guilds whose members had the exclusive right to conduct trade between England and areas such as the Baltic (for the Eastland Company) or Turkey (for the Levant Company).[180] The members of the regulated companies typically elected boards of those who we would now refer to as directors.[181] As the regulated companies evolved into the earliest joint stock companies, this model of an elected board went along for the ride—either as what started out as a regulated company turned into a joint stock company or as the early joint stock companies modeled the governance provisions in their charters on the governance provisions of the regulated companies.[182]

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177 *See, e.g.*, Blair & Stout, *supra* note 173, at 310–15 (favorably mentioning "practical and legal obstacles" to shareholders using their voting power).

178 *E.g.*, Yvan Allaire & Francois Dauphin, *Who Should Pick Board Members? Proxy Access by Shareholders to the Director Nomination Process*, SSRN 29 (Nov. 5, 2015), https://ssrn.com/abstract=2685790; Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 Bus. Law. 67, 70–71 (2003).

179 *See supra* note 71 and accompanying text.

180 *E.g.*, Davis, *supra* note 42, at 88–89, 97–98; Cawston & Keane, *supra* note 22, at 61.

181 *E.g.*, Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 117 (2004).

182 *Id.* at 115–22; T.S. Willan, The Early History of the Russia Company, 1553–1603,

The regulated companies themselves, being essentially guilds, took the elected board governance model commonly used by guilds,[183] which over time had replaced direct governance by all of the guild's members with decision making by elected representatives.[184] Moreover, given the close connection between the economic role and populace of medieval European towns and the merchants, the merchant guilds were closely connected with medieval European municipal governments.[185] Hence, the parallel between the guild boards and the town councils, which developed after medieval towns, became too large for meetings of the entire townsfolk.[186] Moreover, to medieval European jurists, both guilds and towns were a *universitates* (essentially, a corporation) and, as such, were subject to common norms of governance with other corporations.[187] These included political ideas and practices also manifested in medieval European parliaments and in Church councils.[188]

Among these political ideas and practices was the medieval European preference for expressions of consensus when making decisions impacting all members of the community.[189] One manifestation of this preference occurred when Canon Law jurists turned a Roman Law doctrine of *quod omnes tangit ab omnibus approbetur* ("what touches all is to be approved by all") from a technical rule involving co-tutorship into a broad principle of governance.[190] This principle applied not only to the Church, but to other "corporations"—using the term in the broader sense of a collective group, including guilds and towns[191]—and was invoked in the summonses sent by kings demanding that representatives appear at a parliament.[192] The role,

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at 19–21 (1956).

183 *E.g.*, Gevurtz, *supra* note 181, at 156–57.

184 *E.g.*, *id.* at 158–60; Cyril O'Donnell, *Origins of the Corporate Executive*, 26 BULL. BUS. HIST. SOC'Y 55, 63 (1952).

185 *E.g.*, Gevurtz, *supra* note 181, at 146–47.

186 *Id.* at 141–44; *see also* SUSAN REYNOLDS, KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900-1300, at 195–96 (1984) (noting that smaller towns retained open assemblies).

187 *E.g.*, ANTONY BLACK, GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT 18–24 (1984).

188 *Id.* at 44.

189 *E.g.*, REYNOLDS, *supra* note 186, at 302–05.

190 Brian Tierney, *Medieval Canon Law and Western Constitutionalism*, 52 CATH. HIST. REV. 1, 13 (1966).

191 *E.g.*, BLACK, *supra* note 187, at 73.

192 *E.g.*, Summonses to the Parliament of November 1295, *reprinted in* THOMAS N. BISSON, MEDIEVAL REPRESENTATIVE INSTITUTIONS, THEIR ORIGINS AND NATURE 147–48 (1973) (reciting the doctrine that "what touches all should be approved by all" in setting forth the purpose of the summons and commanding county, town, and ecclesial representatives to attend).

then, of a board, council, or parliament was to have representatives with full power (*plena potestas*) grant the consent required on behalf of the broader community.[193]

Indeed, it is fairly easy to see that consent of the governed, rather than economic efficiency, represented the original purpose for boards when we ask what exactly the board of a regulated company or guild did. These boards obviously did not manage a business, or supervise those who did, on behalf of passive investors. Rather, in addition to adjudicating disputes involving the merchants, these boards adopted ordinances to regulate the membership.[194] For example, the board of the Eastland Company adopted a regulation prohibiting members from "colouring" goods—in other words, selling the goods of a nonmember merchant as a member's own—thereby circumventing the company's monopoly.[195] Hence, these boards reflected the essentially democratic notion that the members of a group should elect those who make decisions and rules governing the members of the group.

b. Contemporary Expressions

Even if elected board governance of corporations originated in democratic notions of consent of the governed, one might ask what this has to do with governance of the modern business corporation. In fact, the notion of legitimacy through a democratically elected government remains a thread in corporate governance thinking. One of the best articulations of this sort of thinking is found in the *Blasius* opinion discussed earlier.[196]

The directors in *Blasius* argued that the court should apply the deferential business judgment rule[197] to their efforts blocking the plaintiff

193 *Id.* (stating that the knights sent to parliament are to have "full and sufficient power for themselves and the community of aforesaid shire," and the citizens and burghers sent to parliament are to have such power "for themselves and the community of cities and boroughs separately," to do the business of parliament). It should be mentioned, however, that the medieval European concept of representatives to grant consent on behalf of the broader community did not necessarily mean that the representatives were democratically elected.

194 *E.g.*, Willan, *supra* note 182, at 19–20; Gevurtz, *supra* note 181, at 120.

195 *E.g.*, Schmitthoff, *supra* note 71, at 82. Indeed, some of the ordinances adopted by the boards of regulated companies or guilds did not involve the conduct of business at all—as, for example, in the case of an ordinance prohibiting members of the Merchant Adventurers (which had the exclusive right to trade between England and Calais) from marrying women not born in England. Davis, *supra* note 42, at 80. Presumably, the Merchant Adventurers' marriage limitation was to "promote domestic tranquility."

196 *See supra* notes 97–100 and accompanying text.

197 For a discussion of the meanings attached to the business judgment rule, see Gevurtz, *supra* note 8, at 298–306.

shareholder from obtaining majority control of the board. In rejecting this argument, Chancellor Allen (who had a substantial influence on Delaware corporate law despite not serving on the state's Supreme Court) explained:

> The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. . . .
>
> It has, for a long time, been conventional to dismiss the stockholder vote as a vestige or ritual of little practical importance. . . . Be that as it may, however, whether the vote is seen functionally as an unimportant formalism, or as an important tool of discipline, it is clear that it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.[198]

Indeed, one wonders whether state legislatures would have enacted laws allowing for general incorporation, particularly at a time in which such laws reflected a fear of corporate power, without the patina of democratic legitimacy provided by governance under an elected board.

III. CORPORATIONS AND DEMOCRATIC GOVERNANCE OF SOCIETY AS A WHOLE

A. *Situating the Private Association within the Democratic Governance of Society*

1. The Impact of Corporations on Individuals in Society

Many who express support for democracy in general nevertheless might not much care about whether corporate governance adheres to democratic values.[199] Such a view explicitly or implicitly draws a distinction between political entities (*e.g.*, nations, states or provinces, cities) and private associations such as corporations. Under this view, how private associations choose to govern themselves is primarily a matter of private contracting and does not impact the question of whether the governance of society is democratic. In other words, this view rejects any linkage between the internal and external aspects of corporations and democracy.

This view, however, overlooks the normal operation of human societies. Human societies rarely exist as simply atomistic individuals living

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198 Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

199 *E.g.*, STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 143 (2008) ("While notions of shareholder democracy permit powerful rhetoric, corporations are not New England town meetings. Put another way, we need not value corporate democracy simply because we value political democracy.").

within political entities. Instead, societies consist of various associations among individuals.[200] In addition to families, this includes associations for both non-economic (such as religious) and economic purposes (including business corporations). The decisions of those governing such associations can have as much or more impact on the lives of individuals as the decisions of those in charge of political entities.

This is certainly the case with large corporations. The largest firms, almost all of whom are corporations,[201] produce most goods and services in the United States.[202] They employ the majority of the private sector workers.[203] They pollute the environment[204] and cause innumerable injuries.[205] Their failure can bring down the economy.[206]

2. Democratic Consent or Accountability for Those Governing Corporations

The fact that various associations, such as corporations, impact the lives of individuals does not mean they undermine the democratic

200 *E.g.*, William Little, Introduction to Sociology - 1st Canadian Edition 169–197 (2014), http://solr.bccampus.ca:8001/bcc/items/debe8d05-dbdf-4cb8-80f9-87b547ea621c/1/?attachment.uuid=7471f3fc-1e00-4c98-aaf0-010b00d702f4.

201 *See supra* note 6.

202 *E.g.*, James Manyika et al., *A New Look at How Corporations Impact the Economy and Households*, McKinsey Glob. Inst. (May 31, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/a-new-look-at-how-corporations-impact-the-economy-and-households; *see also* Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. Rev. 41, 58 (2005) ("Measured by the degree to which they affect our lives, corporate decisions designing and delivering cars, clothes, word processors, telephone service or electricity have at least as much impact as do most local governmental activities. In terms of coercion, it is easier to escape local governmental taxation than to avoid paying fees to corporations such as Microsoft, cable companies or major food processors; hospital bills are more likely to threaten our way of life than governmental traffic tickets.").

203 *E.g.*, Andrew Lundeen & Kyle Pomerleau, *Less Than One Percent of Businesses Employ Half of the Private Sector Workforce*, Tax Found. (Nov. 26, 2014), https://taxfoundation.org/less-one-percent-businesses-employ-half-private-sector-workforce/.

204 *E.g.*, Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, Guardian (July 10, 2017), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change (addressing greenhouse gas emissions).

205 *See, e.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1422, 1467 (1999) (presenting as a case study of market manipulation, the tobacco industry's techniques to get consumers to disregard the risk of smoking).

206 *E.g.*, Richard A. Posner, A Failure of Capitalism: The Crisis of '08 and the Descent into Depression 269–70 (2009).

governance of society unless they have an internal governance adhering to democratic norms. Families commonly do not govern themselves under such norms. Here is where one must consider the interaction of the internal and the external. What makes the impact and governance of private associations consistent with a democratic society is either (1) their internal governance under democratic norms; (2) the ability of individuals to disassociate from such associations and from the impact of the decisions of those in charge of such associations; or (3) the prospect for intervention by democratically elected governments of political entities when disassociation is an inadequate remedy.

In other words, the internal governance of corporations is simply one means for potentially giving democratic voice to those impacted by the decisions of corporate management. If internal governance gives such a democratic voice, then corporations serve as part of the democratic governance of society, rather than constituting a threat to it. To look to subnational political entities by analogy, this is why it is rare to hear assertions that the State of California, because of its wealth and power, constitutes a threat to democracy in the United States. After all, the government of the State of California is democratically elected. So long as the democratically elected officials do not take actions to undermine continued democratic accountability, the mere fact that the state is wealthy and powerful does not make it a threat to democracy.[207] On the other hand, to the extent that the internal governance of corporations does not provide democratic voice to those impacted by the corporation, then one must look to the external means of democratic consent or accountability.

Those inclined toward a laissez faire ideology focus on the ability of individuals to either accept or avoid the impact of dealing with a corporation by the choice to either contract or refrain from contracting with it.[208] Put in terms of democratic rather than economic values, individual choice through contracting or refusing to do so provides the consent of, and accountability to, the individuals potentially impacted by the decisions of those in charge of corporations. Thus, it achieves the underlying democratic goal of consent by, or accountability to, the governed.

The problem is that voluntary association and disassociation often might not provide consent and accountability. An obvious example is those harmed by corporate activities to which they did not agree, such

207 Indeed, if the mere wealth and power of a political entity makes it a threat to democracy despite having a democratic government, then the United States itself is a threat to democracy.

208 *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 22–25 (1996); Alchian & Demsetz, *supra* note 164, at 777.

as tort victims or the victims of environmental degradation caused by the corporation's activities. In many other instances, market failures, such as limited realistic options in concentrated markets (for instance, those in which network effects create dominant positions for some companies),[209] other situations involving unequal bargaining power,[210] or inaccurate or insufficient information available to individuals dealing with corporations,[211] can render choice illusory.

In these situations, the availability of intervention by the democratically elected government of a political entity—whether this is through tort liability, safety and environmental regulations, antitrust enforcement, labor laws, or anti-fraud and mandatory disclosure laws—restores democratic accountability. Hence, even Milton Friedman's famous essay,[212] which argued that the job of corporate managers is solely to make money for the shareholders, added the qualifier "while conforming to the basic rules of the society [including] those embodied in law."[213]

Needless to say, the appropriate line between government intervention and leaving protections to private contracting is a subject on which there long has been debate.[214] From the standpoint of democratic values, however, the key is not whether Milton Friedman or Paul Krugman is right on where this line should fall. Rather, it is that democratically elected governments, acting in accordance with democratic principles, make the decision.

Here again, the internal meets the external in the relationship between corporations and democracy. The persons in charge of corporations not only make decisions affecting individuals impacted by corporate activities, but they also make decisions about deploying corporate resources to influence the government. This means that the non-democratic aspects of internal

209 *E.g.*, Zingales, *supra* note 2, at 120–21.

210 *E.g.*, Yosifon, *supra* note 10, at 1200–01 ("Workers, having made firm-specific investments of their human capital and having made community-specific investments in other areas of their lives, may find it impossible to punish, or credibly threaten to punish, directors for such opportunistic conduct by exiting to other firms or labor markets.").

211 *Id.* at 1201 ("Corporations can also manipulate the design of their products or engage in misleading advertising campaigns, distorting consumers' risk perceptions or their evaluation of other product attributes."); Hanson & Kysar, *supra* note 205, at 1439 (discussing techniques companies successfully use to exploit consumer irrationality).

212 Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profit*, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

213 *Id.*

214 *See generally* Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. Chi. L. Rev. 1463 (1996).

corporate governance not only cut off democratic consent or accountability through such internal governance for the corporation's activities, but they also cut off such consent or accountability for the corporation's efforts to influence government. Moreover, if such efforts are successful, then the prospect of government intervention also might fail to restore democratic consent and accountability. This brings us to *Citizens United* and corporate speech.

B. *The Debate about Corporate Speech*

Much of the current concern about the anti-democratic influence of corporations focuses on corporate rights to free speech and the *Citizens United* decision.[215] In this decision, the Supreme Court struck down the federal ban on corporations making independent expenditures for "electioneering communication." In a nutshell, the court held that Congress could not bar political speech simply because it came from a corporation.[216] The result is to seemingly cut off the instinctive approach of many of those worried about excessive corporate influence on democratically elected governments, which is to bar corporations from at least some political activities open to individuals.

This, in turn, raises the question of whether the law can treat corporate political speech differently from speech by individuals. When all is said and done, there are essentially three arguments for doing so: one doctrinal, one results-oriented policy, and one consistent with democratic values.

1. The Corporate "Person" Distraction

A baseline doctrinal argument challenges whether corporations are "persons" subject to the same protections under the First Amendment as individuals.[217] Specifically, corporations come into existence by an act of government, not God, even if now carried out through easy compliance with general incorporation statutes. Hence, the argument runs, rather than being "endowed by their creator with certain unalienable rights," corporations only possess those rights that the government finds it useful to give. This is known as the concession theory.[218] Under a simple-minded version of this

215 *See supra* note 6.

216 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010).

217 *E.g.*, Strine & Walter, *supra* note 4, at 890–91.

218 *E.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 Utah L. Rev. 1629, 1635 (2011).

theory, the government can restrict free speech by corporations however much it wants.[219] While there are counter-theories and back and forth,[220] the problem with taking this argument to its logical extreme is that depriving corporations of the ability to assert free speech claims would severely endanger democracy.

After all, it was the New York Times Company which, in *New York Times Company v. Sullivan*,[221] claimed protection under the First Amendment when the Montgomery Alabama Police Commissioner sued it for defamatory statements contained in an advertisement published in the Times by supporters of Martin Luther King, Jr. The Supreme Court held that the First Amendment applied and a public official suing for defamation cannot recover unless he or she shows that the defendant knew the statement was false. The Court does not even discuss the fact that the New York Times Company is a corporation. Limiting the ability of government officials to stifle criticism by suing for defamation would seem to enhance democracy. Excluding corporations from asserting this First Amendment protection would leave out most publishers and news organizations.[222]

Another Supreme Court decision involving the New York Times Company, as well as the Washington Post Company (also a corporation), is *New York Times Company v. United States*.[223] In this decision, the Supreme Court rejected the government's request for an injunction blocking the two papers' publication of the secret "Pentagon Papers"—a report prepared for the

219 *See, e.g.*, Greenwood, *supra* note 6, at 358–59.

220 *E.g.*, Pollman, *supra* note 218, at 1660–63 (discussing alternative arguments for corporate constitutional rights, including the aggregate theory, under which corporations are extended constitutional rights to protect the interests of their shareholders, and the real entity theory, which asserts that corporations, like other human associations such as nations, take on a life of their own and therefore should be able to assert constitutional rights); *see also* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood: We the Corporations: How American Businesses Won Their Civil Rights*, 132 Harv. L. Rev. 2009 (2019) (book review) (arguing that the treatment of corporations as persons independent of their shareholders has actually led the Supreme Court to provide fewer constitutional rights, while decisions extending constitutional rights to corporations do so to protect the interests of individuals).

221 376 U.S. 254 (1964).

222 In fact, an overwhelming bulk of the media are owned by only a half-dozen corporations. *See* Nickie Louise, *These 6 Corporations Control 90% of the Media Outlets in America. The Illusion of Choice and Objectivity*, Tech Startups (Sept. 18, 2020), https://techstartups.com/2020/09/18/6-corporations-control-90-media-america-illusion-choice-objectivity-2020/. The major book publishers are generally corporations as well. *See, e.g.*, Devin Clemens, *The Ten Largest Publishing Companies in the World*, Tharawat Mag. (Apr. 2, 2020), https://www.tharawat-magazine.com/facts/ten-largest-publishing-companies/.

223 403 U.S. 713 (1971).

Department of Defense which documented the duplicitous history of public assurances by the United States government regarding the war in Vietnam. Once again, the defendants' status as corporations merited no attention in extending free speech protection. Indeed, denying corporations the right to challenge a prior restraint on speech would allow the government to block disclosure it finds uncomfortable from the organs most likely to distribute such information to the public.

Of course, one might distinguish protections of speech from protections of "the press" or draw other distinctions based upon the nature of the corporation or the nature of the speech.[224] This, however, renders broad discussion of the nature of corporate personhood and the First Amendment into something of a red herring. Once the law crosses the Rubicon of extending to some corporations, or corporations in some contexts, free speech rights, there needs to be a principled basis for saying when corporations will not enjoy such rights. Focusing on corporate "personhood" hardly seems to provide this lodestar. Nor is it necessary, since free speech cases draw all sorts of contextual distinctions in deciding when the government has infringed the free speech rights of individuals (who are clearly persons).[225]

2. The Corporate Wealth Argument

The common policy-oriented argument for limiting corporate political speech is that the excessive influence over politicians and government decisions that wealthy corporations can obtain through political expenditures and corporate speech creates a danger to democratic governance

224 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 431 n.57 (2010) (Stevens, J., concurring in part and dissenting in part) (distinguishing cases protecting speech by newspapers on this basis); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) ("There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.").

225 *See, e.g.*, Leslie Gielow Jacobs, *"Incitement Lite" for the Nonpublic Forum*, 85 BROOK. L. REV. 149, 167 (2019) (discussing how "[t]he balance of government authority and individual speech rights differs substantially" according to the type of property on which the speech takes place); W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV.1, 22–23 (1994) (citing multiple cases such as Connick v. Meyers, 461 U.S. 138 (1983), and Rankin v. McPherson, 483 U.S. 378 (1987), to discuss how context is important when considering whether the government infringed upon an individual's free-speech right).

responsive to the interests of all Americans rather than the private greed of corporations.[226] This argument commonly features eye-popping figures on the wealth of large corporations, as well as the amount of their expenditures on political speech, and discussions of the influence of such speech in advancing an agenda hostile to workers, consumers, the environment, and so on.[227] Sometimes, this is accompanied by a conspiratorial vision regarding the broader tenacles of those advancing an aggressively pro-business and anti-regulatory agenda through increasingly conservative courts and the like.[228]

Unfortunately, this line of argument often smacks of "corporations should not enjoy free speech when I do not like what they have to say." Indeed, those who worry about corporate advocacy against regulations addressing worker pay and safety, the environment, or consumer protection, are not often heard expressing qualms about corporations flexing their wealth in order to promote racial equality or punish the intolerant among us.[229]

In any event, the fundamental problem with the corporate wealth argument is that it fails to distinguish corporations from others who also derive political power from wealth (*e.g.*, billionaires). Actually, the bulk of corporations are not that large.[230] On the flip side, there is much writing on the political influence of the so-called donor class of billionaires and other wealthy individuals and families.[231] While the very largest corporations have

226 *E.g.*, Whitehouse with Stinnett, *supra* note 3, at 24–47; Strine, *supra* note 2, at 426.

227 *E.g.*, Whitehouse with Stinnett, *supra* note 3, at 24–47; Strine, *supra* note 2, at 431 n.31, 439 n.60.

228 Strine, *supra* note 2, at 450–74. Incidentally, rather than being some anti-corporate activist, Leo Strine, cited in these footnotes, is the former Chief Justice of the Delaware Supreme Court and a person who devoted his career to matters of corporate law.

229 *See, e.g.*, Chris Kromm, *Why the HB2 Boycott of North Carolina Is Working*, Facing S. (Apr. 29, 2016), https://www.facingsouth.org/2016/04/why-the-hb2-boycott-of-north-carolina-is-working (treating positively the decision by various businesses to boycott North Carolina in response to state legislation constraining the choice of restrooms by transgender individuals); Jonathan Turley, *Free Speech Inc.: The Democratic Party Finds a New but Shaky Faith in Corporate Free Speech*, Hill (May 8, 2021), https://thehill.com/opinion/judiciary/552461-free-speech-inc-the-democratic-party-finds-a-new-but-shaky-faith-in (charging hypocrisy by Democrats supporting free speech rights of social media corporations to exclude content by Trump). Just to show that neither side is innocent in this sort of thing, those who defend corporate speech critical of government regulation recently took a different view when it came to corporations attacking laws making it more difficult to vote. Jennifer Rubin, Opinion, *Republicans Defend Corporate Speech – Unless It Supports Voting Rights*, Wash. Post (Apr. 5, 2021), https://www.washingtonpost.com/opinions/2021/04/05/republicans-defend-corporate-speech-unless-it-supports-voting-rights/.

230 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010).

231 *E.g.*, Paul Krugman, *Why Do the Rich Have So Much Power?*, N.Y. Times (July 1, 2020),

more wealth than the richest individuals,[232] it is not clear how much this really matters. In other words, the wealthiest individuals have more than enough money to influence politics.[233] Moreover, wealthy individuals are commonly such because they are shareholders in wealthy corporations.[234] Hence, limiting political expenditures by corporations, but not wealthy shareholders, might simply result in the same money coming from a different bank account.

Beyond this, the corporate wealth argument creates serious difficulty when it comes to media corporations. As discussed above when dealing with the two *New York Times* decisions, speech by news media corporations may be critical to maintaining a democracy. Yet, "the press" might also include such dominant corporations as Facebook and Google.[235] In addition, even the most conventional news outlets are often part of larger corporate groups whose political agendas could reach far beyond broadcasting the news.[236] Finally, recent years have shown that corporate influence can be as powerful and potentially threatening to democracy when it simply consists of broadcasting supposedly "fair and balanced" news as it can be when consisting of overt political expenditures by a corporation that makes no claim to be part of the press.[237]

Ultimately, defending *Citizen United*'s rejection of the corporate wealth argument is not to discount the concern about money in politics. Indeed, perhaps where the Court has gone wrong lies in an all-to-casual

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https://www.nytimes.com/2020/07/01/opinion/sunday/inequality-america-paul-krugman.html ("A 2015 Times report found that at that point fewer than 400 families accounted for almost half the money raised in the 2016 presidential campaign."); Benjamin I. Page et al., *What Billionaires Want: The Secret Influence of America's 100 Richest*, Guardian (Oct. 31, 2018), https://www.theguardian.com/us-news/2018/oct/30/billionaire-stealth-politics-america-100-richest-what-they-want.

232 *E.g.*, Stine, *supra* note 2, at 439 n.60 ("[T]he ten wealthiest corporations in America have total equity of $1.7 trillion, or roughly four times the net worth of the top ten richest Americans ($488.3 billion).").

233 *See supra* note 231.

234 *See, e.g.*, Strine, *supra* note 2, at 438 n.58 ("[M]any large so-called 'individual contributors' [to campaigns and PACs] in fact control large private corporations from which they can pull resources for political spending, and it may be that some possess voting control over public companies.").

235 *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025 (2011) (discussing meaning of the press). Keep in mind that New York Times Co. v. Sullivan, 376 U.S. 254 (1964), involved an advertisement placed in the Times and that Facebook and Google's primary revenues come from advertisements.

236 *See* Louise, *supra* note 222. For example, ABC is owned by Disney, CNN is owned by AT&T, and NBC is owned by Comcast.

237 *E.g.*, David Brock et al., The Fox Effect: How Roger Ailes Turned a Network into a Propaganda Machine (2012).

equation of spending money with any other form of speech in which more is better.[238] Ignored is the concern that allowing those with greater wealth to have greater political influence seems contrary to the democratic value of equality among voters. Nevertheless, this concern is not limited to corporate speech.

3. Who Decides What a Corporation Says?

The one thing regarding speech that is undeniably different between a corporation and an individual is that a corporation cannot actually decide what it is going to say; instead, those in charge of the company make that decision. This returns us to the interplay of the internal and the external with respect to the relationship between corporations and democracy. Specifically, the undemocratic nature of corporate governance means a lack of democratic consent or accountability not only for decisions regarding corporate conduct, but also for decisions about employing corporate resources to lobby against government intervention that would restore democratic accountability.[239]

a. Speech Advancing Idiosyncratic Views of those in Charge

The ability of those in charge of a corporation to dictate the company's political speech creates potential issues in two basic contexts: one being rather trivial, the other presenting a fundamental issue regarding democracy. The former involves corporate speech in favor of what, for want of better terminology, we can label the idiosyncratic views of those in charge of the corporation. Idiosyncratic in this context does not mean that the views are not widely held. Rather, this term is intended to capture the essential notion that the views are not particularly relevant to the corporate enterprise.[240]

238 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

239 *E.g.*, Pollman, *supra* note 10, at 675.

240 Of course, the imaginative can often conjure up some correlation between the corporate enterprise and the subject of any corporate speech—as done in a somewhat different context by an often-cited court opinion finding a corporate purpose for a manufacturing company's cash contributions to Princeton University. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953). Realistically, however, there are situations in which the corporation's position reflects the happenstance that the individuals in charge wish to advance a particular view, but there is nothing inherent in the nature of

This is the type of speech addressed in *First National Bank of Boston v. Bellotti*.[241] In this decision, the Supreme Court struck down a Massachusetts statute that prohibited banks and business corporations from spending money to influence referenda other than those that affected the property or business of the corporation. This statute seemed to be an obvious effort to force management of a business corporation to stick to business when it came to political expenditures.

In fact, the issues raised in this context are rather minor in the greater scheme of corporations and democracy. For one thing, it is not necessary to address the failings in corporate or shareholder democracy in order to address these issues. Even if one assumes that corporate or shareholder democracy perfectly matches democratic values and practices, there are still likely to be minority shareholders who might object to a particular idiosyncratic political position being advanced at corporate expense. The question is whether states have the power to protect such minority shareholders from having their corporation's assets used to subsidize such views.

Since one of the traditional functions of state corporate law has been to protect minority shareholders from having the corporation's assets used by those in charge, even when supported by the majority of shareholders, for purposes beyond that for which the minority shareholders signed up (conducting lawful business),[242] an affirmative answer to this question should be easy.[243] The Court nevertheless held that the particular statute before the

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the corporation's business or in the interests of whoever would run the corporation's business that commonly would have produced the same corporate speech if someone else was in charge.

241 435 U.S. 765 (1978).

242 This is the ultra vires doctrine. *E.g.*, GEVURTZ, *supra* note 8, at 226–32.

243 The common response to this concern is that no one forces an individual to purchase stock in a particular company. *E.g.*, Austin v. Mich. Chamber of Com., 494 U.S. 652, 686–87 (1990) (Scalia, J., dissenting). Hence, if individuals do not like the views of those in charge, they do not need to be shareholders. *Id.* Yet, this view allows those who gain power over a corporation to force investors to conflate business (whether the corporation is a profitable investment) with political decisions. This implicates the statutory purpose of a business corporation. State corporation statutes (taking corporation in its broadest sense as not limited to business corporations) generally provide a menu of choices as to the purpose of the corporation that organizers can establish. *See, e.g.*, Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 509–11 (1981) (discussing permissible purposes for non-profit corporations under state law). This includes corporations formed for various non-profit purposes—religious, charitable, educational, and the like. Under these circumstances, what is wrong with the state insisting that those who chose to form a business rather than another type of corporation, and sought investors' money based upon this characterization, not force prospective shareholders into making their investment decisions based on factors other than business? This is not to say that states should curb this sort of corporate

Court in *Bellotti* infringed on the First Amendment because it was over- and under-inclusive relative to this goal.[244]

In any event, the practical impact of corporate speech which falls into this context is relatively small. Because the positions taken by the corporation in this context, by definition, flow from the views of whoever happens to be in charge, these positions will exhibit a certain randomness.[245] This, in turn, suggests less grounds for worry about undue corporate influence over government. So, for example, positions urged by corporations with more socially progressive management will offset positions urged by corporations with more socially conservative management and so the impact is simply more speech rather than pushing governmental action in a single direction. While one might object to the ability of some individuals to gain greater influence by using the money of other people who might not subscribe to their views, this does not appear to present a significant structural threat to governance of the overall society in accordance with democratic values.[246]

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speech. Rather, it simply suggests there is nothing untoward in states doing so.

244 Indeed, this decision might be more about how the law is supposed to protect dissenting minority shareholders from management using corporate resources to fund personally, rather than business, motivated political speech, than it is about whether the law can do so. *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235 (1981). Specifically, the Court suggests that minority shareholders might seek such protection by filing a derivative suit. This, however, leaves things to the case-by-case judicial determinations that corporation statutes sought to reduce through provisions such as those allowing corporations to make charitable contributions. *E.g.*, Gevurtz, *supra* note 8, at 229. The result of *Bellotti* is to block the legislature from creating this sort of bright line clarity (which is always going to be over—or under—inclusive) on the negative side for political expenditures. *See* 435 U.S. 765.

245 *See, e.g.*, David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. Times (Mar. 31, 2021) (updated Apr. 5, 2021), https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html (discussing Delta Airlines' and Coca-Cola's changing position regarding Georgia's law making voting more difficult); Matthew Futterman, *NFL Owners Clashed in Private Over Protests*, Wall St. J. (Oct. 2, 2017), https://www.wsj.com/articles/nfl-owners-clashed-over-protests-1506974582 (discussing disagreements between owners of NFL football teams regarding player protests during the national anthem).

246 One other context involving corporate political speech illustrated by recent events occurs where the speech is not aimed at influencing listeners to support a particular position, but rather at maintaining corporate goodwill by coming out in support of positions popular with prospective customers or employees. Since the point of such advertising is simply to say that the corporation agrees with what it thinks the listener already believes, rather than to sway the listener's political views, the impact of such expenditures on democratic governance is even more trivial than corporate speech in favor of the idiosyncratic views of its management.

b. Speech Advancing the Interests of those Structurally in Charge of Corporations over the Interests of those not

The context in which corporate speech potentially implicates the overall democratic governance of society is where the speech favors the interests of those groups structurally in charge of corporations (management and majority shareholders) at the expense of those with less or no voice through corporate or shareholder democracy but who nevertheless are impacted by the corporation and contribute toward its wealth. In other words, the problem flows from the interaction of the internal (the failure of corporate or shareholder democracy to reflect democratic values) with the external (corporate speech seeking to block democratic governments of political entities from protecting the interests of those lacking voice through corporate or shareholder democracy).

In fact, there are several overlapping threads to this concern, hints of which are buried in the muddled distortion argument in *Austin v. Michigan Chamber of Commerce*.[247] In *Austin*, the Court upheld a Michigan prohibition of corporations making independent expenditures in support of, or opposition to, candidates for office—a result the Court overruled in *Citizens United*. In upholding this statute, the Court in *Austin* pointed to the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[248]

At first glance, this seems to be just a gussied-up form of the corporate wealth argument. Specifically, corporations, or indeed anyone with greater wealth,[249] might use their wealth to obtain influence that has no correlation to the public support for the ideas being advanced—in contrast with small dollar donations to political causes in which the amount of money available is roughly proportionate to the number of individuals who support the cause. Yet, this understates the matter.

It is not simply that the wealth available does not correlate with public support of the cause advanced by those in charge of the corporation in this context. Rather, the problem is that the amount of corporate money available to seek political influence in this context is likely to be inversely proportionate to the support of the corporation's cause from those who are

247 494 U.S. 652, 660 (1990).

248 *Id.*

249 Justice Marshall's majority opinion tries to distinguish the use of corporate wealth by arguing that the law (corporate personhood, transferable interests, and limited liability) facilitates such wealth. Yet, laws allowing inheritance and, even more fundamentally, that protect property rights, are necessary for the existence of inherited wealth.

contributing to the corporation's wealth but lack a say in its governance.

Keep in mind that this context involves lobbying for policies that favor those in charge of the corporation over others—such as employees, consumers, involuntary victims of the corporation's activities—who also contributed to the corporation's wealth. Hence, the larger number of individuals from whom those in charge of the corporation can extract corporate wealth, the more wealth they have available to lobby against government efforts to intervene on behalf of such individuals. Moreover, the more successful such lobbying is in preventing government intervention to protect those lacking either voice through internal corporate governance or effective avenues to avoid dealing with the corporation, the more wealth those in charge of the corporation have available to lobby.

Worse yet, corporate lobbying, if it results in government facilitated monopoly—as, for example, through patent protection of critical pharmaceuticals—not only blocks the government from intervening on behalf of those lacking voice through internal corporate governance but also limits democratic accountability through disassociation. Indeed, the more monopoly power corporations possess, the more wealth corporations may obtain to influence government and the more corporations influence government, the more monopoly power they may obtain to increase their wealth and dictate the lives of those who lack a voice in their governance.[250]

All told, to indulge in a bit of hyperbole, it is as if a thieves' guild used their ill-gotten loot to lobby government to reduce the funding of police or to pass laws banning the manufacture and sale of locks.

C. *The Choice*

This brings us back again to the complex dualisms of corporations and democracy. In this instance, the dualism arises in a pair of tools to address the potentially undemocratic impact of corporations on the governance of society. Following the theme of this article, one tool deals with the corporation's relations with external government, while the other deals with internal corporate governance. Further dualism arises in the potential for unintended consequences in both of these approaches, which is reminiscent of the paradoxes regarding corporations and democracy found in the history of corporate law.

250 *E.g.*, Zingales, *supra* note 2, at 119–20 (referring to this as the "Medici vicious circle").

1. Curbing Corporate Political Influence

Much writing,[251] and even more political posturing,[252] on the topic of corporations and democracy advocate actions external to the corporation to curb corporate political influence. Given the attitude of a majority of the Supreme Court toward curbs on corporate political activities and the difficulties of amending the Constitution, this discussion can take on a sort of science fiction quality.[253] Nevertheless, it is the purview of a law review article to talk about what should be and not just what is.

Consistent with the theme of this article, the lodestar of our discussion is pursuing democracy and democratic values. Hence, the object is not to curb corporate political influence in order to advance an agenda aiding employees, consumers, the environment or so on because this is a better social outcome. Rather, it is to ensure democratic consent and accountability when neither internal corporate governance nor the individual ability to deal or not with the corporation provides such. This means we must evaluate the impact of corporate political influence not simply by whether it succeeds or fails,[254] but rather by whether it interferes

251 *See supra* note 3.

252 *E.g.*, Press Release, Senator Bernie Sanders, Saving American Democracy Amendment (Dec. 8, 2011), https://www.sanders.senate.gov/newsroom/recent-business/saving-american-democracy-amendment; S.J. Res. 33, 112th Cong. § 1 (2011) (proposing constitutional amendment, by Senator Sanders, to overturn Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), by declaring that constitutional rights do not belong to for-profit corporations).

253 *But see* Levitt, *supra* note 6 (discussing openings left by *Citizens United*).

254 Of course, if corporate wealth rarely translates into political influence sufficient to change government policy, then there is no reason to discuss whether corporate political influence is a threat to democracy. In fact, there is some debate about the degree to which corporate or any other wealth translates into political influence. While this is often asserted by those worried about the political influence of corporations, *see generally* Zingales, *supra* note 2, at 122–25 (giving examples), or worried about money in politics more generally, critics can point to counterexamples of expensive campaigns or other efforts to influence government that failed in their objectives. *E.g.*, Meg Fowler, *The Most Expensive, Failed Primary Campaigns*, ABC NEWS (Jan. 31, 2012), https://abcnews.go.com/Politics/expensive-failed-primary-campaigns-past-decade/story?id=15483044 (discussing five campaigns which each raised over $50M but lost their elections); Christopher Ingraham, *Somebody Just Put a Price Tag on the 2016 Election. It's a Doozy.*, WASH. POST (Apr. 14, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/ ("Clinton's unsuccessful campaign ($768 million in spending) outspent Trump's successful one ($398 million) by nearly 2 to 1."). There are also organized groups lobbying against corporate positions, such as unions and consumer groups. *E.g.*, Yosifon, *supra* note 10, at 1203–04 (concluding, however, that such efforts are less effective than corporate lobbying). Ultimately, whether corporate or other wealth can

with decision making consistent with democratic values.

It turns out that the corporate part of corporate political influence might be largely irrelevant when it comes addressing this inquiry. To see why, consider the various ways in which corporate political activity could be contrary to democratic norms.

The one on which there is the most agreement is corruption[255]—in other words, seeking influence through payments or actions beneficial to government officials. With a sufficient quid pro quo this can meet the definition of bribery;[256] but it can be problematic even if falling short of that.[257] Getting into a discussion of corruption, campaign finance and the like is well beyond the scope of this article. Fortunately, it is also unnecessary. This is because it is difficult to understand why the individual versus corporate source of a potentially corrupt action should make any difference.[258]

The use of greater wealth to gain greater political influence raises an issue beyond simply the prospect for corruption. In a society with unequally distributed wealth, the ability of those with greater wealth to have greater influence arguably offends the democratic value of equality among voters and, many argue, endangers continued democratic government.[259] The

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yield political influence is an empirical question, which this article will assume to be the case at least to some degree. Without delving into the empirical evidence, there are a couple of grounds to support this assumption. The obvious is that those whose money and elections are at stake must think it works. The other is that the Supreme Court's protection of such expenditures under the First Amendment would be rather pointless if the Court did not assume such expenditures mattered.

255 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 25–27 (1976) (using interest in preventing corruption to justify limiting campaign contributions).

256 *Id.* at 27.

257 *E.g.*, Khadija Lalani, McDonnell v. United States*: Legalized Corruption and the Need for Statutory Reform*, 113 Nw. U. L. Rev. Online 29, 41–50 (2018) (discussing whether actions not technically within the definition of bribery should nevertheless be banned as corrupt).

258 To illustrate, consider the corrupting influence of employment of former government officials by those they regulated while in government (the "revolving door" problem). *See* Tom McGinty, *SEC 'Revolving Door' Under Review*, Wall St. J. (June 16, 2010), https://www.wsj.com/articles/SB10001424052748703280004575309061471494980 (discussing the revolving door problem in the context of SEC employment). It should hardly matter if such employment is by a corporation or by a law firm organized as an LLP, which firm represents those regulated by the agency at which the former official worked.

259 *E.g.*, *World Social Report 2020: Inequality in a Rapidly Changing World*, U.N. Dep't Econ. & Soc. Affs. 48–51 (2020), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf; Sanford Lakoff, *Inequality as a Danger to Democracy: Reflections on Piketty's Warning*, 130 Pol. Sci. Q. 425 (2015). There are a couple of arguments as to why greater influence by those with greater wealth, irrespective of corruption, not only is inconsistent with the democratic

acceptance of these arguments is much more contentious.[260] Fortunately, again, it is unnecessary to get into this debate. While large corporations are wealthy, they are not unique in that regard.[261]

This article discussed above a problem that does, at first glance, seem to arise from corporations. Specifically, those in charge of a corporation can use the wealth generated by its business to lobby government against the interests of those who are also contributing to this wealth but who are not in charge. In this manner, those in charge might be able to use their control over wealth to which others have voluntarily or involuntarily contributed in order to escape any democratic accountability to those impacted by their decisions and who helped create this wealth.

This, however, is not a problem limited to corporate expenditures. For one thing, it arises with all businesses regardless of whether they operate in corporate or non-corporate form. Moreover, to the extent that those controlling corporations (managers, majority shareholders, or shareholders more generally) personally obtain money from the corporation through dividends, stock buybacks, compensation packages, or otherwise, they still could use income to which others have contributed in order to lobby government for actions favoring their interests over the interests of others impacted by their decisions and who helped create this wealth.[262]

All of this is to suggest that *Citizens United*'s rejection of categorical treatment of corporations when it comes to political speech is not the problem. Indeed, in many ways it might be the solution. If one could limit (despite *Buckley*) the use of wealth in political speech, placing corporations within the same limit as any individual would remove the advantage of corporations which hold more wealth than individuals. At the same time, placing individuals under the cap imposed on corporations more completely addresses the problem of using wealth to lobby against the interests of those

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value of equality among voters but also presents a long-term danger to continued democracy. The first raises the prospect of a spiral in which greater political influence by the wealthy leads to greater income inequality, which, in turn, leads to even greater political influence by the wealthy. Ultimately, this can result in a de facto oligarchy. In addition, widespread recognition of the overwhelming influence that the wealthy enjoy over government can weaken support for democracy among the broader electorate and fuel the rise of autocrats.

260 *E.g.*, *Buckley*, 424 U.S. at 48–49 (rejecting equality argument).

261 *See supra* note 231 and accompanying text.

262 Admittedly, this might involve tax disadvantages relative to the corporation using its money.

who also contributed to its creation but have no voice in its use.

In fact, one might argue that the problem of using corporate (or, more broadly, business) income to lobby against the interests of those who contributed to its creation but have no voice in its use can justify some cap on the use of money in political speech even if one does not accept the voter equality rationale. Unfortunately, there is a degree of circularity in this argument. This is because the thieves' guild metaphor used earlier begs the question.

This metaphor assumes that various parties contributing to the wealth under the control of the stockholder majority and corporate management, like the thieves' victims, not only lack a democratic voice through internal corporate governance, but also lack democratic consent and accountability through their ability to deal or not deal with the corporation. Hence, a predicate question from a democratic values standpoint is whether some externality, market failure, or the like exists—a topic on which there is often a difference of opinion in specific situations.[263] Moreover, even if there is some externality or market failure removing democratic consent or accountability through individual choice, this does not mean that decisions by those in charge of corporations were necessarily contrary to the interests of other corporate stakeholders or that government action would be better for them. Again, these are questions on which there is often a difference of opinion in specific situations.[264]

Hence, limiting the ability of those in charge of corporations to use corporate wealth to lobby against regulation or the like, on the ground that this is a misuse of wealth against the interests of nonconsenting parties who contributed to its creation, to some extent curbs the ability of those in charge of corporations to make the case that this is not true in the situation at hand. The result could be that instead of promoting democratic decision making, we might be interfering with it. On the other hand, there is a difference between allowing expenditures to make one's case and rewarding those able to prevail in an unlimited spending arm's race by using money extracted from the opposition in the race. In other words, there is a difference between barring for-profit corporations from some types of political speech (as in *Citizens United*) and imposing reasonable caps on how much one can spend.

263 *E.g.*, Ryan Bourne, *How 'Market Failure' Arguments Lead to Misguided Policy*, Cato Inst. (Jan. 22, 2019), https://www.cato.org/policy-analysis/how-market-failure-arguments-lead-misguided-policy.

264 *Id.*

2. Democratizing Corporate Democracy

The alternate approach looks to the internal governance of corporations. It takes advantage of the separation of ownership and control embedded in the corporate governance model of an elected board in order to institute reforms that might be more difficult in businesses, such as partnerships, in which the owners personally govern.[265] The goal is to have corporate governance follow democratic values. This would render government intervention to protect those lacking voice through internal corporate governance unnecessary to assuring democratic accountability.

To pursue this alternative, we need to address the anti-democratic features in current corporate election mechanics, such as the lack of access to the corporation's proxy solicitation by nominees other than those picked by the incumbent directors. More fundamentally (and challenging) is to end the pay-to-play essence of corporate or shareholder democracy. This requires extending the right to vote for corporate directors to non-shareholders who are impacted by the decisions of directors.

In fact, a number of countries do this to some extent. Their laws grant employees the right to elect a certain number of the directors. This is commonly referred to as co-determination because both shareholders and employees determine the composition of the board and thus have a voice in the overall governance of the corporation. Germany pioneered co-determination laws, which are also found in a number of other European countries[266] and China.[267] Such laws typically allow employees to elect a minority of the corporation's directors (such as one-third); albeit employees elect one-half of the directors in the largest German companies.[268] Perhaps prompted by proposals made by Senator Elizabeth Warren and others during the 2020 election campaign,[269] some scholars have recently advocated

265 *See, e.g.*, REVISED UNIF. P'SHIP ACT § 401(h) (UNIF. L. COMM'N 2021) (providing partners with equal rights to participate in management unless otherwise provided in partnership agreement). This raises the question of whether corporate governance reform will lead to regulatory arbitrage through choice of non-corporate forms of business. *See, e.g.*, Dammann & Eidenmueller, *supra* note 2 (manuscript at 67) (listing countries that also require governing boards with worker representation for limited liability companies).

266 Dammann & Eidenmueller, *supra* note 2 (manuscript at 67–70, 72–73) (listing co-determination laws in Europe).

267 *E.g.*, Jiong Deng, Note, *Building an Investor-Friendly Shareholder Derivative Lawsuit System in China*, 46 HARV. INT'L L.J. 347, 353 (2005). Interestingly, there were some earlier experiments with voluntary co-determination in the United States. *E.g.*, Sarah C. Haan, *The Corporation's Political Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 299 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

268 *See supra* note 264.

269 *E.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

adoption of co-determination for corporations in the United States.[270]

While co-determination would move corporate governance toward more democratic norms, it does not fully address the pay-to-play system. Co-determination, at least as adopted by other countries so far, never gives employees as much power on the board as the shareholders.[271] More broadly, this leaves out a voice in corporate governance for others impacted by the decisions of those in charge of corporations. This includes consumers, lenders, and the overall community in which the corporation operates.

In their article arguing for co-determination,[272] Grant Hayden and Matthew Bodie attempt to distinguish employees and shareholders from these other interested groups based upon the criteria of how much stake the group has in the corporation and the administrative practicality of determining eligibility to vote. On the other hand, the existence of various consumer governed cooperatives—such as mutual insurance companies,[273] credit unions,[274] consumer coop stores[275]—illustrates that it is mechanically possible in some situations for consumers to have a voice.

From time to time, corporate law scholars have floated proposals for corporate boards composed of directors representing multiple constituencies.[276] At this point, complexity increases exponentially. For example, who would vote for the directors representing those potentially injured by corporate pollution?[277]

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270 Dammann & Eidenmueller, *supra* note 2; Hayden & Bodie, *supra* note 9.

271 Even for the largest German corporations in which workers elect half the board, the shareholder-elected directors pick the board's chair, who gets a tie-breaking vote. *E.g.*, Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 Am. J. Compar. L. 453, 474 (2007).

272 Hayden & Bodie, *supra* note 9.

273 *See* Patricia Born et al., *Organizational Form and Insurance Company Performance: Stocks versus Mutuals*, *in* The Economics of Property-Casualty Insurance 167, 167–68 (David F. Bradford ed., 1998) (explaining that mutual insurance companies, in which the customers (policy holders) own the corporation and elect the board of directors, accounted for twenty-five percent of overall property-casualty premiums in the United States in 1991).

274 *See* Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 Am. Bus. L.J. 597, 604 (2011) ("In theory, the most democratically governed financial institutions are credit unions. Organized as cooperatives, they are owned by their members who share equally in their governance . . . ." (footnote omitted)).

275 *E.g.*, *REI Board of Directors*, REI, https://www.rei.com/about-rei/board-of-directors (last visited Mar. 15, 2022) ("REI is the nation's largest consumer co-operative. . . . [A] board of directors selected from REI's membership oversees the company.").

276 *E.g.*, Yosifon, *supra* note 10, at 1237; Kent Greenfield, The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities 149 (2006).

277 One proof of the difficulty of figuring this all out is that such proposals typically float a few ideas rather than explaining how this would all work. Greenfield, *supra* note 276.

In any event, this still leaves the problem of voting in proportion to stock, rather than one-person, one-vote. Perhaps the law could mandate a one-person, one-vote system when it comes to voting by shareholders. Not only is this the rule barring agreement to the contrary for partnerships,[278] but it was also the system for many early corporations.[279]

Actually, shareholder voting by the amount of stock owned versus one-person, one-vote will not matter as much in a corporation whose board is elected by multiple constituencies rather than just by the shareholders. This is because the primary practical impact of voting by shares rather than one-person, one-vote occurs in the corporation with a majority or otherwise controlling shareholder. Under the current corporate governance system, control by a majority shareholder looks more like autocratic or dictatorial rule than what comes to mind when speaking of shareholder democracy. In a system in which shareholders no longer control the majority of the board, such autocracy is no longer a given.[280]

One could avoid many of the complexities of multi-stakeholder elected boards by having the government appoint those in charge of businesses over a certain size—in other words, nationalization or socialism. The common objection is that government control of corporations often leads to politically motivated or outright corrupt decisions, lack of innovation, and economic inefficiency.[281]

Staying with the focus of this article on corporations and democracy, the overlap of nationalization or socialism with non-democratic or outright totalitarian regimes[282] raises an obvious concern. Of course, correlation

278 Revised Unif. P'ship Act § 401(f) (Unif. L. Comm'n 2021).

279 *E.g.*, Dunlavy, *supra* note 86 (discussing voting arrangements in the early corporations in the United States); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 Harv. L. Rev. 149, 156–57 (1888) (describing the evolution in voting in the East India Company from the original one-member, one-vote to voting in proportion to shares in the joint stock).

280 Conversely, a one-person, one-vote system might allow other corporate stakeholders to gain power in corporate elections without expanding the franchise beyond those who own stock. This is because it opens the prospect for employees or other stakeholders to gain significant votes without unrealistic expenditures to buy stock. Ratner, *supra* note 86, at 34. Incidentally, illustrating the potential for unintended consequences, one-person, one-vote eliminates the ability of corporations to operate through subsidiaries other than those that are wholly-owned—which may or may not be a bad thing. *See id.*

281 *E.g.*, Andrei Shleifer, *State Versus Private Ownership*, J. Econ. Persps., Fall 1998, at 133.

282 *E.g.*, Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917, 2918–19 (2012) ("[G]overnment-controlled firms account for about 80 percent of the market capitalization in China [and] 60 percent in Russia . . . ."). These figures, of course, post-date the more extreme government ownership in the Soviet Union or Maoist China.

is not causation and so government control over corporations in many notorious dictatorial regimes does not prove that such socialism promotes dictatorial regimes as opposed to the other way around. This is more so since government control of many large firms is also found in democratic countries.[283] In any event, it would unduly extend the length of this article to address the arguments by those such as Hayek that government control over major industries inevitably leads to undemocratic governments.[284]

All told, any effort to democratize corporate governance by attacking the pay-to-play system raises complex questions and the potential for unintended consequences. Accordingly, it is useful to keep in mind that human institutions are imperfect, and democracy is commonly a matter of more versus less. Hence, much as the history of democracy in general is a history of expanding voting rights to different groups, expanded voting rights in corporations might start with co-determination and gradually work to include other stakeholders.

Conclusion

The relationship between corporations and democracy involves both the internal governance of corporations and the external impact of corporations on the overall governance of society. This stems from the reality that those in charge of corporations make decisions that significantly impact individuals in society. If the governance of society is to be truly democratic, then those making decisions for corporations must have some consent by or accountability to the individuals impacted by their decisions.

Despite some democratic features, corporate or shareholder democracy as currently conceived is inconsistent with fundamental democratic values and thus fails at this task—a function perhaps of economic utilitarianism prevailing over democratic ideals. The ability of individuals to deal or refuse to deal with a particular corporation provides such consent and accountability in many, if not the bulk, of instances. Nevertheless, externalities and market failures leave significant gaps. In this event, the availability of intervention by a democratically elected government of a political entity is necessary to restore accountability. Here is the real democratic deficit potentially created by *Citizens United*: if those controlling corporations, who are not democratically accountable through internal corporate governance, can make unlimited use of corporate resources to influence government against such intervention, they could also lack accountability through the

283 *E.g.*, *id.* at 2948 ("By 1977, nineteen (38 percent) of the top fifty largest industrial companies in Europe were state-owned . . . .").

284 *E.g.*, Friedrich A. Hayek, The Road to Serfdom (1944).

actions of democratically elected governments of political entities.

For corporations to be part of, rather than antithetical to, the democratic governance of society, we face a choice: either there should be some cap on the use resources generated by the corporation to lobby against government intervention protecting the interests of those lacking representation through corporate democracy, or else we should reform corporate democracy to be consistent with democratic values—or perhaps a bit of both.