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THE CORPORATION IN ELECTION LAW

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I. INTRODUCTION

The corporation has long played a central role in election law. Indeed, the Tillman Act of 1907, which barred corporations from contributing to candidates for federal office,¹ has been called “the first federal campaign finance law.”² Despite this long history, however, election law has not settled on a single, coherent conception of the corporation—what it is, what values it serves, and what role it should play in politics. As a result, election laws regulating corporate political activity have been based on a variety of divergent and often inconsistent views of the corporation.

This state of affairs mirrors a similar dilemma in corporate law, which has variously been described as “schizophrenic”³ and “chaotic”⁴ for lacking any settled view of what a corporation is and what place it ought to have in society. In election law, these competing forces emerge as a tangled web of restrictions, bans, and principles—some restricting corporate power, others liberating it. Due to the tensions and inconsistencies between the various views of the

* My gratitude goes to Melissa Bomes, Scott Bowman, Rick Hasen, Ken Karst, Chris May, Karen Orren, and James Zagel for their comments and suggestions.

1. See Tillman Act, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1994)). The Tillman Act also prohibited federally-chartered corporations and banks from contributing to any candidate for elective office, state or federal. See *id.*

2. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW xvii (1988). But see Navy Appropriations Act, ch. 172, sec. 3, 14 Stat. 492 (1867) (1867 law barring federal officers from soliciting contributions from Navy yard-workers).

3. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992).

4. DAVID SCUTILLI, CORPORATIONS VS. THE COURT: PRIVATE POWER, PUBLIC INTERESTS 79 (1999).

corporation, none of the laws' goals are fully achieved. The laws based on one view of the corporation are inhibited by laws based on other views of the corporation. The purpose of this Article is to identify the various ways in which election law has conceptualized the corporation and highlight some of the dilemmas engendered by this diversity.

There are five basic ways that election law has viewed the corporation. The first and arguably most influential view of the corporation is the "political equality" view. According to the political equality view, a corporation is a corrupting force in politics that uses its wealth to gain unfair advantages over ordinary individuals. We can see this view in laws justified as measures to equalize, or tone down, the political voice of corporations.

Election law also manifests two views of the corporation that revolve around the corporation's status as an "entity." Under the "artificial entity" view, the corporation is understood to be a creature of the state, with only those rights granted by the state. In contrast, the "natural entity" view posits that the corporation is akin to a natural individual with inherent rights, such as freedom of speech, independent of the state. Defining a corporation as either an artificial or a natural entity has profound effects on whether the corporation has constitutional rights it can assert to defeat electoral regulation.

Election law's final two views of the corporation understand it primarily as an association of individuals. When viewed as a "perilous association," the corporation warrants election laws that are designed to protect shareholders and employees who do not wish to support corporate politics. When viewed as a "salutary association," however, the corporation warrants election laws that are structured to advance the values gained by association through the corporate form.

Each of these views has propelled electoral regulation of the corporation or figured prominently in election law adjudication and debate. Because these views are often contradictory and incompatible, however, the body of corporate electoral law is at best problematic and unsatisfactory, with laws designed to achieve one goal undetermined by others seeking different objectives. At worst, corporate election law is internally inconsistent, ineffective, and, in some cases, constitutionally dubious.

II. POLITICAL EQUALITY AND THE CORPORATION

Business corporations have long been condemned for exerting too much influence in government. Such condemnation is a product of the view that corporations, due to their immense aggregations of capital, are a profoundly inegalitarian force in politics. This view of the corporation has been an enduring theme in debates over corporate politics and has animated seminal electoral reforms. The goal of laws based on this view is to achieve political equality by limiting the corporate voice. Nevertheless, I suggest here, reforms based on this view of the corporation exist in tension with current constitutional doctrine and are ineffective in achieving their goal of political equality between corporations and ordinary citizens.

The rise of the national railroads and large manufacturing and industrial firms in the decades following the Civil War led to the strident anti-corporate rhetoric of the Progressive Era, and the first wave of corporate electoral reform. Aggregations of wealth were not only unsettling due to their increasing power over the lives of Americans who preferred small, parochial republican communities,⁵ they were also dominating politics by squeezing out the electoral voice of the ordinary citizen. Government was increasingly viewed as controlled by private moneyed interests—corporations, trusts, and industrialists like Cornelius Vanderbilt who believed and acted as if "The public be damned!"⁶ State politics were often directed not by popular demands, but by those of businesses operating within their borders. This occurred from New Hampshire—where the Concord and Boston & Maine Railroads fought over government spoils⁷—to California—where the Southern Pacific Railroad hand-picked the majority of judges and legislators in the young state.⁸ The railroads, according to Republican reformer William E. Chandler, exercised

5. On the unsettling nature of Progressive era changes in American society, see ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967); T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* (1981).

6. *THE DICTIONARY OF CULTURAL LITERACY* 436 (E.D. Hirsch, Jr., et al. eds., 1988) (quoting Cornelius Vanderbilt).

7. See MUTC, *supra* note 2, at 4.

8. See Karl Mannheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 *LOY. L.A.L. REV.* 1165, 1184 (1998).

"systemic control" over government, from "the lowest town offices" to "the executive officers of state and nation."⁹

Turn of the century corporate involvement in politics was particularly distressing because it was seen as anti-democratic in two senses: corporations worked against the people's interests and corporations received special treatment.¹⁰ Corporations were not just constituents making a fair claim to their share of the political pie, they were usurpers of the individual's right to participate in democratic governance. Chandler warned, "[W]hen corporations can furnish money to carry elections from corporation treasures, individualism in government is gone—individual free will and individual responsibility."¹¹ Thus, "[w]hen the custom grows broad enough the whole character of government is changed, and corporations rule, not men."¹² Elected officials were perceived by many to be representatives of industry, not people or regions: it was said that "[o]ne senator, for instance, represented the Union Pacific Railway System, another the New York Central, still another the insurance interests of New York and New Jersey."¹³

To save democracy from oligarchic capital, electoral reformers organized to "purify the politics"¹⁴ of American government. On the federal level, the linchpin of the electoral reform movement was the Tillman Act of 1907, banning corporate contributions to federal candidates and all contributions from federally-chartered corporations.¹⁵ The Tillman Act was justified by many on equality grounds, to restrict the corrupting influence of corporations in politics.¹⁶ Proponents of the bill emphasized the special treatment contributing

corporations received from the Republican administrations of William McKinley and Theodore Roosevelt, such as immunity from antitrust prosecutions.¹⁷ In 1896 and 1900, McKinley's financier Marcus Hanna imposed fixed assessments upon corporations as contributions,¹⁸ charging them according to their capitalization and their "stake in the general prosperity."¹⁹ Standard Oil, the largest corporation of its day, was required to contribute \$250,000 to the 1896 Republican presidential campaign.²⁰ The 1904 Democratic presidential nominee, Judge Alton Parker, made incumbent Roosevelt's acceptance of corporate contributions a primary issue of the election.²¹ This, coupled with the high-profile Armstrong committee investigation into the political power of New York's insurance triumvirate—New York Mutual, and Equitable Life²²—led to proposals for restraining corporate influence.

Even the beneficiary, Roosevelt, though victorious at the polls in 1904, was shamed into denouncing corporate contributions and called for their ban the following year.²³ Congress heeded the call with the passage of "Pitchfork Ben" Tillman's bill. Although stating that the "evils" of money in politics were "so generally recognized" that it was "unnecessary to make any argument," the Senate Report explained that the corporate contribution ban was "calculated to promote purity in the selection of public officials."²⁴ During legislative debate, one representative described the motivating force to be "the popular demand of the country that we shall prevent the influence of corporations."²⁵ By 1928, that demand had resulted in thirty-six states enacting kindred legislation regulating corporate campaign contributions.²⁶

9. MUTCH, *supra* note 2, at 7 (quoting William E. Chandler).

10. According to Richard Hofstadter, the opening of the 20th century witnessed a rapidly spreading fear that "the great business combinations, being the only centers of wealth and power, would be able to lord it over all other interests and thus put an end to traditional American democracy." RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 225 (1955).

11. MUTCH, *supra* note 2, at 176 (quoting William E. Chandler).

12. *Id.*

13. WILLIAM ALLEN WHITE, *MASKS IN A PAGEANT* 79 (1928).

14. 41 CONG. REC. 1454 (1907) (statement of Rep. Grosvenor).

15. See Tillman Act, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1994)).

16. See EDWIN M. EPSTEIN, *CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATION IN PERSPECTIVE* 12 (1968).

17. See MUTCH, *supra* note 2, at 1.

18. See HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 220, 325 (1912).

19. GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT 49-50 (1973).

20. See EPSTEIN, *supra* note 16, at 11.

21. *See id.*

22. See MUTCH, *supra* note 2, at 2-3.

23. See EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 190 (1928).

24. S. REP. NO. 59-3056, at 2 (1906).

25. 41 CONG. REC. 1452 (1907) (statement of Rep. Mann).

26. See SIKES, *supra* note 23, at 127.

Many of those same states took even more extreme measures to reform electoral politics in the name of limiting the corporate voice. One such measure—the popular initiative—became commonplace between the Spanish-American War and the First World War.²⁷ The initiative mechanism was specifically designed by populist progressives to curb the political influence of corporations, especially railroads, and enhance the voice of the common person.²⁸ It was widely believed throughout the Midwest and West that the only way to avoid corporate corruption was to take politicians out of the process, leaving it to the people to decide political issues themselves directly at the polls. The most profound structural campaign finance reform ever implemented, the initiative process, was based explicitly on the argument that corporations dominated politics and needed to be restrained in the name of political equality.

The view of the corporation as a profoundly inequalitarian influence in politics has lingered in American public discourse throughout the twentieth century. The courts, however, have been hostile to electoral reforms based on this view. Consider the majority opinion of former corporate lawyer Justice Lewis Powell, Jr. in *First National Bank of Boston v. Bellotti*.²⁹ Massachusetts, in justifying its ban on corporate spending to influence ballot initiative campaigns, echoed the equality concerns that had previously led to the adoption of the Tillman Act and the initiative process itself. Corporations, the state argued, might “destroy the confidence of the people in the democratic process . . . [because they are] wealthy and powerful aggregations of capital whose views may drown out other points of view.”³⁰ Powell’s opinion rejected this argument as unproven and contrary to the neutrality demanded by the First Amendment.³¹

Perhaps the historical pedigree of Massachusetts’s argument pressured Powell into the bewildering contortions he makes in the opinion. Initially he appears open to Massachusetts’s equality argument, stating that it “would merit our consideration” if it were

“supported by record or legislative findings [showing] that the relative voice of corporations has been overwhelming.”³² In the next paragraph, however, Powell states that “[t]o be sure, corporate advertising may influence the outcome of the vote; this would be its purpose.”³³ Moreover, the “fact that advocacy may persuade the electorate is hardly a reason to suppress it.”³⁴

Taking Powell’s initial demand for evidence of a dominant corporate voice at face value, the standard creates a nearly insurmountable barrier for laws based on political equality concerns. Despite many thoughtful, research-intensive efforts to show that corporations exert considerable influence in ballot campaigns,³⁵ the complex web of factors influencing any election makes satisfying a court of law as to specific causal relationships unlikely. How can one prove that voters were overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other side? So long as this evidentiary hurdle exists, the courts are bound to frustrate electoral reformers who press for regulation to limit corporate influence.

Perhaps the corporations most likely to be viewed as having a significant influence over election results would be media corporations, and free press concerns may prevent their regulation. Concurring in *Bellotti*, Chief Justice Warren Burger noted that “[media conglomerates . . . pose a much more realistic threat [of corporate domination] than do [ordinary businesses that are] not regularly concerned with shaping popular opinion.”³⁶ Indeed, while the number of mass media outlets has exploded over the last twenty years, the ownership of those outlets has remained concentrated.³⁷ This has

27. See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 51 (1989).

28. See *id.* at 43-50.

29. 435 U.S. 765 (1978).

30. *Id.* at 789 (Powell, J., characterizing Massachusetts’s argument).

31. See *id.* at 789-91.

32. *Id.* at 789.

33. *Id.* at 790.

34. *Id.*

35. See, e.g., Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 542-47 (1982); John S. Shockey, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 391-406 (1985).

36. *Bellotti*, 435 U.S. at 796-97 (Burger, C.J., concurring).

37. See Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 186 (1998).

heightened the power Burger noted as being "in few hands."³⁸ Not only can media corporations be tainted in their coverage of politics by the common corporate concern for shareholder value, media corporations are the only ones lawfully allowed to publicly endorse candidates.³⁹ Though some have challenged this media exception,⁴⁰ most liberal reformers would likely agree with Justice Thurgood Marshall's suggestion in *Austin v. Michigan Chamber of Commerce*⁴¹ that media exceptions are constitutionally justifiable.⁴² If so, politics and public debate could still be dominated by corporate entities no matter what equality-based reform election law adopts.

To the extent corporate electoral reforms are based on equality concerns, they run afoul of settled constitutional doctrine. As the per curiam opinion in *Buckley v. Valeo* explained, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁴³ Perhaps. Nonetheless, as the initiative process and the Tillman Act⁴⁴ indicate, toning down the political voice of corporations in the name of equality is not foreign to election law. So long as *Buckley* remains good law, equality-based election laws regulating the corporation, such as the corporate contribution ban and the initiative process, will exist in tension with controlling constitutional doctrine.⁴⁵

Not only do election laws based on a political equality view of the corporation run counter to current constitutional doctrine, they

38. *Bellotti*, 435 U.S. at 797 (Burger, C.J., concurring).

39. See Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. (forthcoming 1999).

40. See *id.*

41. 494 U.S. 652 (1990).

42. See *id.* at 667-68.

43. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

44. The Court implicitly upheld the ban on corporate contributions in *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 208-10 (1982).

45. Justice Powell finessed this tension in *Bellotti*, suggesting that the contribution ban might be justified by the governmental interest in preventing the "corruption of elected representatives through the creation of political debts." *Bellotti*, 435 U.S. at 788 n.26. If, as *Buckley* suggests, the potential for quid pro quo corruption arises from large campaign contributions, then the complete ban on corporate contributions is vastly over-inclusive. See *Buckley*, 424 U.S. at 26-29 (per curiam).

have been remarkably ineffective. Neither ballot initiatives nor contribution bans have purified politics from corporate influence. Corporations often play an active and influential role in ballot initiatives by promoting or opposing ballot measures through advertising, direct mail, and interest group funding.⁴⁶ Since the 1970s, corporations have successfully financed ballot campaigns on initiatives involving environmental controls, nuclear power, tobacco taxes, and mandatory bottle returns—often vastly outspending their opponents by margins as great as thirty-five to one.⁴⁷ This continuing corporate influence has spurred a new round of initiative reform, with states such as Montana enacting prohibitions on corporate ballot campaign expenditures.⁴⁸ Such prohibitions, however, are of questionable constitutional validity in light of *Bellotti*'s forceful protection of corporate speech in the initiative process.

Many legislators who supported the corporate contribution ban in 1907 would not be surprised by the law's ineffectiveness. "I shall vote for it," declared one representative in the floor debate, but "no good will come of this legislation. It does not go far enough."⁴⁹ Roosevelt warned of the danger that the law would "be obeyed only by the honest, and disobeyed by the unscrupulous."⁵⁰ Politically active corporate executives, in contrast, viewed the contribution ban as "something like the Prohibition Act, which turned a reasonable activity into a crime."⁵¹ Indeed, like prohibition, the contribution ban has been ineffective, driving activity underground. One particularly frank executive admitted to *Fortune* magazine in 1956 that "[a] lot of corporation presidents just reach in the till and get \$25,000 to contribute to political campaigns,"⁵² covering up the contributions

46. See Winkler, *supra* note 37, at 139.

47. See Allen K. Easley, *Buying Back the First Amendment: Regulation of Disproportionate Corporate Spending in Ballot Issue Campaigns*, 17 GA. L. REV. 675, 686-94 (1983); David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power, and the Initiative Process*, 61 BROOK. L. REV. 1347, 1378-95 (1995).

48. See, e.g., MONT. CODE ANN. § 13-35-236 (1997).

49. 41 CONG. REC. 1454 (1907) (statement of Rep. Grosvenor).

50. EPSTEIN, *supra* note 16, at 59.

51. Duncan Norton-Taylor, *How to Give Money to Politicians*, *FORTUNE*, May 1956, at 113, 238.

52. *Id.*

through creative record-keeping and expecting restitution come bonus time.⁵³

By the time of Watergate, few doubted Orin E. Atkin's observation that corporate violation of the ban was widespread.⁵⁴ Edwin Epstein described the history of the Tillman Act as "marked by constitutional uncertainty, statutory ambiguity, judicial limitations, administrative nonenforcement, and corporate violation."⁵⁵ It is no surprise, therefore, that the result of the ban has been not to solve the problem of corporate wealth in election campaigns, but to help obscure its influence.⁵⁶

Other areas of corporate election law have opened up loopholes enabling corporations to exert electoral influence and inhibiting the attainment of political equality. Corporations seeking to influence candidates, for example, can give unlimited amounts of unregulated "soft money" contributions to party committees.⁵⁷ Evoking a familiar rhetorical conflict, Wisconsin's reformist Senator Russell Feingold writes that soft money transforms our representative democracy into a "corporate democracy" in which political influence is tied to wealth.⁵⁸ A system based on wealth advantages corporations, which are granted by law "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation of assets—that enhance their ability to attract capital."⁵⁹ As a result, corporations are particularly well-equipped to influence politics. Moreover, under federal election law, corporations can form political action committees ("PACs")⁶⁰ and the PAC explosion of the 1970s

53. See *id.*

54. See MUTCH, *supra* note 2, at 166.

55. EPSTEIN, *supra* note 16, at 90.

56. See *id.*

57. The term "soft money" refers to "any political contribution that is not subject to federal law The only limitation on soft money is that it cannot (legally) be used explicitly to advocate the election of a specific candidate." DAN CLAWSON ET AL., DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY 107 (1998).

58. See Senator Russell Feingold, *Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote,"* 35 HARV. J. LEGIS. 377, 378-82 (1998).

59. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-59 (1990).

60. See *infra* Part IV (explaining PACs, the development of which is more

and 1980s broadened the avenues for corporate influence through candidate contributions.⁶¹ By contributing to candidates through PACs, corporations buy access to elected officials, purchasing not votes but sympathetic ears in times of need⁶²—ears unavailable to most constituents. Not surprisingly, corporate PACs are condemned by critics for undermining the democratic process, pursuing special narrow interests at the expense of the public interest, and drowning out the voices of ordinary individuals.⁶³

It may be that attempts to restrain corporate influence through electoral reform are futile. The organization of the broader political system insures that corporations will remain powerful forces in legislatures and regulatory agencies. Funded directly by their treasuries, corporations do extensive legislative lobbying to shape laws. Moreover, the modern administrative state, with its revolving doors between government and industry, means that the regulators and the regulated are often the same people, or share a common background. Equalizing the corporate voice is a daunting, if not impossible, task.

III. ENTITY VIEWS OF THE CORPORATION

Election law debates demonstrate two views of the corporation as an entity. Under these views, the corporation is an identifiable being, distinct from its shareholders and employees. What separates the two entity views is how they frame the relationship between the corporate entity and the state. The corporation is sometimes viewed as an artificial entity, created by the state and having only those rights granted in its corporate charter. At other times, the corporation is viewed as a natural entity, akin to an individual with inherent rights not dependent on the state. Each of these views is, however, problematic; their coexistence breeds instability into election law.

consistent with an association view of the corporation).

61. The number of PACs grew from 89 in 1974 to 1,682 in 1984. See THEODORE J. EISMEIER & PHILIP H. POLLOCK III, BUSINESS, MONEY, AND THE RISE OF CORPORATE PACS IN AMERICAN ELECTIONS 101 (1988).

62. See generally CLAWSON ET AL., *supra* note 57, 63-106 (arguing that corporate PACs secure access to politicians and, thus, influence legislation).

63. See AMITAI ETZIONI, CAPITAL CORRUPTION 39-41 (1984).

A. *The Corporation as an Artificial Entity*

In the early nineteenth century, the corporation was considered an artificial entity because it "owed its existence to the positive law of the state rather than the private initiative of individual incorporators."⁶⁴ As Chief Justice John Marshall explained in *Dartmouth College v. Woodward*, "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."⁶⁵

The artificial entity view arose out of the basic legal structure of the corporation. Historically, every corporation was individually created by a special legislative charter,⁶⁶ gained through a process of lobbying, debate, and influence-peddling in the manner of other types of legislation. Because charters were special contracts with the state, they were strictly construed to limit corporate powers to more or less explicit grants of state-recognized power. The courts used the *ultra vires* doctrine to invalidate corporate activity beyond the scope of the charter.⁶⁷ Corporations "were legally privileged organizations" warranting close supervision to ensure their objectives were "consistent with public welfare."⁶⁸

Twentieth century debates about corporate political participation are colored by the artificial entity view. For example, the artificial entity view was reflected in arguments about the Tillman Act. All corporations were prohibited from contributing to federal candidates; however, the proposed legislation would bar those with federal, as opposed to state, charters from contributing to any candidate for elective office.⁶⁹ Legislators insisted that the broader prohibition on political involvement by federally-chartered corporations was

justifiable because "[w]e can regulate the terms under which corporations of that character can live and move and have their being."⁷⁰

Regulation of all corporations was necessary because they, like the "Frankenstein monster" that Justice Louis Brandeis envisioned, were turning on their creators by becoming politically active.⁷¹ The views expressed by the *New York Tribune* in 1905 were widely shared:

A corporation is not a citizen It is an artificial creation, brought into existence by favor of the state solely to perform the functions allowed by its charter. Interference by it with the state and attempts by it to exercise rights of citizenship are fundamentally a perversion of its power.⁷²

States attempted to prevent such perversion by arguing that use of corporate funds to make political contributions was *ultra vires*. For example, in the 1904 case of *McConnell v. Combination Mining & Milling Co.*,⁷³ the Supreme Court of Montana held that the mining company's contribution to advance the silver cause was "clearly outside of the purposes for which the corporation was created" because the contribution was made for "strictly political purposes."⁷⁴ The contributions that the Republican National Committee received from the New York Insurance Company also occasioned an *ultra vires* prosecution in *People ex rel. Perkins v. Moss*.⁷⁵ According to the New York Court of Appeals, "[t]he company had not the right under the law of its existence, to agree to make contributions for political campaigns, any more than to agree to do other things foreign to its charter."⁷⁶

Although the *ultra vires* doctrine has withered away to near irrelevance and no longer provides a basis for banning corporate

70. *Id.* See also S. REP. NO. 59-3056, at 2 (1906) ("The Congress has the undoubted right thus to restrict and regulate corporations of its own creation.").

71. *Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting).

72. *MUTCH, supra* note 2, at 177 (quoting the *New York Tribune* from September 18, 1905, at page 6).

73. 76 P. 194 (Mont. 1904).

74. *Id.* at 199.

75. 80 N.E. 383 (N.Y. 1907).

76. *Id.* at 387. While no criminal liability was found because the court found no criminal intent or inherent immorality, the court did suggest that the payments made gave rise to a private wrong. See *id.*

64. David Milton, *Theories of the Corporation*, 1990 DUKE L.J. 201, 206.

65. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517, 636 (1819).

66. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188-89, 194-95 (2d ed. 1985); J. WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 33-34 (1970).

67. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 77-78 (1992).

68. RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855 5 (1982).

69. See 41 CONG. REC. 1453 (1907) (statement of Rep. Hardwick).

political expenditures, the artificial entity view continues to emerge in election law debates. Perhaps the most ardent supporter of the artificial entity view is Chief Justice William H. Rehnquist. Rehnquist argues that a corporation has no inherent right to participate in politics but has only those rights that are granted by the state or "incidental to its very existence."⁷⁷ Hence,

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 liberty of the press essential to the conduct of its business.⁷⁸

Rather than propose a categorical rule, Rehnquist would base the determination of which rights a corporation holds on the context of the particular corporation's business as understood by the state that created it. Those who believe that media corporations, such as the *New York Times*, ought to have broader First Amendment rights than non-media corporations, such as Exxon, might welcome Rehnquist's approach because it provides a constitutional—or at least theoretical—basis for the creation of media exceptions to corporate electoral regulations.

Nevertheless, Rehnquist's approach would be difficult to apply in practice. Determining which rights are "incidental" to a corporation's existence is no simple, mechanical task. Rehnquist's ambiguous standard is likely to result in inconsistent interpretations of which rights particular types of corporations hold. Some courts might even hold that any activity that furthers corporate business interests is incidental to incorporation. Even if applied consistently, the Rehnquist approach might grant media corporations too much influence, allowing them to occupy the field of corporate political activity unchallenged. Additionally, it may be nearly impossible to determine which rights are incidental to corporations with multiple business

operations and units. Indeed, few major corporations have only a single business.⁷⁹ Moreover, the structure of corporate law encourages corporations to have multiple business objectives. General incorporation laws, which replaced special charters as the norm for incorporation in the last decades of the nineteenth century, allow incorporation for any lawful purpose.⁸⁰ A corporation formed for any lawful purpose could plausibly claim that political speech rights are incidental to whatever lawful purposes its incorporators can imagine.

B. *The Corporation as a Natural Entity*

According to the natural entity view, the corporation is a creature of private initiative, not of the state.⁸¹ Under this view, the state serves merely as a facilitator for incorporators' pursuit of profit. As a natural entity, the corporation, like an individual, has a spectrum of inherent rights the existence of which owes nothing to the state.⁸²

The Waite Court more or less formally adopted the natural entity view of the corporation in *Santa Clara County v. Southern Pacific Railroad*⁸³ in 1886. In a two-sentence discussion, the Court held that corporations are persons within the meaning of the Fourteenth Amendment⁸⁴ and thereby provided the doctrinal foundation for the extension of numerous constitutional rights to corporate entities.⁸⁵ The doctrinal equation of a corporation with individuals conceptually unmoored the once artificial corporation from the state that created it. The corporation became a holder of Lockean natural and inalienable rights increasingly immune from state infringement.

The natural entity view was adopted by Republican opponents to the Tillman Act. One congressman reasoned, "There is no more reason why a corporation should not contribute to political campaign funds than there is why an individual should not, and the same rule

79. See SCUULLI, *supra* note 4, at 149 (noting that as early as 1969, a mere seven percent of major U.S. corporations had only a single business).

80. See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (1991).

81. See Milton, *supra* note 64, at 211.

82. See *id.* at 211-14 (discussing the United States Supreme Court holding that the Fourteenth Amendment protects corporations).

83. 118 U.S. 394 (1886).

84. See *id.* at 396.

85. On the constitutional rights held by corporations, see Winkler, *supra* note 37, at 195 n.269.

77. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) (quoting Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 517, 636 (1819)).

78. Bellotti, 435 U.S. at 824 (Rehnquist, J., dissenting).

ought to be enforced against the individual as against the corporation.⁸⁶ Another reasoned, "A corporation . . . is just as much an individual as is a man, and Congress has just as much power over that individual, over all individuals, as it has over that corporation."⁸⁷ While the Fifty-ninth Congress disagreed and passed the Tillman Act, election law would eventually evolve somewhat in the direction desired by the Republicans.

Just as the *Santa Clara* Court accepted the corporation as a rights-holder without substantive argument,⁸⁸ courts have also allowed corporate First Amendment rights to emerge doctrinally without much thoughtful discussion. The first challenge to the Tillman Act, which occurred in *United States v. United States Brewers' Association*,⁸⁹ set the tone. Criminally indicted for violating the contribution ban, several Pennsylvania and New York brewing companies argued that the law infringed on their inherent speech rights.⁹⁰ The court upheld the law but ducked the question of corporations as rights-bearers. Refusing to state whether corporations have First Amendment rights, the court ruled instead that the ban "neither prevents, nor purports to prohibit, the freedom of speech or of the press."⁹¹ Therefore, the court did not need to determine if corporations had the inalienable right of free speech.

The Supreme Court first confronted the issue directly in *Belloci*.⁹² Commentators who have argued that *Belloci* reflects a natural entity view of the corporation⁹³ are only half-right. The opinion, penned by Justice Powell, granted the corporation broad speech protection as if it were a natural rights holder, but carefully avoided giving explicit recognition of the natural entity view. In fact, Powell

did not say very much at all about the corporation as such, resting the protection on two other factors: one, previous case law had protected the speech rights of media companies⁹⁴—even though in none of the cases had the corporate identity of the speaker been raised as an issue; and two, the public had an interest in the free flow of information, regardless of the speaker's identity.⁹⁵ By emphasizing these factors and ignoring the corporate identity of the speaker, Powell rendered the corporate entity invisible while at the same time formalizing its equal rights. Since *Belloci*, the Court has generally assumed corporations to have First Amendment speech rights akin to individuals.⁹⁶

Election law debates over the application of the unconstitutional conditions doctrine to the corporate form reflect the interplay of the artificial and natural entity views of the corporation. Justice Antonin Scalia and others have contended that corporate electoral speech rights cannot be restricted on the basis that corporations enjoy state-conferred advantages.⁹⁷ Accepting the natural entity view, they argue that corporations enjoy full First Amendment speech protections and it would be unconstitutional for a state to require a corporation to forfeit those rights to gain the state-conferred benefits that come with incorporation. Whereas adherents of the artificial entity view, such as Rehnquist, would accept electoral regulation limiting corporate political speech as a condition of doing business, natural entity proponents would invalidate those regulations as unconstitutional conditions on the exercise of speech.

While I do not attempt here to sort out the bedeviling nuances of the "wonderfully inconsistent" unconstitutional conditions doctrine,⁹⁸ rejecting electoral regulation of the corporation on unconstitutional

86. 41 CONG. REC. 1452 (1907) (statement of Rep. Mann).

87. *Id.* at 1454 (statement of Rep. Grosvenor).

88. See *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886).

89. 239 F. 163 (W.D. Penn. 1916).

90. See *id.* at 165-66.

91. *Id.* at 169.

92. 435 U.S. 765 (1977).

93. See, e.g., William H. Simon, *Contract Versus Politics in Corporation Doctrine*, in *THE POLITICS OF LAW* 387, 389-90, (David Kaiys ed., rev. ed. 1990) (arguing that *Belloci* reflects a naive view of the corporation that is essentially the same as the natural entity view).

94. See *Belloci*, 435 U.S. at 797-98.

95. See *id.* at 801-02.

96. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990) (holding that a state ban on corporate expenditures was an infringement of chamber of commerce's free speech rights, but one that could be justified and upheld under strict scrutiny).

97. See *id.* at 679-80 (Scalia, J., dissenting); Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767, 787 (1991).

98. Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374 (1995).

conditions grounds is inconsistent with other conditions imposed on rights of electoral participation. For example, non-profit organizations waive their First Amendment right to engage in political activity in exchange for governmental benefits in the form of tax exemptions.⁹⁹ Similarly, the Presidential Election Campaign Fund¹⁰⁰ conditions public financing for presidential candidates on the acceptance of expenditure limits—a direct infringement of free speech.¹⁰¹ Lobbying restrictions also mandate the forfeiture of constitutional rights, forbidding, for example, government employees from lobbying—an exercise of their constitutional right to petition—for a time after they leave office. Conditioned rights permeate the law of the political process, not merely electoral regulation of the corporation.

IV. ASSOCIATION VIEWS OF THE CORPORATION

In the latter half of the twentieth century, electoral regulation of the corporation has often reflected understandings of the corporate form as an association. Laws that look to the internal organization of corporations, such as those that distinguish among shareholders, management, and employees in their ability to use the corporate form for political purposes, belong within the category of association-based electoral regulation. There are two categories of association views manifested in election laws: one that sees corporate association as perilous to its members, and one that sees it as salutary to its members. In this section, I identify these variants of the association view in electoral regulation and show how they compete with each other, undermining the coherence and efficacy of association-based corporate election law.

A. *The Corporation as a Perilous Association*

The separation of ownership of a corporation and control of its assets¹⁰² gave rise to the perilous association view of the corporation.

99. I.R.C. § 501(c)(3).

100. 26 U.S.C. §§ 9001-13 (1994).

101. *But see* Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280, 282-83 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980) (holding that the Fund does not impose an unconstitutional condition).

102. *See* ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (famously discussing the separation of ownership and control in public stock corporations).

Under the perilous association view, the corporation presents a number of dangers, foremost among them the problem of agency costs. Corporate managers may act at the expense of shareholder profits, using other people's money to pursue managers' own ends. Thus, one group of corporate "members," the managers, poses the threat of misusing the capital invested by another group, the stockholders. Borrowing the principles of fiduciary duty from the common law of trusts,¹⁰³ corporate law responded to this agency dilemma by adopting limits on managerial self-dealing, prohibitions on waste of corporate resources, and measures to insure efficient restrained management.

The perilous association view is reflected in election laws designed to protect members of the corporation to whom the political activity of the corporation may pose harm, such as stockholders who do not wish to finance corporate political activities. The concern for dissenting shareholders is the rationale that "probably fits the present federal regulatory scheme better than any other."¹⁰⁴

Nevertheless, the courts have traditionally given the dissenting shareholder view short shrift. In *Cort v. Ash*,¹⁰⁵ shareholders sued the directors of Bethlehem Steel for funding political advertisements allegedly in contravention of the corporate contribution ban. Justice William Brennan, Jr., writing for a unanimous Court, complained that "protection of ordinary stockholders was at best a secondary concern"¹⁰⁶ behind the Tillman Act and its subsequent recodifications. In *United States v. CIO*,¹⁰⁷ Justice Wiley Rutledge derisively described shareholder protection as "majority prohibition."¹⁰⁸ In *Bellotti*, Justice Powell also rejected the dissenting shareholder rationale as a basis for electoral limits on corporate spending.¹⁰⁹

ration of ownership and control in public stock corporations).

103. *See* SCULLI, *supra* note 4, at 92-93.

104. Marlene Arnold Nicholson, *The Constitutionality of the Federal Restrictions on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 999 (1980).

105. 422 U.S. 66 (1975).

106. *Id.* at 81.

107. 335 U.S. 106 (1948).

108. *Id.* at 147 (Rutledge, J., concurring).

109. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 792-95 (1978). The lone exception to this trend of discounting the protection of dissenting shareholders as a valid concern is a case upholding section 54(1) of the Mith-

As a matter of history, the Court was clearly wrong in stating that protection of dissenting shareholders was at best a secondary concern to the Tillman Act. For example, President Roosevelt's statement to Congress requesting passage of the Tillman Act prominently emphasized the perilous association view: "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholder's money for such purposes."¹¹⁰ Also, in legislative debates over the Act, Democrats called for the Republicans who had accepted contributions from New York insurance companies to "refund to the widows and orphans the money of which the trustees of insurance companies robbed them during the last campaign."¹¹¹ Such funds, they insisted, were "diverted and misappropriated" from policy holders and "misused" for "illegitimate political expenditure."¹¹² To adherents of the perilous association view, corporate contributions were "wholly unjustifiable" means by which "executive officers . . . sought to impose their political views upon a constituency of divergent convictions."¹¹³

The perilous association view helps to explain the segregated fund rules for corporate electoral spending. When Congress recodified the corporate contribution ban in 1971, it included important association-based modifications. For the first time, federal law explicitly allowed corporations to establish separate segregated funds to contribute to candidates and finance independent expenditures in connection with federal elections. These funds, known as PACs, are created by corporate management and bear the corporation's name. Under the Federal Election Campaign Act ("FECA") amendments adopted in 1976, the corporation pays for general administrative and fund-raising expenses with general treasury funds whereas the political expenditures and contributions made by the PAC are funded by voluntary contributions solicited from a restricted class of people

gan Campaign Finance Act which prohibited corporations from using corporate treasury funds for independent expenditures for candidates in state elections. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

110. SIKES, *supra* note 23, at 190.

111. 41 CONG. REC. 1452-53 (1907) (statement of Rep. Williams).

112. *Id.* at 1452 (statement of Rep. Williams).

113. SIKES, *supra* note 23, at 110.

associated with the corporation.¹¹⁴ The restricted class is limited to shareholders, executive and administrative personnel, employees—although here there are additional limits—and their families.¹¹⁵

It was the dissenting shareholder rationale that inspired the Supreme Court's most dramatic approval of corporate electoral restrictions in *Austin v. Michigan Chamber of Commerce*.¹¹⁶ In upholding a state law requirement that corporations and corporate-funded entities—such as the Chamber of Commerce—use only voluntary PAC funds to finance public endorsements of candidates in state elections, *Austin* articulated a notion of corruption as the political conversion of other people's money.¹¹⁷ According to *Austin*, government has a compelling interest in preventing this form of corruption peculiar to the corporate form.¹¹⁸ In so doing, the Court gave constitutional status to the perilous association view of the corporation.

This view of the corporation is flexible enough to distinguish between ideological and business corporations. Non-profit corporations formed for ideological purposes enjoy greater freedom in electoral activity because people join such corporations out of ideological camaraderie to pursue shared political ends. There is generally no reason to suspect that the ideological non-profit corporation's financial supporters dissent from the corporation's political agenda.¹¹⁹

Laws designed to protect dissenting shareholders of business corporations should, unlike current election law, distinguish between large, publicly-traded, business corporations and closely-held business corporations. It is altogether conceivable that closely-held business corporations often will have no shareholders who oppose their political expenditures. To the extent that protecting dissenting

114. See 2 U.S.C. § 441b(b)(4)(B) (1994).

115. See *id.* § 441b(b)(4).

116. 494 U.S. 652 (1990). Some commentators read *Austin* to reflect primarily a concern for political equality. See, e.g., Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 108-11; Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 41 (1996).

117. See *Austin*, 494 U.S. at 660.

118. See *id.*

119. See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 243-45 (1986).

shareholders is the goal of the perilous association-based laws, these laws should provide exceptions to corporations that can show unanimous shareholder consent for their political activity.¹²⁰

The dissenting shareholder rationale is not without its critics.¹²¹ One common criticism is that electoral regulation is not necessary because dissenting shareholders have adequate means of registering their objection to corporate political activity through standard corporate law or by availing themselves of the market for shares. Dissenting shareholders, the argument goes, can object by selling their shares, pursuing reforms through the mechanisms of corporate democracy, or suing management for waste of corporate resources.

*Stern v. General Electric Co.*¹²² illustrates that the traditional corporate law remedies provide little protection for aggrieved shareholders. In *Stern*, General Electric ("GE") shareholders tried to force a vote on a shareholder proposal to require the company to disclose its PAC contributions.¹²³ Yet, as has long been recognized, shareholder proposals rarely work to restrain management because most shareholders eligible to vote are passive and rationally apathetic.¹²⁴ Here, GE refused to allow a vote on the proposal.¹²⁵ Dissenting shareholders then filed a derivative suit against management for wasting corporate assets.¹²⁶ To support their claim of waste, shareholders complained that the GE PAC contributed to congressional incumbents without regard for the candidates' positions on business issues, to unopposed candidates, and even to both candidates in a single contest.¹²⁷ Yet to get beyond the summary judgment phase, the shareholders had to show that the corporation received absolutely no benefit from the political expenditures, which they were unable to

120. See *Bellocchi*, 435 U.S. at 794-95.

121. See, e.g., Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAR. U. L. REV. 381, 406-13 (1992) (criticizing the dissenting shareholder rationale).

122. 924 F.2d 472 (2d Cir. 1991).

123. See *Stern v. General Electric Co.*, 837 F. Supp. 72, 75 (S.D.N.Y. 1993).

124. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1171 (1981) ("Most shareholders are passive investors seeking liquid holdings").

125. See *Stern*, 837 F. Supp. at 75.

126. See *id.*

127. See *Stern v. General Electric Co.*, 924 F.2d 472, 473 (2d Cir. 1991).

do.¹²⁸ Indeed, it is hard to imagine any case in which shareholders could prove no benefit whatsoever from contributions; management could justify almost any contribution as an attempt to open a candidate's eyes to corporate needs. Due to the unbridled discretion embodied in the business judgment rule, derivative suits by dissenting shareholders, such as GE's, are destined to fail.

Certainly the most vexing question raised by election laws concerning dissenting shareholders is why should they protect those who dissent from corporate contributions to candidates, but not from corporate political lobbying or other political expenditures.¹²⁹ To the extent protecting shareholders is the goal of the perilous association view, many current electoral regulations work against achieving that objective. Corporations are allowed to use shareholder funds to create and administer corporate PACs,¹³⁰ and make unregulated and unlimited soft money contributions to the national political parties from their general treasuries.¹³¹ Because no laws prevent corporations from financing ordinary political activities, such as speech or lobbying on issues of the day, with shareholder money, shareholders, even dissenting ones, continue to subsidize corporate politics.

The FECA also provides a measure of protection for another group whose association with the corporation creates dangers of abuse: employees. Employees are vulnerable to coercive solicitation of political contributions by management. While management is lawfully allowed to solicit employees to make PAC contributions, § 441b establishes a web of rules to protect employees from managerial coercion. For example, § 441b makes it unlawful for a corporate PAC to use money secured by "job discrimination" or "financial reprisal."¹³² It further requires that solicited employees be informed of the "political purposes" of the fund and of their right to refuse to contribute to it.¹³³ Corporate PACs can only solicit employee contributions twice a year,¹³⁴ thereby limiting the opportunities for

128. See *Stern*, 837 F. Supp. at 73, 76-77.

129. For responses to this question, see Winkler, *supra* note 37, at 168-71; Nicholson, *supra* note 104, at 985-86.

130. See 2 U.S.C. § 441b(b)(2)(C) (1994); 11 C.F.R. § 114.1(a)(2)(iii).

131. See CLAWSON ET AL., *supra* note 57, at 108.

132. 2 U.S.C. § 441b(b)(3)(A) (1994).

133. *Id.* § 441b(b)(3)(B)-(C).

134. See *id.* § 441b(b)(4)(B).

harassment. The law requires that all employee solicitations be in writing and be delivered by mail to the employee's residence,¹³⁵ reflecting the common sense notion that personal solicitations are more coercive than written solicitations. In addition, the corporate PACs must implement safeguards to insure that management cannot determine which employees decline to contribute amounts of less than fifty dollars.¹³⁶ However, the FECA regime does not prevent corporate coercion of executive and administrative personnel, who do not enjoy the same safeguards as employees,¹³⁷ and thus remain potential victims of their perilous association with the corporation.

B. *The Corporation as a Salutory Association*

Competing with the perilous view, the salutary view conceives of the corporate association as beneficial to its members. There are two variants of the salutary view in election law. The first envisions the corporation as a benefit-inducing "nexus of contracts" among stockholders, management, employees, suppliers, creditors, and customers.¹³⁸ The second envisions the incorporators as using the organizational form to achieve self-fulfillment.¹³⁹ Thus, those who share the salutary association view of the corporation see the corporation as providing opportunities for personal or economic enrichment, rather than dangers or threats of abuse, and expect managers and shareholders to work together in pursuit of common or at least compatible goals with little need for state regulation.

1. Contract-based salutary association

The view of the corporation as a salutary contractual association is grounded in neoclassical economics.¹⁴⁰ According to this view, a

corporation is the sum of different inputs, such as shareholders, employees, managers, suppliers, customers, and creditors, who join the enterprise through contractual relationships.¹⁴¹ This view accepts the voluntary decision to join this web of contracts as advancing the self-interest of the signatories. Voluntary signatories to the corporate contract do not need the protective paternalism of state regulation.¹⁴² Some signatories, such as suppliers and lenders, are capable of protecting themselves from disfavored managerial activity through negotiation and detailed written contracts. Shareholders, though lacking detailed contracts, can vote to establish limits on corporate politics or sell their shares freely.¹⁴³

Under the contractual association view of the corporation, rational contractors can be expected to vote or use detailed contracts to restrict corporate politics up to the point at which the costs of restriction exceed its benefits.¹⁴⁴ If management's politics damage the corporation or are disfavored by society, the stock market will discipline management by devaluing the corporation's stock and encouraging a takeover.¹⁴⁵ Electoral regulation is therefore costly, inefficient, and unnecessary.¹⁴⁶

Elements of the contractual view of the corporation are evident in *Belotti* and in the *Austin* dissent. In *Belotti*, Justice Powell rejected the state's justification of the ban on corporate initiative expenditures as an effort to protect dissenting shareholders.¹⁴⁷ According to Powell, "shareholders normally are presumed competent to protect their own interests."¹⁴⁸ Dissenting in *Austin*, Justice Anthony Kennedy declared that a shareholder dissatisfied with corporate politics can "cease to associate with the group."¹⁴⁹ In his own

THE CONSTITUTION 2-12 (1995); see generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991) (discussing the "nexus of contracts" theory).

141. See EASTERBROOK & FISCHEL, *supra* note 140, at 4-7.

142. See BUTLER & RUBSTEIN, *supra* note 140, at 25-27.

143. See *id.* at 64-65 (describing shareholders' ability to exit corporation).

144. See *id.* at 64.

145. See *id.* at 8 (discussing market discipline on managers).

146. See *id.* at 66.

147. See First Nat'l Bank of Boston v. *Belotti*, 435 U.S. 765, 795 (1978).

148. *Id.*

149. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting).

135. See *id.*

136. See *id.*

137. See *id.* § 441b(b)(4)(A)-(B).

138. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

139. See, e.g., Susan L. Ross, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 461 n.130 ("Specific corporations designed for political purposes serve the self-fulfillment needs of the incorporators and contributors.");

140. See HENRY N. BUTLER & LARRY E. RUBSTEIN, *THE CORPORATION AND*

Austin dissent, Justice Scalia suggested that a dissenting shareholder unhappy with corporate politics should just "sell his stock."¹⁵⁰

The contractual view of the corporate association exaggerates stockholders' freedom to sell their shares. Over half the available equity in American corporations is held by institutional investors such as pension funds, mutual funds, and insurance companies.¹⁵¹ A large number of the individuals whose money is invested in corporations through these institutional investors have little, if any, ability to control in which companies their money is invested.¹⁵² Selling shares is therefore considerably more difficult for dissenting shareholders than the contractualists assume.

The difficulty most shareholders face in selling their shares points to a larger criticism of the contractualists' theory that the market will discipline managers. Corporate funding of PACs and political speech expenditures is relatively cheap—so cheap that it evades the scrutiny of the market. PAC expenses and ballot initiative advertising represent only a minuscule fraction of a percent of annual earnings for most publicly-traded corporations. Since market valuation of shares is routinely based on a multiple of corporate earnings, the impact of such spending on the corporate share price is insignificant. Because each shareholder's contribution is so minute, they have little incentive to monitor corporate political spending. Even the diligent investor will not find basic information about corporate politics in the marketplace because corporations are not required to disclose details about what expenditures were made in favor of which causes or candidates.

2. Constitutive salutary association

The constitutive variant of the salutary association view is based on the idea that corporations are intermediary institutions, akin to political parties or interest groups, that allow people to join together to pursue common, self-fulfilling ends. According to proponents of this view, "the corporate form performs an important democratic

function in facilitating the personal self-realization of the individuals who have made the voluntary choice to make use of it."¹⁵³ As a result, "one should view the corporation as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals . . . seeking to self-realize by engaging and investing in business."¹⁵⁴

A constitutive view is consistent with election laws that provide avenues for meaningful, non-coercive political association between shareholders and management in the corporate name. The FECA PAC rules enable a restricted class of people associated with the corporation to organize under the corporate name to pursue common political ends. The FECA rules allow members of the class, who might find the opportunity empowering, to join a corporate PAC. The FECA also exempts from the ban on corporate endorsements of candidates internal political communication to the restricted class, providing this group greater opportunity than non-members to share political ideas and coordinate with the corporation.

Corporate PACs are justified on constitutive grounds. Supporters claim that PACs are "voluntary membership organizations,"¹⁵⁵ similar to "political parties, interest groups, and . . . other associations."¹⁵⁶ They "represent individuals who share a common set of beliefs and values and can find greater individual expression together through collective action."¹⁵⁷ According to the constitutive view, corporate PACs are a means of fostering personnel and employee political participation.¹⁵⁸

Political scientists have cast some doubt on this description of corporate PAC contributors. A study of 1980 PAC contributors concluded that PAC contributors showed little relative political commitment or engagement and were less likely to vote than individuals

150. *Id.* at 687 (Scalia, J., dissenting).

151. See Allen D. Boyer, *Activist Shareholders, Corporate Directors, and Institutional Investment: Some Lessons From The Robber-Barons*, 50 WASH. & LEE L. REV. 977, 977 (1993).

152. See Winkler, *supra* note 37, at 167.

153. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998). Accord Ross, *supra* note 139, at 461 n.130.

154. Redish & Wasserman, *supra* note 153, at 254.

155. Lee Ann Elliot, *Political Action Committees: Precincts of the '80s*, 22 ARIZ. L. REV. 539, 540 (1980).

156. EISMEIER & POLLOCK, *supra* note 61, at 13.

157. ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS 4 (1986).

158. See Elliot, *supra* note 155, at 547-48.

who contribute directly to candidates.¹⁵⁹ Furthermore, some corporate PACs' practice of contributing to both Democratic and Republican candidates,¹⁶⁰ often in the same election, suggests their purposes are often more instrumental than constitutive. When corporate PACs give to both sides of an electoral contest, the PAC contributions preserve access to elected officials but hardly can be said to reflect the political self-realization of contributors.

The FECA's restricted class rules can be partially explained by a salutary association view. Executive and administrative personnel theoretically enjoy a more beneficial relationship with the corporation than hourly employees do. At the higher levels of the corporate hierarchy, executives and administrators set the policies governing the organization and determine which political causes the PAC supports. They enjoy an unusual degree of intimacy with the organization, its people, and its goals.

Trouble arises in formulating rules to determine who has a close enough relationship to the corporation to be considered a "member," and thus eligible to contribute to a corporate PAC. As then-Justice Rehnquist phrased it, members must have "some relatively enduring and independently significant financial or organizational attachment" to the corporation.¹⁶¹ In *Federal Election Commission v. National Right to Work Committee (NRWC)*, a nonstock corporation solicited PAC contributions from 267,000 people who had previously contributed money to the organization.¹⁶² Analogizing "members" to corporate stockholders, the Court held that these solicitees lacked a sufficiently enduring relationship to the corporation, despite their prior financial contributions.¹⁶³ Rehnquist explained that NRWC

contributors were not members because they "play[ed] no part in the operation or administration of the corporation; they elect[ed] no corporate officials;" nor had they "exercis[ed] any control over the expenditure of their contributions."¹⁶⁴

Yet those whom the FECA allows to be solicited would not meet this standard if it were rigorously applied. With the exception of some high-ranking executives, most salaried employees of the modern corporation do not "operate" the organization, establish its policies and politics, or elect its governors. Nor can passive shareholders of a public corporation be said to exercise any meaningful control over corporate activity.¹⁶⁵ Almost none of these potential contributors to corporate PACs have much of a say in how or where their contributions are expended. PACs are "caucus" organizations—that is, they are led by a few individuals who decide how to spend contributions with little or no input from the donors.¹⁶⁶

The *NRWC* Court's refusal to include past financial contributors within the limited class of solicitable members, because they did not have an enduring and independently significant tie analogous to stockholders, shows how slippery these categories are. Day traders, although they do not have an enduring relationship with the corporation, are entitled to vote as shareholders if they own on the record date. Individual pension and mutual fund investors, even with a significant attachment to their corporations, are often involuntary associates of the enterprise. To allow these stockholders more room to associate meaningfully than those who, like *NRWC* supporters, have made the conscious choice to affiliate with the organization's politics undermines the achievement of election law's constitutive goals.

Financial supporters, such as those in *NRWC*, are not the only participants in the corporate enterprise that might benefit from political association through PACs. Brand-loyal customers, suppliers, creditors, and even neighboring communities might also find corporate association beneficial. Yet, by excluding them, the FECA's PAC rules frustrate the achievement of meaningful corporate association for many potential members of the corporation.

159. See Ruth S. Jones & Warren E. Miller, *Financing Campaigns: Macro Level Innovation and Micro Level Response*, 38 WEST. POL. Q. 187, 205 (1985); Frank J. Sorauf, *Who's in Charge? Accountability in Political Action Committees*, 99 POL. SCI. Q. 591, 597 (1984).

160. See, e.g., Stern v. General Electric Co., 837 F. Supp. 72, 74 (S.D.N.Y. 1993) (shareholder plaintiffs alleged that the General Electric PAC had contributed to opposing candidates in the same race).

161. Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 204 (1982) (upholding the FECA's PAC solicitation rules).

162. See *id.* at 200.

163. See *id.* at 206. Section 441b(b)(4)(c) uses the term "membership organization," but Rehnquist's opinion focuses on defining "members."

164. *National Right to Work Comm.*, 459 U.S. at 206.

165. See BUTLER & RIBSTEIN, *supra* note 140, at 63.

166. See EISMAYER & POLLOCK, *supra* note 61, at 15.

Corporate PAC rules illustrate the ways in which both salutary and perilous association views of the corporation interact in the same regulatory scheme. Not only do both of these association views raise troubling questions for election law, but their coexistence prevents the goals of either from being achieved. Neither shareholders nor employees receive adequate protection from management. And many of those who might wish to pursue political ends are excluded from participating in corporate PACs and thus are unable to achieve meaningful, self-realization through the corporate form.

V. CONCLUSION

Election law manifests several different views of the corporation and its place in politics. These ways of conceptualizing the corporation—in terms of political equality, as an artificial or natural entity, or as a perilous or salutary association—each appear in election law debates, regulations, and adjudication. Yet they often work at loggerheads, leaving corporate electoral regulation devoid of coherence and consistency.

Is there one view of the corporation that should be adopted? Perhaps, but it is unlikely that any one way of conceptualizing the corporation will become dominant any time soon. The corporation is a multi-faceted institution; it is at once an economic, political, and social organization that serves many goals and purposes. Indeed, the competing themes that echo through election law reflect a larger lack of consensus on the corporation and its place in society. As long as society remains uncertain of how to conceptualize the corporation, corporate election law will continue to be patterned by stripes of many colors.