Corporate Political Speech

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The controversy concerning the nature of the corporation presents a challenge for constitutional law. If courts continue to embrace the historical view of the corporation as a legal "person" endowed with personhood at the will of the state, then it seems to follow that government should have broad power to limit corporations' rights. But if, as many scholars now believe, a corporation is a nexus of contracts, these contract rights should be constitutionally protected to the same extent as other contract rights. Thus, the state must show why intervention in the corporate contract is constitutionally justified given the availability of self-protection through private contracting.

Resolution of this controversy is important in determining the constitutionality of restrictions on corporate political speech. Most recently, the Supreme Court decided in Austin v. Michigan Chamber of Commerce that laws restricting corporate political activity do not offend the First Amendment. That decision brought full circle a series of cases beginning with broad recognition of corporate First Amendment rights in Justice Powell's decision in First National Bank v. Bellotti.

This Article asserts that Justice Powell had it right in Bellotti. The Supreme Court's subsequent curtailment of corporate speech rights is based on mistaken views both of the nature of the First Amendment interest at stake in corporate speech and of justifications for state intervention in this area. More broadly, this Article urges a view of constitutional protection

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1. See infra note 82 and accompanying text.

This Article does not discuss the separate question of whether corporate governance processes are within the First Amendment's protection of freedom of association. For a comprehensive discussion of this issue, arguing that the First Amendment should protect associational rights in commercial as well as noncommercial firms, see Nicholas Wolfson, A Transaction Cost Analysis of the First Amendment (manuscript on file with the author, April, 1991). See also Roberts v. United States Jaycees, 468 U.S. 609 (1984) (compelling state interest justified requiring non-profit corporation to admit women).

of corporate activities that is better informed by economic theories of the firm and of the electoral process. Providing constitutional protection of corporate activities is particularly important in light of the continuing pressure for state and federal election reform.5

The Article begins by reviewing the Supreme Court's principal corporate speech decisions in Part I. Part II develops a general framework for analysis by articulating a pragmatic cost-benefit approach to applying the First Amendment. Part III then develops the appropriate corporate framework for applying this analysis, building on the contract theory of the corporation. Parts IV and V bring together the constitutional and corporate frameworks by discussing, respectively, the costs and benefits of regulation within a contract model of the corporation. Part IV discusses the cost side of the pragmatic approach by explaining the precise First Amendment interest at stake in corporate speech. Part V critically analyzes possible justifications for state regulation, including those suggested by the Court. It shows that these purported justifications do not outweigh the significant protected interest that is at stake, particularly in light of the availability of contractual devices as substitutes for regulation. Part VI contains concluding remarks.

I. CORPORATE SPEECH IN THE SUPREME COURT

The Supreme Court has dramatically shifted its position on corporate speech over the eleven-year period between the first and the most recent of its corporate speech cases. The following brief summary of these cases sets the stage for the economic analysis of corporate speech that is the focus of this Article.

A. Bellotti: First Amendment Protection of Corporate Speech

In First National Bank v. Bellotti,6 the Supreme Court, in an opinion by Justice Powell, held that corporate political expenditures and contributions were constitutionally protected.7 The Court invalidated under the First

7. See Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley the Court held that the Federal Election Campaign Act, 2 U.S.C. § 431-455 (1988), was unconstitutional to the extent that it limited expenditures that could be made by an individual or group (including a partnership or corporation) on behalf of a particular candidate, candidates' use of personal or family funds to support their own election, and overall expenditures by candidates. Id. at 143. The Court reasoned that the Act's limitations directly suppressed communication and that contribution and expenditure limitations "impinge on protected associational freedoms" by restricting the extent to which people can affiliate with candidates and pool resources to pursue common goals. Id. at 16-17, 22.

However, the Court distinguished contribution and expenditure restrictions. Contribution
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and Fourteenth Amendments a Massachusetts statute that prohibited certain business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The Court reasoned that speech that otherwise is protected does not lose its protection because of the corporate identity of the speaker. Corporate speech is protected not merely as a property right, but as a part of the guarantee of liberty to all natural and artificial persons.8 The Court also rejected the idea that First Amendment protection was a "purely personal" guarantee that was not available to corporations.9

Having held that corporate speech was constitutionally protected, Justice Powell went on to hold that the statute could not be sustained by any compelling state interest in preventing corporations from unduly influencing referendum votes. The Court noted that there was no candidate to corrupt in this context, and that the First Amendment does not permit restricting some speech to equalize representation of points of view.10 The Court also refused to sanction the restriction of corporate speech in order to offset state-conferred advantages such as limited liability.11 Nor would the Court sustain the statute on the ground that the statute protected shareholders from corporate use of shareholder investments to support views with which the shareholders disagreed: the shareholders got only narrow protection under the statute,12 the statute applied even in the face of unanimous

limits involve less of a restriction on expression and association than expenditure restrictions because a contribution restriction "entails only a marginal restriction upon the contributor's ability to engage in free communication," the amount of a contribution at most "provides a very rough index of the intensity of the contributor's support for the candidate," and "the transformation of contributions into political debate involves speech by someone other than the contributor." Id. at 20-21. A contribution limitation constrains associational freedom less than an expenditure limitation because contribution ceilings "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." Id. at 22.

The Act's limitations on contributions to single candidates and by an individual during a calendar year were justified on the ground that they limited actual and apparent "corruption," which the Court defined as securing "a political quid pro quo from current and potential office holders." Id. at 26. But this government interest did not sustain expenditure limitations. Nor could expenditure limitations be justified by "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections . . . ", because "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 . . . ." Id. at 48-49.

9. Id. at 778 n.14.
10. Id. at 790-91.
11. Id. at 791 n.30.
12. Id. at 767-68. The statute applied only to expenditures by particular types of organizations and only in referendums. Id. See also MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977).
shareholder authorization,\textsuperscript{13} and shareholders had governance mechanisms for objecting, were not compelled to invest in a corporation, and could disinvest at any time.\textsuperscript{14}

Although \textit{Bellotti} appears firmly to establish First Amendment protection for corporate speech, the decision is explicitly limited to a restriction on corporate expenditures and contributions in connection with a \textit{referendum} campaign. Justice Powell noted that statutes limiting corporate contributions in candidate elections involve an important governmental interest in preventing corruption of elected officials.\textsuperscript{15} More generally, Powell stated that in deciding the specific issue of whether corporate speech not relating directly to the corporation's business interests is protected "we do not \ldots address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."\textsuperscript{16}

The limited scope of the majority opinion makes the opinions of the four dissenting Justices particularly important as an indication of the Court's direction in later cases. Justice White, who wrote for Justices Brennan and Marshall, reasoned that corporate speech should be protected only when it furthers self-expression by the shareholders, as is the case with corporations formed solely to advance particular causes, or press corporations, or commercial speech, which "may be viewed as a means of furthering the desires of individual shareholders."\textsuperscript{17} White reasoned that restricting speech unconnected with the corporation's business leaves shareholders and managers free to express themselves other than through the corporation.\textsuperscript{18} He also asserted that the state has an interest in regulating corporate speech to ensure that the special advantages (such as limited liability) it grants corporations to permit the aggregation of corporate wealth are not used to weight the political debate in favor of corporate views\textsuperscript{19} and that shareholders are not forced to support speech with which they disagree.\textsuperscript{20}

Justice Rehnquist based his dissent on the Court's earlier holding in \textit{Dartmouth College v. Woodward}\textsuperscript{21} that a corporation "possesses only those

\textsuperscript{13.} \textit{Bellotti}, 435 U.S. at 792-95.
\textsuperscript{14.} \textit{Id.} at 794-95 & 794 n.34.
\textsuperscript{15.} \textit{Id.} at 788 n.26.
\textsuperscript{16.} \textit{Id.} at 777. In the note accompanying the statement quoted in the text, the Court went on to say:

Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities.

\textit{Id.} at 777 n.13.
\textsuperscript{17.} \textit{Id.} at 805.
\textsuperscript{18.} \textit{Id.} at 807-09.
\textsuperscript{19.} \textit{Id.} at 809-12.
\textsuperscript{20.} \textit{Id.} at 812-21. Justice White analogized the situation in \textit{Bellotti} to cases holding that employees could not be compelled to have their union dues support political causes they opposed. \textit{Id.} at 813-19 (discussing \textit{Abood v. Detroit Bd. of Educ.}, 431 U.S. 209 (1977) and \textit{Machinists v. Street}, 367 U.S. 740 (1961)).
\textsuperscript{21.} 17 U.S. (4 Wheat.) 518 (1819).
properties which the [state-conferred] charter of creation confers on it, either expressly, or as incidental to its very existence." 22 In the case of a nonpress commercial corporation, these "properties" do not include a right of political expression. 23 Thus, the state need not even justify corporate speech restrictions under the First Amendment. 24

B. From Bellotti to Austin

Justice Powell's opinion in Bellotti stands as the high point of the Court's protection of corporate political speech. The dissents in Bellotti itself foreshadowed the erosion that would occur in subsequent opinions.

In Federal Election Commission v. National Right to Work Committee (NRWC) 25 Justice Rehnquist's unanimous opinion held that Congress constitutionally could prohibit a nonprofit corporation from mass soliciting contributions to a segregated fund from non-"members." The statute's limitation on associational freedom was justified by the interests in protecting against corporate use of "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization" and in protecting individuals from corporate use of money to support candidates individuals may oppose. 26 Although the Court distinguished Bellotti as applying to state referenda rather than candidate elections, 27 NRWC appears broadly to reject Bellotti by tolerating only a slender justification for restricting corporate speech: NRWC, rather than using a large treasury amassed through use of corporate "advantages" for political purposes, merely acted as an administrative intermediary organizing small contributions into a political force consistent with the expressed wishes of the contributors. 28 Thus, NRWC seems consistent with Justice Rehnquist's refusal to recognize First Amendment protection of the speech of any corporations. 29

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23. Id. at 825. Like Justice White, Justice Rehnquist distinguished corporations organized "for explicitly political purposes." Id. at 825 n.6.
24. Id. at 826 n.6.
27. Id. at 210 n.7.
28. NRWC's purpose ironically was to combat the evil of compulsory union dues that Justice White cited as an analogy in his Bellotti dissent to justify statutory protection of corporate shareholders (see supra note 20). Id. at 199-200 (quoting NRWC's charter).
29. See supra notes 21-24 and accompanying text. Another indication of the Court's retreat from First Amendment protection of corporate speech is Justice Rehnquist's opinion in Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985). The Court invalidated federal limitations on expenditures by political action committees, distinguishing NRWC as turning on the law's "special treatment" of corporations." Id. at 495.
In Federal Election Commission v. Massachusetts Citizens For Life, Inc. (MCFL) the Supreme Court refused to reach the same result as in NRWC in a case involving expenditures, as distinguished from the less-protected activity of campaign contributions involved in NRWC. The Court, in an opinion authored by Justice Brennan, held that a federal prohibition of use of corporate treasury funds for expenditures in a federal election would unconstitutionally burden the exercise of First Amendment rights as applied to a newsletter published by a nonprofit corporation organized to oppose abortion. As in Justice White's Bellotti dissent, the Court reasoned that government restrictions on corporate political activity could be justified by the state's interest in preventing political use of corporate wealth amassed in the economic marketplace. But the Court clarified that the state interest was only in curtailing political abuse of the corporate form, not in regulating "use of the corporate form per se." This state interest did not apply to MCFL-type companies whose resources reflected the political views of its contributors. The Court identified three features that characterize such corporations:

First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, it was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Thus, the Court seemed to back away from the Rehnquist idea that corporations as state creations were entitled to no First Amendment protection. Notably, Justice Powell joined the MCFL majority.

However, in its latest analysis of the application of the First Amendment to corporate speech, following Justice Powell's retirement, the Court took an important step away from Bellotti. In Austin v. Michigan Chamber of Commerce the Supreme Court held that a Michigan statute's prohibition

32. Id. at 264 (footnote omitted).
33. See supra text accompanying notes 21-24. Justice Rehnquist, in a dissent joined by Justices White, Blackmun and Stevens, argued that Congress could conclude that the special advantages of the corporate form create a sufficient potential for corruption and use of individuals' funds for purposes they oppose to be able constitutionally to distinguish corporations from other organizations. Justice White also wrote separately to state that he adhered to his Bellotti dissent.
on corporate use of treasury funds for *expenditures* for or against candidates for state office was not unconstitutional under the First and Fourteenth Amendments as applied to a newspaper advertisement placed by the Michigan Chamber of Commerce, a nonprofit corporation, in support of a specific candidate. Writing for the Court, Justice Marshall (one of the *Bellotti* dissenters) reasoned that the statute, although a direct restriction on expressive activity, was constitutionally justified by the state’s interest in protecting against “corruption” in the form of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”

To see how *Austin* narrowed First Amendment protection of corporate speech, it is helpful to review the approaches still available to the Court after *NRWC* and *MCFL*. The Court could have held, as did the Court of Appeals, that the Chamber of Commerce should be regarded as an ideological corporation like MCFL because one of the Chamber’s principal activities was to disseminate ideas and because the Chamber is funded by dues from members sharing its political goals rather than by revenues from profit-making activity. The briefs in *Austin* focused on this issue: most of the amici briefs were filed by ideological groups arguing on behalf of the appellee Chamber of Commerce that the case should be governed by *MCFL*. Also, the Court could have held that, even if the Chamber of Commerce differed from the corporation involved in *MCFL*, the restriction was constitutionally prohibited because it related to the directly expressive category of expenditures rather than to the less protected category of contributions.

Despite these available approaches, the Court narrowly applied *MCFL*. The Court held that the Chamber, although nonprofit, could be regulated because the Chamber was not formed for the express purpose of promoting political ideas, members received nonpolitical benefits from the Chamber and so would be reluctant to disassociate, and the Chamber could be used to funnel money from business corporations. Underlying the Court’s narrow


38. *See supra* note 7 (discussing distinction between expenditures and contributions).
reading of *MCFL* is an emphasis on the Chamber's adoption of the corporate form—"the unique state-conferred corporate structure that facilitates the amassing of large treasuries." The Court rejected arguments that the statute was overinclusive in reaching close corporations that did not amass politically potent wealth and underinclusive in not applying to unincorporated labor unions, because the state was entitled to single out firms adopting the special advantages of the corporate form.

In short, the post-*Bellotti* cases culminating in *Austin* whittled Justice Powell's broad recognition of First Amendment protection of corporate political speech down to protection of corporate political activities in referendum contests, and of narrowly defined *MCFL*-type corporations. *Austin*’s and *Bellotti*’s polar positions cannot both be correct. The rest of this Article presents an economic basis for choosing between them.

**II. BALANCING FIRST AMENDMENT RIGHTS**

Before discussing the appropriate scope of First Amendment protection of corporate speech, it is necessary to place this analysis in a general First Amendment framework. Speech is not absolutely protected, but rather is accommodated with other social interests. Interests cited as justifying corporate speech regulation include "corruption" of the political process and protection of shareholders. This suggests a pragmatic approach to the scope of First Amendment protection of corporate speech that considers both the costs and benefits of regulation. The best articulation of such an

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39. *Austin*, 494 U.S. at ___, 110 S. Ct. at 1398. Along similar lines, the Court upheld the statute's distinction between all corporations and all unincorporated associations against an Equal Protection argument because of the state's interest in protecting against "political 'war chests' amassed with the aid of advantages given to corporations." *Id.* at ___, 110 S. Ct. at 1401.

40. *Id.* at ___, 110 S. Ct. at 1398.

41. *Id.* at ___, 110 S. Ct. at 1401. The Court noted that because employees can refuse to contribute to a union's political activities while remaining a member in other respects, funds for a union's activities reflect members' political support. *Id.* at ___, 110 S. Ct. at 1400-01. But this characteristic is unrelated to the unincorporated form of organization.

42. The Court also rejected a challenge that distinguishing corporations from other speakers violated corporations' Equal Protection rights under the Fourteenth Amendment. *Id.* at ___, 110 S. Ct. at 1401-02.

There were strong dissents by Justice Kennedy, writing for Justices O'Connor and Scalia, and by Justice Scalia writing separately. Justice Scalia's separate opinion frontally attacked the justifications advanced for government regulation of corporate speech. Justice Kennedy's opinion also questioned these justifications, but mainly criticized applying these justifications to issue-centered nonprofit corporations like the Michigan Chamber of Commerce and emphasized the need to protect the activities of this sort of association.


44. See supra Part I and infra Part IV.
approach is by Judge Richard Posner.\textsuperscript{45} Posner builds on Judge Hand's rule that a court should determine the constitutionality of a speech restriction by asking "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."\textsuperscript{46} Posner reduces this to the formulation that the regulation should be sustained only if

\[ B < PL, \]

where \( B \) is the cost of the regulation (including any loss from suppression of valuable information), \( P \) is the probability that the speech sought to be suppressed will do harm, and \( L \) is the magnitude (social cost) of the harm.\textsuperscript{47}

More specifically, under the Posner formulation \( B \) equals the social loss from suppressing the information (\( V \)) plus error costs (\( E \)) of trying to distinguish valuable from undesirable information, and \( L \) is discounted to present value. Thus, the formula becomes \( V + E < P \times L/(1 + i)^n \), where \( n \) is the number of periods between the speech and the expected harm and \( i \) is the discount rate.\textsuperscript{48}

Under this balancing process, the Court should consider both the benefits of regulation and its negative effects on speech. The latter include the effect on interest group power and reduction of information discussed in Part II (C). The \textit{Austin} Court implicitly considered the cost of regulation in holding that a state concern with corporate "corruption" of the political process could sustain even regulation of politically impotent closely held firms. The Court's holding can be explained on the basis that the regulation's negative impact on speech is not so great as to require careful balancing and narrow tailoring. Justice Scalia's dissent sharply criticized the Court's holding "that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere potential for producing social harm."\textsuperscript{49}

Some may object to the quantification that seems inherent in the Posner formulation. Indeed, the formulaic presentation is startling when compared with the vagueness that generally characterizes constitutional analysis. But as already discussed the Posner formula only makes explicit what is implicit in the Court's balancing process. This clarity aids analysis unless it is carried too far by inserting arbitrary numbers for symbols.

\begin{itemize}
  \item \textsuperscript{46} United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), \textit{aff'd}, 341 U.S. 494 (1951). Posner quoted Judge Hand's rule but noted that Hand meant "probability" instead of "improbability." Posner, \textit{supra} note 45, at 8 & 8 n.27.
  \item \textsuperscript{47} Posner, \textit{supra} note 45, at 8.
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1413 (1990) (emphasis in original).
\end{itemize}
A more serious objection to the Posner formulation is that it invites weighing the inherent value of speech. For example, Posner argues for the curtailment of Nazi and Klan speech partly on the basis that “[t]he ideas that the Nazis and the Ku Klux Klan propagate are as worthless as they are vicious.” He adds that “while Communist dogma cannot be dismissed so readily, the political successes of Communism have been due largely to force rather than persuasion.” The latter statement suggests either that Communist speech is inherently less worthy of protection because it may be connected with the use of force, or that speech connected with force should not be absolutely protected. There is an important difference between these two conclusions: the first is questionably based on the value of the speech, while the second is more soundly based on the weight of the state interest (that is, protecting against force) balanced against it. Thus, it is appropriate to qualify the Posner analysis by avoiding subjective conclusions about the merit of speech and concentrating instead on the specific costs of regulation.

Application of the balancing test might be qualified in the present context if regulation of corporate speech is appropriately characterized as general regulation of conduct that only incidentally impacts speech. In this situation, a sort of presumption favoring the regulation applies under United States v. O’Brien. O’Brien held that a government regulation requiring draft registrants to carry draft cards could be sustained and appropriately applied to the symbolic act of draft card burning if, among other things, the regulation furthers a substantial government interest “unrelated to the suppression of free expression,” and if the restriction on speech is no greater than essential to further the government activity. Thus, if a speech restriction is “speech-neutral,” the restriction may be sustained if it is “content-neutral.” This test was most recently applied in Barnes v. Glen Theatre, Inc. to sustain the regulation of nude dancing where such regulation was incidental to the general regulation of public nudity.

51. Id. at 6-7.
52. Posner himself is ambiguous on this point, particularly regarding obscenity. At one point he says that he is “dubious” about assigning a minimal value to “obscene” speech, but at another is willing to assign a low value to obscenity for purposes of dismissing error costs in this area as “de minimus.” Id. at 11 & 28-29.
A lower standard of scrutiny for "speech-neutral" regulation applies because such regulation is unlikely to have a speech-suppressive purpose that is contrary to the goals served by the First Amendment, and involves a low likelihood that any nonspeech justification that government asserts for the restriction is merely a pretext for suppressing speech rather than a legitimate state interest. In other words, speech-neutrality is relevant both to the burden on speech (B in the Posner equation) and to the justification for regulation (Posner's PL).

The *O'Brien* test is not, however, applicable to corporate speech. Corporate speech restrictions clearly affect speech rather than merely expressive conduct, as do any contribution and expenditure limits. Unlike the draft card rule involved in *O'Brien*, corporate speech restrictions cannot be characterized as general restrictions that only incidentally affect speech. Rather, the restrictions only address specific types of communication that assist or oppose a candidate in a political election or do not "materially affect[ ]" the speaker's business.

Moreover, the fact that restrictions single out corporate speech does not make them relatively innocuous time, place, and manner restrictions, but rather makes the restrictions content-oriented because they differentially affect certain viewpoints. The corporate features of limited liability and

56. See Posner, supra note 45, at 18 (stating that speech-directed regulation is more likely to have "impermissible . . . purpose"); Stone, Content Regulation, supra note 54, at 227-33.

57. See supra notes 53-56 and accompanying text (discussing speech versus conduct distinction); infra notes 88-113 and accompanying text (discussing who within corporation should be regarded as engaging in this speech).

58. For opposing arguments that corporate speech restrictions are general, and therefore neutral, in the sense that they apply irrespective of the position advocated by the speaker, see Buckley v. Valeo, 424 U.S. 1, 257 (1976) (dissenting opinion of Justice White) and J. Skelley Wright, *Politics and the Constitution: Is Money Speech*, 85 YALE L.J. 1001, 1009 (1976).


60. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 784-86 (1978), in which the majority condemned the statute on this ground.


62. For arguments that differential effects should be deemed significant, see BeVier, supra note 59, at 1061 (arguing that speech restrictions may be effectively nonneutral because restrictions on certain activities are tied to political agendas opposed by spending reformers); John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 416 (1980); Stone, Content Regulation, supra note 54, at 248-50 (emphasizing nonneutrality of certain speaker-based restrictions, like those concerning independent candidates).
specialization of risk-bearing and management functions are particularly suited to profit-seeking, capital-intensive endeavors requiring complex decisionmaking.\(^6\) It follows that corporate speech restrictions peculiarly affect advocacy of profit- and producer-oriented activity. This differential effect is exacerbated by the \textit{MCFL} rule that speech by issue-oriented corporations is entitled to greater First Amendment protection than is speech by typical profit-oriented companies.\(^6\) In short, where the statute draws these sorts of lines, it should no longer be entitled to \textit{O'Brien}'s presumption of validity.\(^6\)

The most that can be said to justify applying only limited scrutiny to corporate speech restrictions is that the corporate speech restrictions are not the sort of classic content-oriented censorship involved in, for example, the Indiana antipornography law struck down in \textit{American Booksellers Association, Inc. v. Hudnut.}\(^6\) But since \textit{O'Brien} does not apply to corporate speech restrictions, the content-neutrality of the speech restrictions does not justify according special deference to the government justification.

III. Theories of the Corporation

The Supreme Court's application of the First Amendment to corporate speech depends on its theory of the corporation. Specifically, it matters whether the Court treats the corporation as a contract that is entitled to the same constitutional treatment as other contracts, or whether it characterizes incorporation as a state privilege, or at least as a special sort of contract for which mandatory legal rules are appropriate.

A. Incorporation as a State Privilege

Justice Rehnquist argued in his \textit{Bellotti} dissent that corporate political speech is not protected simply because this is not one of the privileges states


\(^{64}\) The differential effect persists even as to financial restrictions that apply to both unions and corporations, because unions have an advantage in securing their members direct political efforts. See Bolton, supra note 62, at 415-16. In any event, the regulation in \textit{Austin} singled out corporate activities and excepted unions.

\(^{65}\) For similar arguments, see the concurring opinion of Judge Posner in the lower court, Miller v. Civil City of South Bend, 904 F.2d 1081, 1089-1104 (7th Cir. 1990), \textit{rev'd sub nom.}, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), and the dissenting opinion of Justice White (joined by Justices Marshall, Blackmun and Stevens) in \textit{Barnes}, 111 S. Ct. at 2471, emphasizing that the statute at issue did not ban all nudity, but only nudity in certain contexts. Justice White's position on nude dancing contrasts interestingly with his refusal to accept the same line of reasoning regarding corporate speech. See supra note 45.

\(^{66}\) 771 F.2d 323 (7th Cir. 1985), \textit{aff'd without opinion}, 475 U.S. 1001 (1986).
have chosen to confer on their legal creations. Although this position was firmly rejected by the *Bellotti* majority, the broad view of the state's power to regulate corporate speech adopted in such recent cases as *NRWC* (an opinion written by Justice Rehnquist) and *Austin* indicates that the theory may be at least operating in the background. Moreover, the Supreme Court has cited the "state-privilege" theory in other contexts. The Court long ago held that corporate "privileges" are an important basis for the special tax on corporations. It also used the theory of state creation of corporate rights to justify state antitakeover legislation against a Commerce Clause challenge. As applied to the First Amendment, the theory is that individuals securing the benefit of corporate features should be denied First Amendment rights because these features are created by the states. If this theory is accepted, it obviously would make unnecessary any further analysis of the constitutional protection of corporate speech.

The state-creation or state-privilege theory is deeply flawed as a justification for denying First Amendment protection to corporate speech. Corporate features are adopted by private contract rather than as a result of legislative favor as they were at the time of *Dartmouth College*. The state-privilege argument is not supported by the need for a state filing, any more than it is in other contexts such as security agreements under Article 9 of the Uniform Commercial Code. Nor is limited liability state-created since this feature can be achieved by both corporate and noncorporate firms

67. See supra text accompanying notes 21-24 (discussing Justice Rehnquist's *Bellotti* dissent).
69. The state-privilege argument was an important basis for the state court decision upholding more than seventy years earlier the constitutionality of the Michigan statute involved in *Austin*. See People v. Gansley, 158 N.W. 195 (1916).
70. Flint v. Stone Tracy Co., 220 U.S. 107 (1911). The Court stated: "The tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals . . . the continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." *Id.* at 162. See also Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, WASH. U. L.Q. (forthcoming 1992).
71. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 91 (1987) (stating that it is "an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares").
73. See Butler & Ribstein, *Contract Clause, supra* note 72, at 775.
largely by private contract. Even in tort cases limited liability can be characterized as simply the state's refusal to extend vicarious liability beyond the assets invested in a firm. That the state recognizes this feature of the parties' contract no more establishes that corporations are state-created than the nonliability of creditors for corporate torts shows that credit contracts are "state-created."

Even if individuals doing business in the corporate form did derive their powers from the state rather than from private contract, it still would not follow that the states should be free from constitutional scrutiny should the states make the privileges of incorporation conditional. First, such limitations may be regarded as an unconstitutional condition on corporate privileges. Government exercise of power should be subject to constitutional safeguards even if it only reduces the value of government-conferred privileges. Second, the First Amendment protects interests other than those of corporate speakers who have availed themselves of the corporate "privilege."

Justice White's *Bellotti* dissent articulated a rationale for limited constitutional protection of corporate speech that is at least superficially similar to Rehnquist's state-creation theory. Justice White reasoned that states ought to be able to prevent corporations from using their state-conferred advantages to dominate the political process. This could be described as the "Frankenstein" theory of corporate speech: The state should be able to build limits into its creatures to prevent them from destroying its creators.


75. See id. at 127-29 (discussing limited liability with respect to involuntary creditors and concluding that limited tort liability should not be regarded as privilege conferred by state).


Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.

77. See Epstein, *supra* note 76, at 102-03.

78. See infra section IV(A)(2).

79. See Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First
Unlike Justice Rehnquist's state-creation theory, however, Justice White's theory seems to predicate the state's power not on the idea that corporate speech is unprotected, but rather on a finding of harm to the political process.  

B. The Regulatory Theory of the Corporation

The "state-privilege" argument is an artifact of history. But some modern scholars adhere to a regulatory theory of the corporation under which corporate contracts should be regulated more extensively than ordinary contracts. There is an extensive counter-literature advocating a contract theory of the corporation that shows how efficient contractual forms have evolved within the corporate firm and that regulation may be costly. As discussed throughout the remainder of this Article, the Supreme Court implicitly has accepted the regulatory view by assuming that regulation is necessary to remedy supposed inadequacies in private contracting within the firm. This Article also asserts, consistent with the contract theory of the corporation, that the Court's assumptions are unwarranted.

IV. A Theory of First Amendment Protection of Corporate Speech: The Costs of Regulation

In evaluating the constitutionality of corporate speech restrictions, it is necessary first to consider precisely why the First Amendment protects corporate political speech at all. Justice Powell quickly disposed of this question in Bellotti, noting that a corporation, as a "person," is surely entitled to First Amendment protection. This assertion does not, however, clarify the scope of constitutional protection of corporate speech. Because a corporation has the legal attributes of a "person" only by operation of


80. See infra text accompanying note 199.
81. See Butler & Ribstein, Opting Out, supra note 72, at 4 n.9 (extensively citing relevant literature); Ribstein, supra note 74, at 84 n.11 (same).
82. See Butler & Ribstein, Opting Out, supra note 72, at 3 n.3 (citing relevant literature).
83. See supra text accompanying notes 8-9 (discussing Supreme Court's protection of corporate speech under Bellotti). The language of the First Amendment seems straightforwardly to protect corporate speech because, rather than providing for any particular object of protection, it simply says that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. amend. I. The Fourteenth Amendment provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. See Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886) (holding that "person" includes corporations). See also Bellotti, 435 U.S. at 780 (holding that artificial persons are protected concerning denial of "liberty," including First Amendment rights); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (same).
law, the policies underlying the law ultimately determine the extent to which a corporate person has particular attributes for purposes of constitutional protection. The Fifth Amendment illustrates this point, providing that no "person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Although, as just noted, a corporation has long been held to be a "person" for purposes of protection by the Due Process clause, this holding was based on protecting shareholders' property rights. It does not necessarily follow, for example, that the shareholders' individual privacy rights also extend into the corporation. Accordingly, the Court has held that the self-incrimination clause protects only individuals, and so cannot be used to protect a custodian of corporate records from having to produce those records.

By the same token, even if the corporation is a constitutional "person," it does not necessarily follow that its speech is accorded the same protection as individuals' speech. The degree of protection depends on the application of the balancing test discussed in Part II. Accordingly, it is necessary to look beyond the literal text of the Constitution to determine whether, and to what extent, corporate speech is entitled to protection.

This Part develops a theory of First Amendment protection of corporate speech. It begins in subpart A by identifying the interests represented by the "corporation" that potentially deserve First Amendment protection, including the interests of managers, shareholders, and listeners. Subpart B, building on the economic theory of interest groups, demonstrates precisely

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84. Indeed, the legal concept of the corporation has fluctuated throughout history, from the original concept of the corporation as a state-created entity, through the concept of the corporation of an aggregate of its owners, and finally to a concept that has mixed aggregate and entity elements. For a history of concepts of the corporation, see Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. Va. L. Rev. 173 (1985). For other histories building largely on Horwitz, see William W. Bratton, The New Economic Theory of the Firm: Critical Perspectives from History, 41 Stan. L. Rev. 1471 (1989); Gregory A. Mark, Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441 (1987); David Millon, Theories of the Corporation, 1990 Duke L.J. 201.


86. See Horwitz, supra note 84; O'Kelley, infra note 88; Mark, supra note 84.

87. See United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911). In Braswell v. United States, 487 U.S. 99 (1988), the Court carried this distinction to the extreme of denying the self-incrimination privilege to production of documents by the sole shareholder of a corporation.
how these interests are affected by regulation that only restricts corporate activity while leaving individuals free to speak in other ways.

A. Identification of Protected Interests

The corporation, as a nexus of contracts, obviously cannot be "speaking." Accordingly, corporate speech should be constitutionally protected only to the extent necessary to protect the rights of individuals connected with the corporation. In closely held corporations with decentralized management, the owner-managers usually are speaking for the corporation. In publicly held corporations, however, there is some question as to who the speakers are, and therefore who, if anyone, should be protected by the First Amendment. Before considering the extent of constitutional protection that should be accorded corporate speech, it is necessary first to consider precisely whose First Amendment interests are at stake, particularly in publicly traded corporations.

1. Corporate Speakers: Managers and Claimants

In a publicly held corporation with centralized management, corporate speech, like other corporate conduct, originates from the managers rather than the shareholders. If the managers speak as agents of the shareholders or others in the corporation, the relevant protected interest belongs to the shareholders the managers represent. If managers speak on their own behalf, their own speech interest should be constitutionally protected. This is clearest when managers' speech is supported by their compensation paid directly in money or indirectly by the corporation's authorization of the authorizing managers' use of corporate funds for "personal" speech. Moreover, managers' speech should be protected even if they are spending shareholders' money without authority. First Amendment protection does not depend on the legitimacy of the source of the funds used to support the speech. Such a distinction would be impossible to make, because even direct compensation may be "excessive" in the sense that it results from managers' abuse of their power to fix their own pay. In any event, this is strictly a matter of contracting within the firm. Perhaps, to aid contracting between


89. This point is recognized even by a prominent critic of corporate speech rights. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 219-20 (1989).

90. For a contrary view, see Brudney, supra note 88; Schneider, supra note 79, at 1266. See also CHARLES E. LINDBLOM, POLITICS AND MARKETS 192-94 (1977) (discussing unconstrained ability of businessmen to draw on corporate resources to support political activities).
shareholders and managers, the state should be able to regulate this activity notwithstanding the First Amendment. But that relates to government interests justifying the regulation, and not to determining whether there is any constitutionally protected interest.\footnote{11. For criticism of the shareholder-protection rationale for regulating corporate speech, see infra section V(A).}

If the managers speak as agents, shareholders might be regarded as the principals because of their powers to elect and remove directors and their powers to sue managers who fail to manage according to what is in the shareholders' interests. However, several problems exist with characterizing shareholders as the principals. First, corporate speech expresses shareholder views only in a very attenuated sense. Shareholders arguably approve corporate speech because they can constrain the managers to speak on their behalf through such devices as fiduciary duty rules and the power to vote the directors out of office. But the business judgment rule provides broad latitude for corporate political activity.\footnote{92. See Shlensky v. Wrigley, 237 N.E.2d 776 (1968) (sustaining business decision motivated partly by nonbusiness objectives). See also A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, appeal dismissed, 346 U.S. 861 (1953) (holding charitable gift not ultra vires).} And because management changes are costly, shareholders will undertake such a change to constrain only very costly corporate speech. In other words, the managers' speech is not so much authorized by the shareholders as not significantly contrary to their interests.\footnote{93. Perhaps as large institutional shareholders become more active in corporate governance, corporate speech can be more closely identified with specific shareholders. For a comprehensive reexamination of the passive-shareholder view of public corporation governance see Bernard S. Black, \textit{Shareholder Passivity Reexamined}, 89 Mich. L. Rev. 520 (1990). At this point, new trends in shareholder monitoring have not developed to the point where large shareholders can be identified with specific corporate activities.} Moreover, most individuals either hold a diversified portfolio of investments or invest in corporations only indirectly through institutions such as mutual funds.\footnote{94. Cf. Steven Shiffrin, \textit{The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment}, 78 Nw. U. L. Rev. 1212, 1246-47 (1983) (citing these circumstances as undercutting constitutional protection of corporate speech).} In either event, investors normally care little about the internal affairs of individual companies or statements or expenditures made by their managers.

Second, managers may speak for parties other than shareholders to the corporation's contracts. It is true that directors normally are elected only by shareholders, while creditors and others rely on the corporation's performance of specific contractual obligations to pay wages, repay debt and the like. The shareholders' contracts therefore seem to differ from those of other corporate claimholders in a way that arguably makes shareholders uniquely responsible for managers' speech. But other claimants can check managerial conduct. For example, creditors may have significant monitoring rights, particularly in insolvent or nearly insolvent firms.\footnote{95. \textsc{Nicholas Wolfson}, \textit{The First Amendment and the SEC}, in \textsc{Corporate First Amendment Rights and the SEC} 111, 123 (1990) (questioning whether creditors should be distinguished from shareholders since both groups are investors who differ only regarding the form of their contracts).} Workers may
have considerable say through their power to strike or quit. Moreover, the legal recognition of shareholders as principals recently has been breaking down. Some commentators argue that managers should act on behalf of stakeholders other than shareholders, particularly in connection with resisting takeovers. There is some case law support for this view and many state statutory provisions permit or require directors to consider non-shareholder constituencies in making corporate control decisions.

Thus, in light of both the attenuated shareholder responsibility for corporate speech and the managers' emerging responsibilities to "stakeholders," corporate speech may represent the views primarily of managers rather than of any particular nonmanagerial participants in the corporate enterprise.

However, it does not follow from shareholders' attenuated role as corporate speakers that corporate speech deserves only weak First Amendment protection. Such a result could be based only on a strong regulatory theory of the corporation under which agency problems merit mandatory rules. Instead, any such agency problems should be analyzed from the standpoint of justifying state interference with a constitutionally protected interest, rather than negating the existence of that interest.

2. Protecting Rights of Non-Speakers

Speaker-based protection is neither the only nor even the most widely accepted theory of First Amendment protection. The most important early

96. See John C. Coffee, Jr., The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups, 1988 Wts. L. Rev. 435, 448 (asserting that board should be viewed as "mediator" to enforce implicit contracts among shareholders and other constituencies); E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees, 45 HARY. L. Rev. 1145 (1932); Martin Lipton, Takeover Bids in the Target's Boardroom, 35 BUS. LAW. 101, 120 (1979); Morey W. McDaniel, Bondholders and Stockholders, 13 J. Corp. L. 205 (1988) (advocating fiduciary duties to bondholders); Lewis D. Solomon & Kathleen J. Collins, Humanistic Economics: A New Model for the Corporate Social Responsibility Debate, 12 J. CORP. L. 331 (1987); William H. Steinbrink, Management's Response to the Takeover Attempt, 28 CASE W. RES. L. Rev. 882 (1978).

97. See Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972) (upholding defensive stock issuance partly on ground that the target, a large urban newspaper, was "quasi-public institution"); Wieboldt Stores, Inc. v. Shottenstein, Fed. Sec. L. Rep. (CCH) ¶ 94,872 (N.D. Ill. 1988) (holding that corporation, acting on behalf of unsecured creditors, could sue directors for approving LBO on ground that board had duty to determine whether LBO was in best interests of corporation as well as shareholders); GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016 (S.D.N.Y. 1985) (upholding "pension parachute" that vests "excess" funds in pension plan to assure workers that such funds will not be used by bidder).


99. See infra section V(A) (discussing proposition that state law control of agency costs does not, in fact, justify the regulation).

100. Perhaps the leading proponent of the speaker-based protection theory is Professor C. Edwin Baker, who argues that speech is protected to the extent that it promotes the
basis of First Amendment rights is J.S. Mill’s argument that free speech is essential to the discovery of the truth.101 As Justices Holmes and Brandeis said in their famous Abrams dissent, “the ultimate good desired is better reached by free trade in ideas... [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”102

Because facts are inherently subjective and “truth” is unattainable, free speech is important to help people make decisions in a democratic society. This philosophy could be extended to all decisions free people make for themselves,103 or narrowed to political decisions.104 In the words of one prominent commentator:

[T]he purpose of [the First Amendment] is not to protect the need of Hitler or Lenin or Engels or Marx “to express his opinions on matters vital to him if life is to be worth living.” We are not defending the financial interests of a publisher, or a distributor, or even of a writer. We are saying that the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.105

These nonspeaker-based theories of First Amendment protection would support constitutional protection for corporate speech apart from protection autonomy of the individual. See generally Baker, supra note 89. Baker would refuse to protect corporate speech, but he would do so not because corporate speech generally does not represent the expression of the shareholders’ views, but because it is market-driven and therefore does not serve individual autonomy. See id. at 219-24; C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1, 34-40 (1976); C. Edwin Baker, Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech, 130 U. PA. L. REV. 646 (1982). The peculiarly sweeping nature of this limitation is criticized in Shiffrin, supra note 94, at 1249-51.

101. See JOHN STUART MILL, ON LIBERTY ch. 2 (1st ed. 1859). Another famous early source of First Amendment theory is JOHN MILTON, AREOPAGITICA—FOR THE LIBERTY OF UNLICENSED PRINTING (1644):

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter?

Id. at 51-52. For another prominent theory emphasizing the truth-discovering role of free speech, see Emerson, supra note 43 (stating that “attainment of truth” is one of four fundamental values underlying right to freedom of expression, along with “self-fulfillment,” “participation in decision-making” and achieving “balance between stability and change”).


104. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521 (arguing that freedom of speech is important in checking abuse of official power); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971) (asserting that First Amendment is intended to protect constitutional processes of government and should not be extended beyond this sphere).

105. MEIKLEJOHN, supra note 104, at 91.
of self-expression by individuals connected with the corporation. Significantly, this was the theory that Justice Powell stressed in *Bellotti*, saying:

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.\(^{106}\)

Justice Powell's *Bellotti* opinion endorsed in other ways the inherent value of speech. He noted that the recognition of First Amendment rights of corporations engaged in the communications business were based partly on the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas"\(^{107}\) rather than on the idea that the First Amendment protects only property rights.\(^{108}\) In *Austin*, Justice Powell also supported the informational role of the First Amendment, recognizing the rights of corporations to engage in commercial speech.\(^{109}\) Indeed, Justice Powell noted that, by limiting corporations to views "materially affecting" their business, the legislature exacerbated the First Amendment problem by attempting "to give one side of a debatable public question an advantage in expressing its views to the people. . . ."\(^{110}\)

The Supreme Court has not, however, completely rejected a speaker-based theory of the First Amendment. The Court has distinguished expenditures and contributions primarily on the speaker-based ground that the former is the more expressive activity.\(^{111}\) Additionally, Justice White's dissenting opinion in *Bellotti* emphasized the "self-fulfillment" function of the First Amendment,\(^{112}\) a position that seems to have gained acceptance in post-*Bellotti* corporate speech cases that focus on whether the speech represents shareholder views. But Justice Powell's explicit recognition of the broad social interests furthered by free speech remains a significant basis of constitutional protection of corporate speech.

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108. The *Austin* Court also held that the statute's distinction of media corporations did not violate equal protection because, even if the press was not constitutionally entitled to greater protection, the state could recognize the press' important role in the collection and dissemination of information. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, —, 110 S. Ct. 1391, 1401-02 (1990).

109. *Id.* For an important commercial speech case stressing the inherent value of speech to society rather than the self-expression by the speaker see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

110. *Bellotti*, 435 U.S. at 785 (footnote omitted).

111. See supra note 7.

112. See supra text accompanying note 17.
All of this is not to suggest that speakers' rights can be wholly separated from the rights of others affected by restricting speech. The speaker has no practical interest in "speech" that no one hears, and the listener cares who is uttering the speech. Nevertheless, the interests of speakers and others may differ. This is particularly true in the corporate context, where the speech may be valuable even if there is no clearly identifiable speaker.113

B. The Effect of Corporate Speech Restrictions: An Interest Group Analysis

Even if there are individual interests at stake in protecting corporate speech, some members of the Court have asserted that these interests are trivial because regulating corporate speech leaves individuals connected with the corporation free to support political action directly.114 However, this argument ignores the economics of interest groups, as well as the important effects of corporate political activity restrictions on both corporate speakers and on society.

1. Effect on Speakers

Interest group theory is a positive theory of the forces that actually produce government action, as distinguished from normative theories of how government ought to act.115 Because interest group theory models how government works, it is obviously relevant to interpretations of the First Amendment based on the importance of free speech to constitutional processes of democratic government.

Under interest group theory, politicians broker wealth transfers (such as subsidies, tax reductions, and trade barriers) to interest groups that function as demanders of legislation.116 These groups pay politicians (in the form of votes, contributions, expenditures, junkets, employment for politicians' associates, and so forth) to effect these transfers. A group will pay no more than $1 to receive $1 of transfers and, by a parity of reasoning,

113. See infra section IV(B)(2) (discussing social effects of corporate speech restrictions).
114. See Austin, 494 U.S. at —, 110 S. Ct. at 1398; Bellotti, 435 U.S. at 807-09 (White, J., dissenting). Restrictions on corporate campaign expenditures and contributions also leave corporations free to engage in other political activity such as lobbying, but this is clearly not a full substitute for the restricted activity.
will suffer a $1 transfer if it would have to pay more than $1 to avoid the transfer.

An important point both for interest group theory in general and for corporate speech in particular is that wealth transfers occur because of differing organization costs among interest groups. An interest group that receives $1 benefit from a wealth transfer will pay $1 less the cost of receiving the benefit. This cost includes resources expended to learn the effects of legislation and to identify and communicate with other potential group members who may be affected.\textsuperscript{117}

If these organizational costs were the only ones that mattered, larger groups often would have an advantage over smaller groups because scale economies of organization would cause costs to increase more slowly than benefits with increases in size. But scale economies of large groups are offset by the “free rider” problem: while benefits are shared by all members of the group, the costs may be incurred by a few organizers who cannot cheaply force the other group members to bear their share of the costs.\textsuperscript{118}

Thus, although total benefits to large groups may increase more quickly with the increasing size of the group than the organization costs identified in the previous paragraph, the costs of overcoming the free rider problem rise just as rapidly with the increasing size of the group. This explains why relatively small interest groups, such as those consisting of producers, often can outbid much larger groups consisting of most voters.\textsuperscript{119}

As an example of the foregoing, suppose group A can gain a gross marginal benefit of $1 from a wealth transfer at a total marginal organizational cost (including the costs of overcoming the free rider problem) of $.50.\textsuperscript{120} Suppose group B will lose $1 from the transfer and has organizational costs of $.60. In this situation, group A can “bid” $.50 to effect the transfer, while group B can bid no more than $.40.\textsuperscript{121}

\textsuperscript{117} See McCormick & Tollison, supra note 115, at 17; Stigler, supra note 115, at 10-13. This information cost factor in interest group formation links Stigler’s interest group theory with his seminal work in information theory. See George J. Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961).

\textsuperscript{118} This problem was emphasized in the pioneering work on group formation, Mancur Olson, The Logic of Collective Action (1965). For some other discussions of the importance of free riding in interest group theory, see McCormick & Tollison, supra note 115, at 17-18; Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Quart. J. Econ. 371, 377 (1983); Robert D. Tollison, Public Choice and Legislation, 74 Va. L. Rev. 339 (1988).

\textsuperscript{119} Mancur Olson refers to the latter as “latent” groups. See Olson, supra note 118, at 48-52.

\textsuperscript{120} Note that there may be no “free rider” costs if a single member will incur a substantial loss or gain from a wealth transfer without any organizational effort to devise incentives or penalties. Also note that marginal organizational costs of seeking a wealth transfer normally will be lower for existing than for forming groups.

\textsuperscript{121} The following graph, drawn from graphs in McCormick & Tollison, supra note 115, at 19-20, captures these insights:
A final factor in the interest group analysis critical to the corporate speech issue is that many interest groups, including corporations, have important nonpolitical features, such as mutual assistance of the members or profit-making activities. These groups can support political activities.

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**FIGURE I**

This graph assumes wealth transfers worth $1. The horizontal line at $1 is what all groups would pay in the absence of organizational costs to effect and avoid transfers. Under this zero-organizational-cost assumption there would be no wealth transfers. More generally, wealth transfers depend on heterogeneous organization costs. See id. at 25-27.

The graph reflects that groups with more than $1 of organization costs would "pay" less than 0 for $1 of wealth transfers. The downward sloping demand curve (D) reflects what interest groups with different organization costs would pay for $1 of wealth transfers. Groups with demand prices between $P^*$ and $P^* - f$ cannot outbid groups with demand prices higher than $P^*$ but, given the costs (f) of running the system, they can bid enough to resist the transfer. The upward sloping supply curve (S) is simply the demand curve turned around and increased at every point by a constant amount (f) which represents the direct costs of operating the political transfer system. The intersection of S and D (P) is a transfer point: groups with organization costs less than (above and to the left of) this point will pay for wealth transfers provided by interest groups with organization costs more than (below and to the right of) $P^* - f$.

122. As discussed *infra* text accompanying notes 206-10, this factor applies fully to both for-profit and "ideological" corporations.
out of the revenues generated by their nonpolitical activities in excess of the costs of these activities. Such organizations have low marginal costs of political organization because they obtain collective goods as a "by-product" of their organization for noncollective reasons. Because of this factor, corporate speakers may be more likely to be at the left of the transfer point (that is, will receive rather than supply wealth transfers) than some other groups or individuals who do not speak through the corporation.

It follows from the above analysis that regulations limiting corporate speech may have a significant adverse effect on the level of political activity because they force corporate participants to incur additional organization costs in order to act collectively. This makes the corporate mechanism a nontrivial mechanism of expression, and therefore raises significant First Amendment concerns. Ironically, this justification for constitutional protection occurs precisely because of a factor the Supreme Court has emphasized as supporting restrictions on corporate speech: the combination of political and nonpolitical benefits.

Restrictions on corporate speech do not, of course, make it impossible for corporate participants to express corporate views individually. Individual managers or shareholders may act politically both independently and through political action committees. Election laws currently permit corporations to use treasury funds to administer PACs, and there are many wealthy and active business-oriented political action committees. Moreover, cor-

123. Mancur Olson refers to this as the "by-product" effect. See Olson, supra note 118, at 132-67. See also McCormick & Tollison, supra note 115, at 17; Posner, supra note 115, at 342-43. Note that while the organizations may have low, or zero, marginal costs of generating funds for political purposes, they may have high opportunity costs of using the funds for political purposes. See infra text accompanying note 210.

124. This is relevant not only to speech by corporate participants but to these participants' associational freedom. For a discussion of associational freedom and application to both commercial and noncommercial firms, see Wolfson, infra note 2. For the Supreme Court's recognition that restrictions on political contributions and expenditures may impinge associational freedoms, see supra note 7.

125. This was an important basis for the Austin Court's distinction of MCFL. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. at 1391, 1398-1400 (1990).

126. The Supreme Court held that statutory limits on PAC expenditures were unconstitutional in Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 483 (1985). See supra note 29. The activities of such business-oriented groups as the Business Roundtable (consisting of chief executives of large corporations) and the United Shareholders of America might be sufficiently "expressive" of underlying member views to be protected under the MCFL rationale. This result is, of course, somewhat doubtful in light of Austin's refusal to protect the activities of the Michigan Chamber of Commerce.

127. See 2 U.S.C. § 441b(b)(2)(C) (1988) (exempting from restrictions on corporate and union expenditures and contributions amounts paid for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes.

corporations can engage directly in such political activities as lobbying and sponsoring political advertisements, and can achieve similar goals through nonpolitical activity such as litigation. But merely because corporate participants can employ these alternative means of expressing their views does not justify foreclosing one of the alternatives. Nonincorporated groups must incur additional organization costs. Thus, at the margin, political representation of corporate interests will be reduced. Second, the groups that are formed and whose activities are protected will represent different interests than the corporations whose speech is restricted. Finally, corporate activities other than direct contributions and expenditures may have limited effect. For example, because contributions buy access to candidates, lobbying without such contributions is likely to be less effective.

2. Social Effects

Corporate speech restrictions may affect society as a whole, not just corporate participants. This is relevant in light of the listener-rights basis of corporate speech protection.

First, restricting corporate political activity could cause laws to be inefficient by permitting noncorporate groups to dominate the political process. This concern is discussed below as the other side of the argument that restrictions on corporate speech are justified to prevent inefficiency resulting from imbalance.

Second, interest groups can constrain politicians to act in their constituents' interests. Because challengers need access to funds from interest groups to fund the costly campaigns necessary to unseat incumbents, campaign spending by challengers is particularly influential in determining

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129. See Austin, 494 U.S. at _____, 110 S. Ct. at 1425 (Kennedy, J., dissenting); see also Michael J. Malbin, Looking Back at the Future of Campaign Finance Reform, in Money and Politics in the United States 247, n.21 (Michael Malbin, ed. 1984) (noting low contribution ratios for employees solicited by corporate PACs).

130. As a result, restrictions on corporate speech may skew corporate political activity towards managers' interests and away from shareholders' interests. See infra text accompanying notes 160-66.


132. See supra section IV(A)(2).

133. See supra text accompanying notes 149-51.

134. See Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest and Public Agenda, 6 J.L. ECON. & ORGANIZATION 167, 186-87 (1990). Among other things, unconstrained legislators may act consistently with ideological preferences that are not shared by their constituents. See Joseph P. Kalt & Mark A. Zupan, The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions, 33 J.L. & ECON. 103, 103-06 (1990) (showing evidence that ideological voting of politicians is partly function of ability of voters to form coalitions, measured in study by degree to which voters in state conform to national political norm as indicating their heterogeneity).
election outcomes. Accordingly, laws that restrict interest group activity tend to favor incumbents. This, in turn, makes incumbents more secure in office and more able to indulge their personal ideologies or other preferences instead of constituents' preferences. This insight supports Justice Scalia's view in his *Austin* dissent that corporations are an important private check against abuse of official power. This reasoning also accords with a positive economic theory of the First Amendment. If people think they can win a race for political favor, they may oppose restrictions on lawmaking. But the constitution reflects the fact that most people know in advance, at the time the time constitutional restrictions are enacted, that they will be hurt by laws that favor incumbent politicians.

Third, restricting corporate speech may impose social costs by reducing the quantity and balance of information made available to voters. This consideration is particularly relevant to restrictions on campaign expenditures like those upheld in *Austin*. Because of the free-rider problem, voters often have little incentive to acquire information about political choices.

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135. For data showing the effects of challenger and incumbent spending, see GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS at 48-49 (1980); Gary C. Jacobson, *Practical Consequences of Campaign Finance Reform: An Incumbent Protection Act?*, 24 PUB. POL’Y I (1976).


137. Justice Scalia quoted de Toqueville:

Governments . . . should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.

*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, ---, 110 S. Ct. 1391, 1416 (quoting ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 109 (Bradley ed. 1948)). See also JAMES COLEMAN, THE ASYMMETRIC SOCIETY 51-55 (1982) (arguing that private organizations protect individuals from state power). Note that these arguments focus on private associations' ability to protect individuals from the "state." The more important point concerns protecting constituents form government agents.

138. This assumes that the expected gross gains exceed expected deadweight rent-seeking costs. For a discussion of rent-seeking costs, see supra Part III.


is one of the factors that lets relatively small interest groups obtain wealth transfers from much larger groups with higher organizational (including free rider) costs. Permitting expenditures by all competing groups can result in a more informed electoral choice, and thus benefit voters generally even more than it benefits the competing interest group. This is true whether the expenditures are in a referendum campaign, as in Bellotti, or in a candidate election, as in Austin. Indeed, expenditures by interest groups may be more important in the latter context as a way of exposing candidate contributions by other interest groups.

V. JUSTIFYING CORPORATE SPEECH REGULATION

Given the substantial First Amendment interests at stake, and accordingly a high B in the Posner formulation, in regulating corporate speech, the question then becomes whether this regulation can be justified by a sufficient state interest in regulation, PL in Posner's formula. Evaluation of some possible rationales for restricting corporate speech, including those given in the Supreme Court corporate speech cases, demonstrates that they do not justify regulation under the pragmatic approach this Article applies. A central problem with all of these rationales is that they are based on a regulatory theory of the corporation that underestimates the ability of private contracting to minimize agency costs related to corporate speech. Accordingly, these purported state interests do not outweigh the significant First Amendment interests that might be compromised by regulation.

A. Shareholder Protection and Agency Costs

Restrictions on corporate campaign contributions have been justified by some members of the Supreme Court as protecting shareholders from having to support views with which they disagree. Justice White's Bellotti dissent analogized corporate speech to compulsory flag salutes in schools and the

141. See Phillip Nelson, Political Information, 19 J.L. & Econ. 315, 327 (1976), arguing that "Even though contributions are being made for the most pernicious of purposes, the majority benefits. The payoff to other minorities is reduced more than the gain of the new contributors." Nelson adds: "One . . . expects limits on campaign financing to strongly favor minority interests against the majority." Id. at 329.

For an example of this phenomenon, see Don Phillips, "Bringing Truck Lobby to Screeching Halt," WASH. POST, June 15, 1991, at A1 (pointing out that railroads' advertising campaign showing danger of triple-trailer trucks offsets power of trucking lobby).

142. Justice Scalia's Austin dissent makes the point that the information that the corporation is behind the expenditure is relevant to voters.

Why should the Michigan voters in the 93d House District be deprived of the information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity? Austin, 494 U.S. at 1415, 110 S. Ct. at 1416.

143. See supra text accompanying notes 47 & 48.

144. See Bolton, supra note 62, at 377, noting early characterization of corporate speech as "embezzlement."
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use of employees’ compulsory union dues to finance political contributions.\textsuperscript{145} Justice White also reasoned that the state has an interest in ensuring that shareholders will not be deterred from investing in corporations because of unwillingness to support corporate political views.\textsuperscript{146} In \textit{NWRC}, Justice Rehnquist, writing for a unanimous Court, said that one of two purposes of federal restrictions on campaign contributions is to protect corporate shareholders or union dues contributors “from having that money used to support political candidates to whom they may be opposed.”\textsuperscript{147} Also, Justice Brennan’s \textit{Austin} concurrence emphasized the state’s “compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber’s political message.”\textsuperscript{148}

Before evaluating the Court’s theory, it would be helpful precisely to define the issue in economic terms. The shareholder-protection argument essentially asserts that restrictions on corporate political activity reduce a type of “agency cost” arising between corporate shareholders and corporate managers. Agency cost refers to the costs a principal incurs in delegating to an agent discretionary power over the principal’s resources. The agent may be tempted to take self-interested actions that impose costs on the principal. The principal has some incentive to reduce these costs by monitoring the agent or by establishing incentive devices. The agent also has an incentive to offer a bond by investing in assets (including reputation) that will be forfeited if the agent misbehaves. The parties to an agency relationship can be expected to contract so as to minimize the total of (1) monitoring costs; (2) bonding costs; and (3) residual losses imposed by agents on principals because of misaligned incentives despite monitoring and bonding.\textsuperscript{149} Because the parties will not willingly incur monitoring and bonding costs in excess of the amount these costs save in residual agency loss, their interests normally will be imperfectly aligned and the agent will have some incentive to benefit herself at the principal’s expense.

Managers’ use of corporate funds to invest in speech contrary to investors’ interests or beliefs can be regarded as a type of agency cost.\textsuperscript{150}


\textsuperscript{146} \textit{Bellotti}, 435 U.S. at 818-19.


\textsuperscript{150} There is agency cost even if the shareholders do not disagree with the speech, but do disagree with this use of corporate funds as opposed to other, more profitable uses.
Managers' and shareholders' interests are, in fact, likely to diverge regarding speech. Managers may advocate pet causes that do not relate to the corporation. Even speech that is apparently on behalf of the corporation may represent a divergence of interest because shareholders usually hold diversified portfolios of shares while managers often heavily invest human and financial capital in their corporations. Thus, managers may want to advocate wealth transfers to their own firms from others, while shareholders would regard such transfers as shifting wealth within their portfolios which imposes deadweight transfer costs. It is not even clear that shareholders would favor wealth transfers from noncorporate groups to corporations because they may lose as members of transferee groups (i.e., as consumers or employees).

The parties to the corporation have the incentive to invest in devices that minimize this divergence of interest up to the point that the cost of the devices exceeds the costs saved by instituting the controls. The cost of the devices could include direct enforcement costs or, less directly, the reduction of benefits from turning control of corporate speech over to managers. A law restricting political activities on behalf of corporations by corporate managers would accomplish the same purpose. Accordingly, corporate speech restrictions arguably serve rational economic goals (L in the Posner formula).

Notwithstanding these considerations, the shareholder-protection argument is a weak justification for corporate speech restrictions because the shareholder-protection rationale, consistent with the regulatory theory of the corporation, minimizes regulatory cost as well as the effectiveness of private solutions to the agency cost problem.

1. Legal Rules Protecting Shareholders are Unnecessary

There is a serious question whether shareholders need the sort of protection they are supposedly getting from statutes restricting corporate political activity. In the first place, the cost of corporate political activity is likely to be very low because most public corporation shareholders are indifferent to the speech of "their" corporations. As Justice Scalia pointed out in his Austin dissent, even if shareholders are concerned with what the corporation is saying, they easily can protect themselves from unwanted speech by selling when they disagree. Contrary to what Justice Brennan asserts, this usually would not cause "financial sacrifice." Because the

152. See supra text accompanying notes 93-94.
154. Id. at 1405 (Brennan, J., concurring) (citation and footnote omitted).
public corporations to which the shareholder-protection rationale supposedly applies are traded in efficient securities markets, the sale price reflects at least all current public information concerning the stock. Although there may be undisclosed inside information that in hindsight might make the sale look ill-timed, it is equally possible that such information would make the timing of the sale look fortuitous. In other words, at the time of a speech-motivated trade, the expected value of undisclosed information is likely to be zero. Thus, the stock and its market price are largely fungible in the absence of significant costs of sale or expenses resulting from the need to readjust the shareholder's portfolio.

Corporate managers might engage in speech that is so objectionable to all investors that it reduces the market price of the corporation's stock. In this situation, exit by an individual shareholder is not a complete remedy because the exiting shareholder receives only the reduced market price. The shareholders have other options in this setting, including mounting a proxy contest or tender offer to remove the managers or suing for breach of fiduciary duty. In other words, shareholders have the familiar alternatives of "exit" and "voice" as means of obtaining redress. That neither alternative is fully effective, particularly in public corporations, does not necessarily justify statutes forbidding corporate political speech. Because managers' speech rarely will be very costly, the costs to shareholders of prohibiting corporate speech probably outweigh the benefits to the shareholders of forbidding corporate political speech.

Accordingly, a significant difference exists between the plight of a shareholder and that of a union member who disagrees with use of his compulsory union dues. Moreover, even if the costs of voice and exit were comparable in the two situations, the shareholders' choice of investment contracts among many virtually fungible opportunities is far broader than the unionist's choice of labor contracts. Even the rare shareholder who cares about corporate speech could choose to invest only in firms that did

155. Even if the shareholder has inside information, this does not affect the analysis. If the information is positive, the shareholder need only hold until it is revealed. If the information is negative, the shareholder has another incentive to sell.

156. The reduction in market price results from a combination of the market's re-evaluation of management and its assessment of the costs of replacing the managers through takeover or otherwise. The market's re-evaluation of management might occur because investors would find it distasteful to associate with the managers' views or, more likely, because the speech indicates a general lack of probity that casts doubt on the managers' ability to make rational business decisions.

157. See Stern v. General Elec. Co., 924 F.2d 472, 478 (2d Cir. 1991) (holding that shareholder action for corporate waste was not preempted by FECA, but complaint failed to state cause of action for breach of fiduciary duty).

158. See ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). As shareholder dissatisfaction with managers' speech increases, "exit" becomes less satisfactory and "voice" becomes more satisfactory. "Voice" is more likely than "exit" to result in discipline of the managers as distinguished merely from relief for shareholders.
not engage in political activities or in mutual funds that monitor the political correctness of the corporations in which they invest. The availability of choice of contracts further weakens the case for a mandatory prohibition.

To summarize the foregoing in terms of the Posner formula,\textsuperscript{159} even if there might be some loss to shareholders (L) from failing to restrict corporate political speech, there is only a small probability (P) that a significant L will ever occur.

2. Corporate Speech Restrictions May Harm Shareholders

Even if shareholders need protection from managers’ use of corporate funds for political activity, prohibiting corporate political contributions and expenditures may be an excessively costly way of providing this protection. Thus, corporate speech restrictions may not optimize the \textit{total} agency costs previously described.\textsuperscript{160} In terms of the Posner formula, B (the value of permitting managers to speak for the corporation) may outweigh \( P \times L \).

First, even speech that benefits the managers personally may be an efficient form of managerial compensation in the sense that the managers' benefit from controlling corporate political activity exceeds the cost to the shareholders of granting this power.\textsuperscript{161} The foregone benefit from this efficient compensation may exceed the benefit derived from guarding against the extremely unlikely event of managers’ engaging in highly offensive speech.

Second, corporate speech restrictions may exacerbate residual agency loss because campaign laws channel corporate political activity into political action committees. The laws allow use of corporate funds to organize and operate PACs.\textsuperscript{162} Although corporate PACs can solicit funds from shareholders as well as from employees,\textsuperscript{163} they primarily solicit from managerial employees.\textsuperscript{164} This may be due both to managers’ wish to limit PAC membership and to the high cost of soliciting shareholders compared to shareholders’ expected contributions. Shareholders would decline to contribute to corporate PACs for the same reasons that they would oppose political activity—because they oppose activity seeking transfers between corporations

\textsuperscript{159} See supra text accompanying notes 47-48 (discussing Posner's formula).

\textsuperscript{160} See supra text accompanying note 149.


\textsuperscript{162} See supra note 127 and accompanying text. Indeed, even before corporate political action committees were authorized, corporations avoided restrictions on direct corporate political activity by coordinating employee contributions. \textit{See Sabato, supra} note 128, at 6-7.

\textsuperscript{163} See 2 U.S.C. § 441b(b)(4)(A) (providing that corporation may solicit “stockholders and their families and its executive or administrative personnel and their families . . .”).

\textsuperscript{164} \textit{See Sabato, supra} note 128, at 61 (study showing that only 17% of corporate PACs do any shareholder solicitation); Budde, \textit{supra} note 136, at 456.
in their portfolios and to corporations from noncorporate groups.165

The combined effect of encouraging corporate PACs while prohibiting direct activity by corporations may be to cause corporate speech to reflect managers' interests even more than it would if it were channelled through the corporation.166 Managers may choose to use their PACs to advocate laws, such as antitakeover statutes, that shift corporate power and resources from shareholders to managers. If the managers sought to use corporate treasury funds that way, they would be at least potentially subject to shareholder discipline. It is true that managers could channel all political activity through PACs even without restrictions on corporate speech. But if corporations could use treasury funds for political purposes, shareholders might be able to force managers to act politically through the corporation rather than by funding PACs. Thus, by permitting corporations to organize PACs but prohibiting them to act directly, current law reduces shareholder power over corporate political activity.

Shareholders could, of course, form their own interest groups to oppose those of managers. But the shareholders' groups, unlike "corporate" PACs, would have to bear their own organizational costs. These costs, together with the free-rider problem inherent in collective action, would inhibit such efforts.

In sum, although the current scheme of regulation of corporate political activity saves shareholders from the small agency cost of having their invested funds used in ways they would oppose (P x L in Posner's formula), it may increase agency cost by weakening incentive devices and increasing the political power of managers vis à vis shareholders through PACs (B in the Posner formula). Whether the latter costs exceed the former benefits is an unanswered empirical question.

3. Campaign Finance Laws Are an Inappropriate Means of Protecting Shareholders

Despite the questions raised regarding the costs and benefits of shareholder-protection regulation, there is little doubt that the First Amendment would not prohibit, and indeed arguably would protect, enforcement of a contract among shareholders and the firm's managers to restrict the managers' right to use corporate funds to engage in political speech.167 By the

165. See supra text accompanying note 94.
166. See Archibald Cox, Constitutional Issues in the Regulation of the Financing of Election Campaigns, 31 CLEV. ST. L. REV. 395, 410-11 (1982) (noting that it is PAC leadership—primarily corporate executives—who obtain influence through PACs); Sabato, supra note 128, at 34 (corporate CEO's normally have significant influence on activities of corporate PACs).
same reasoning, a state ought to be able to provide through its corporation statute a corporate speech limitation that corporations could adopt by shareholder vote. If corporate speech limitations were provided by state statute, it would be appropriate for Justice Brennan to rely on the traditional state role of defining shareholder rights.168 In other words, some regulation of corporate speech might be consistent with the contract theory of the corporation.

However, this defense of the shareholder-protection rationale assumes that the rule ultimately is provided by the shareholders’ contract. Justice Scalia’s view of that contract, expressed in his *Austin* dissent, differs from the view represented by corporate speech restrictions. He points out that a shareholder

knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal.169

A statutory provision that overrides the shareholders’ “deal” cannot rest on a contractual foundation, but rather is based on the regulatory view of the corporation.170

A campaign finance limit in a state corporation statute might be defended on contractual grounds as to shareholders who invest in corporations bound by the provision. Even a seemingly “mandatory” provision may be justified because shareholders who opposed the provision could choose to invest in firms incorporated elsewhere,171 and because shareholders might favor some protection against managers’ changing the charter with the approval of shareholders who are unable to organize effectively against the charter amendment.

Federal campaign contribution limitations can be explained only in terms of the regulatory theory of the corporation. The same is true of state campaign laws that apply to campaign activity by all corporations in the

168. *Austin*, 494 U.S. at ____, 110 S. Ct. at 1406 n.8 (citing CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987)) (upholding state anti-takeover statute against Commerce Clause and Supremacy Clause attack).

169. *Id.* at ____, 110 S. Ct. at 1412.

170. If a state statute overrides an existing deal it is arguably unconstitutional under the Contract Clause. For a discussion of this problem in the context of state anti-takeover statutes, see Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 505 (7th Cir.), cert. denied, 493 U.S. 955 (1989); Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. Cin. L. Rev. 611 (1988); Robert W. McGee, *Mergers and Acquisitions: An Economic and Legal Analysis*, 22 CREIGHTON L. REV. 665 (1989); Butler & Ribstein, *The Contract Clause, supra* note 72, at 795-98. But it is unlikely shareholders can now make this argument regarding corporate speech restrictions since these have been in place for some time.

regulating state because it is so costly for investors to determine which corporations have an interest in engaging in political activity in regulating states and to adjust their portfolios accordingly.

This interference with private contracting might be justified if shareholders are incapable of choosing protection against the supposed agency costs inherent in corporate political speech or if shareholders need protection against managers' pushing through a move to reincorporate from a regulating to a nonregulating state.\textsuperscript{172} The first argument ignores the powerful market forces that discipline the terms of state corporation laws.\textsuperscript{173} Moreover, even if one of these conditions held, the mandatory nature of the laws would be unjustified if the laws imposed costs in excess of benefits in many of the situations in which they applied.\textsuperscript{174} Even if mandatory statutes might be justified on these grounds, the justifications would be suspect. The fact that the government has acted through election statutes rather than through corporation statutes indicates that the statutes are intended as direct speech restrictions rather than as shareholder protection that only indirectly impacts speech. As is generally the case with such direct viewpoint restrictions,\textsuperscript{175} the nature of the restriction raises serious doubts about the sincerity of a nonspeech-related justification.\textsuperscript{176}

In short, the shareholder-protection rationale for the current scheme of restrictions on corporate political activity depends on a showing that (1) shareholders incur agency costs from permitting corporate political activity (L in the Posner formula); (2) that these costs outweigh benefits of permitting the managers to engage in corporate speech through the corporation (B in the Posner formula); and (3) that the costs of leaving such protection to shareholder choice outweigh the benefits of doing so. Such a showing would be extraordinarily difficult to make.

Further, there is no justification for distinguishing ideological and for-profit corporations based on the need for shareholder protection. For the reasons discussed below in connection with the "corruption" argument,\textsuperscript{177} members of ideological corporations face high costs of exit, and therefore

\textsuperscript{172} For commentary favoring a mandatory federal rule on this basis, see Jeffrey N. Gordon, \textit{Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice}, 76 \textit{CAL. L. REV.} 1 (1988).


\textsuperscript{174} \textit{See generally Butler & Ribstein, Opting Out, supra note 72 (comparing costs and benefits of mandatory corporate rules).}

\textsuperscript{175} \textit{See supra note 56 and accompanying text.}

\textsuperscript{176} \textit{Cf. Cort v. Ash}, 422 U.S. 66 (1975) (refusing to recognize shareholder right of action against managers under federal election law on ground that statute was not intended to provide for such relief). Thus, this is an example of a "false positive"—that is, a nonjustification for a speech restriction. \textit{See BeVier, supra note 59, at 1074-75.}

\textsuperscript{177} \textit{See infra text accompanying notes 231-35.}
incur at least the same costs as the members of for-profit corporations incur.\textsuperscript{178}

\textbf{B. Limiting Corporations' Political Power}

All the relevant Supreme Court cases embrace to some degree the notion that government legitimately may constrain the political power of corporations in order to avoid "corruption" of the political system. But, before beginning an evaluation of the variations of this argument, it is important to consider what weight the argument should have. Regulation designed in light of the "corruption" justification is based on the effect of a particular type of speech (\textit{i.e.}, corporate) and therefore clearly is a viewpoint restriction.\textsuperscript{179} Thus, accepting this justification is likely to involve a significant impact on the nature of public debate, and therefore would represent a high \( B \) in the Posner equation. It follows that the courts should accept such a justification only upon a very strong showing of the potential for harm combined with a showing that the regulation narrowly targets the harm. An evaluation of the variations on the "corruption" justification shows that such a strong showing of the potential for harm has not been made.

\textit{1. Interest Group Capture of Politicians}

One version of the "corruption" argument asserts that it is necessary to limit the purchase of politicians' votes by large companies. The Supreme Court held in \textit{Buckley v. Valeo} that FECA's contribution limits were justified because "large contributions are given to secure a political quid pro quo from current and potential office holders."\textsuperscript{180} Commentators have criticized \textit{Bellotti}'s invalidation of restrictions on corporate contributions as facilitating "capture" of politicians by interest groups rather than ideology.\textsuperscript{181}

The problem with this argument in the present context is that it cannot be used to distinguish corporate from noncorporate speech. "Capture" results from the ability of interest groups of all kinds to supply the financial support politicians need.\textsuperscript{182} Indeed, the \textit{Buckley} reasoning was applied to

\textsuperscript{178} For a discussion of the essential similarities between ideological and for-profit corporations from the standpoint of organization theory, see Wolfson, \textit{supra} note 2.

\textsuperscript{179} See \textit{supra} text accompanying note 56 (noting relevance to balancing of whether speech restriction is directed at particular speech). A close analogy is the Indiana antipornography statute struck down in \textit{American Booksellers Ass'n, Inc. v. Hudnut}, 771 F.2d 323 (7th Cir. 1985), that targeted speech that degraded women. See \textit{supra} note 66.

\textsuperscript{180} \textit{Buckley v. Valeo}, 424 U.S. 1, 26 (1976).


\textsuperscript{182} In fact, the "capture" theory resembles the first primitive approaches by political scientists to explain regulation as a narrow function of influence solely by regulated firms. \textit{See} \textit{Arthur F. Bentley, The Process of Government} (1908); \textit{David B. Truman, The Governmental Process: Political Interests and Public Opinion} (1951). This theory has long since been replaced by a broader theory that considers all of the relevant interest groups. \textit{See} sources cited \textit{supra} note 115. For a comparison of the "capture" theory and the modern economic theory of regulation, see Posner, \textit{supra} note 115, at 341-44.
limits on a variety of contributions. If corporations withdraw from the field, this will simply reallocate strength to other interest groups, rather than eliminate the financial "quid pro quo." There is no reason to believe that such a shift is desirable.

2. Equalizing the Influence of For-Profit Firms

A more sophisticated version of the "corruption" argument is that unless corporate speech is limited corporations will have access to political influence that is disproportionate to voter support. Under this equality theory, the First Amendment lets government serve as a sort of traffic cop in allocating communication channels so that all can be heard.

This argument is based largely on the ability of for-profit firms to seek collective goods as a "by-product" of support for their profit-making activities. In other words, shareholders invest in the firm and consumers buy the firm's products not because of the firm's political goals, but because they are offered consumers' surplus or a financial return on their investment. It follows that for-profit firms can support political views that are not necessarily supported by the investors who fund this power. By contrast, the MCFL Court believed that shareholders in "ideological" corporations could withdraw if displeased with the firm's political goals without suffering an economic penalty.

This rationale provides at least one positive explanation for corporate speech restrictions like the one involved in Austin. The statutes were first passed in the early part of this century during a time of general distrust of large institutions that fueled the Populist and Progressive movements. It was also a time of distrust of large corporations that had recently broken loose from state control as a result of the development of a national market in corporate charters. Just as the antitrust laws sought to reduce the scale of enterprise, the first restrictions on corporate political activity sought to reduce corporations' political power.

183. See Bolton, supra note 62, at 417.
184. See Cox, supra note 166, at 417 (analogizing such restrictions to applying Roberts' Rules of Order).
185. See supra text accompanying note 123.
187. For an alternative explanation, see infra text accompanying note 255.
190. See supra note 72.
The equality idea was an important basis of the earliest restrictions on corporate political activity and was later urged by some influential commentators. The justification was, however, at first soundly rejected in Buckley v. Valeo: "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." Justice Powell also firmly rejected the equality justification in Bellotti. He quoted the above language from Buckley in opposition to the argument that corporate speech may "drown out" other viewpoints. Justice Powell also noted that the equality argument had been accepted only in the "special context of limited access to channels of communication," and had been rejected even in the more persuasive context of candidates' access to newspaper space.

Nevertheless, the equality principle emerged in Justice White's Bellotti dissent, in NRWC and in MCFL where, as just noted, it provided a basis for distinguishing ideological and business corporations. In Austin this version of the "corruption" argument became the central basis for limiting corporate speech. The Austin Court distinguished the danger of "financial quid pro quo" corruption relied on in Buckley to justify legislation aimed at contributions from the "different type of corruption" at which the Michigan's expenditure restriction aimed. According to the Austin Court, "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 

192. See United States v. United States Brewers' Ass'n, 239 F. 163 (W.D. Pa. 1916) (citing equality justification in rejecting First Amendment challenge to campaign financing law); Bolton, supra note 62, at 376 (discussing role of equality justification in early campaign financing laws).


195. Bellotti, 435 U.S. at 788-92. Justice Powell wrote that there was no evidence that "corporate advocacy threatened imminently to undermine democratic processes," and did not find the argument "inherently persuasive or supported by the precedents of this Court." Id. at 789, 790.

196. Id. at 790-91.

197. Id. at 791 n.30 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)).

198. Id. (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)).

199. Id. at 809-12 (White, J., dissenting).

200. Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 208-10 (1982) (discussing early history of restrictions on union and corporate contributions and noting that such restrictions may be necessary to protect "the integrity of our electoral process") (quoting United States v. International Union United Automobile Workers, 352 U.S. 567, 570 (1957)).

The Supreme Court had it right in *Buckley* and *Bellotti*. Inequalities of resources and opportunities for communication are pervasive and complete equality is an unachievable goal. Accordingly, any implementation of an equality principle would necessitate pervasive government interference and inevitably difficult choices about what sorts of inequalities should be tolerated.202

The *Austin* majority attempted to reconcile limitation of corporate speech with the Court's rejection of the "equality" principle by reasoning that it is not corporate wealth in itself that justifies regulation, but rather the fact that this wealth is accumulated by means of "the unique state-conferred corporate structure."203 But this reasoning simply returns to the argument based on supposedly state-conferred corporate privileges. Because that argument is itself invalid,204 it cannot be used to bolster the "inequality" justification. As Justice Scalia said in *Austin*:

> When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.205

One possible way to square the "corruption" argument with the Court's earlier rejection of the equality principle is to show that restricting corporate political power will prevent at least gross disparities in political power between corporations and other interest groups. This would preserve democratic processes and prevent massive wealth transfers rather than serve the discredited goal of ensuring equal voice.

But there is no reason to believe that unrestricted corporate speech would lead to massive wealth transfers to for-profit firms. In the first place, the "by-product" theory of collective action, in which firms use surplus from noncollective activity to support political action,206 applies to both for-profit and "ideological" firms. Many ideological firms grow large and powerful by combining selective incentives and political goals,207 such as the outdoor activities offered by the Sierra Club.208 Labor unions and farm

202. For commentary critical of applying an equality principle under the First Amendment, see BAKER, supra note 89, at 37-46; BeVier, supra note 59, at 1058-60.
204. See id. at 1409-10 (Scalia, J., dissenting); supra section III(A).
206. See supra text accompanying note 123.
208. See RUSSELL HARDIN, COLLECTIVE ACTION 32 (1982) (stating that outings were major early motivation for joining Sierra Club), 105 (stating that Sierra Club's political activities supported by contributions rather than by members' dues).
groups in particular have amassed considerable membership by offering economic benefits, such as insurance, that are separate from the organizations' political goals.\textsuperscript{209} In fact, it is often difficult to determine whether membership in such groups is motivated primarily by selective incentives, ideology or other considerations.\textsuperscript{210}

Moreover, even if for-profit firms have more surplus potentially available for political activity than do nonprofit firms, the former's political advantage cannot be determined without comparing the firms' opportunity costs for their surplus. Corporate managers who are acting in their principals' interests will invest the firm's surplus in nonpolitical activities if its risk-adjusted return from doing so exceeds that from investing in political activities. For-profit firms that extensively engage in productive activities probably face significantly higher opportunity costs for their surplus than do nonprofit firms that engage primarily in political activities.

Imperfectly disciplined managers may invest surplus in political activities if they will personally gain from doing so, even if the firm does not. But there is no reason to believe that even imperfectly disciplined for-profit managers will systematically gain more from political investments than from nonpolitical investments given their ability to divert financial gain from nonpolitical investments to themselves through excessive compensation and the like. Indeed, managers in for-profit firms are less likely to prefer political investments for selfish reasons than those in ideological firms given the for-profit managers' significant opportunities for financial gain.\textsuperscript{211}

Even if for-profit firms have some advantage under the "by-product" theory in generating surplus for collective action,\textsuperscript{212} ideological groups may be able to overcome this advantage by organizing at lower cost because of forceful leaders who serve as "political entrepreneurs" out of initial commitment to a cause;\textsuperscript{213} because many members have sufficient moral or political commitment to the cause or group that they are willing to incur the costs of membership without being offered selective incentives;\textsuperscript{214} because geographical proximity of members makes the group relatively easy to

\textsuperscript{209} See Moe, supra note 207, at 61 (noting importance of union shop rules in increasing union membership), 168-76 (discussing importance of economic incentives in American labor unions), 181-91 (discussing economic incentives in farm group membership), 205-18 (summarizing results of questioning members of various interest groups). As an example of the importance of selective incentives to attracting members to these groups, Moe reports that in 1971 the Farm Bureau had 7000 members in Cook County, Illinois, where Chicago and only 1000 farms were located, and that Indiana had 50 percent more Farm Bureau members than farms. \textit{Id.} at 185 (citing \textsc{Samuel R. Berger}, \textsc{Dollar Harvest} 26 (1971)).

\textsuperscript{210} See generally Hardin, supra note 208.

\textsuperscript{211} One commentator has argued that nonprofits are organized as such precisely in order to prevent managers from engaging in undetectable diversion of profits. \textit{See} Henry Hansmann, \textit{Ownership of the Firm}, 4 \textsc{J.L. Econ. & Organization} 267 (1988).

\textsuperscript{212} See supra note 123 and accompanying text.

\textsuperscript{213} See Hardin, supra note 208, at 35-37.

\textsuperscript{214} \textit{Id.} at 106; Moe, supra note 207, at 113-19.
organize, or because interest groups offer social or relational incentives to join or provide "prominent" rallying points for people with shared ideologies.

Moreover, interest groups' ability to compete in political markets does not depend solely on financial resources. First, some organizations, such as civil rights groups, have had a significant impact primarily because their members contribute time to such activities as marches and vote drives. Second, groups may be strong simply because politicians realize that a comparatively small membership may, precisely because of the difficulty of collective action, represent a much larger supply of votes. Third, groups' influence depends partly on their ability to coordinate their activities. Accordingly, labor PACs may be able to compete effectively with corporate PACs because, like a cartel, they are better able to concentrate their resources on, and therefore control, particular politicians. To illustrate, suppose an ideological firm has only $.50 of surplus that is potentially available for political activity, while a potential transferee for-profit firm has $.60. The ideological firm may be able to outbid the for-profit firm where, for example: (1) the for-profit firm has a much higher-value use for $.10 of its surplus; (2) the ideological firm can cheaply raise an additional $.10 of political capital; and (3) the ideological firm can bid nonfinancial resources to offset the remaining $.10 difference.

In light of the significant power of noncorporate interest groups, restricting corporate speech may upset or prevent a desirable equilibrium among competing interest groups that otherwise would exist. Madison recognized at the time of the drafting of the Constitution not only the inevitability of "factions," but also that in a large republic no single faction could dominate. Gary Becker has shown that interest group competition


216. See MOE, supra note 207, at 113-19; HARDIN, supra note 208, at 32-33 (explaining this as important explanation for women's organizations); Carole J. Uhlman, "Relational Goods" and Participation: Incorporating Sociability Into a Theory of Rational Action, 62 PUB. CHOICE 253 (1989) (offering model to predict group mobilization based on interactions among persons).

217. See HARDIN, supra note 208, at 223 (discussing prominence of Sierra Club).

218. See HARDIN, supra note 208, at 110.

219. Id. at 225.

220. See Gerald Keim & Asghar Zardkoohi, Looking for Leverage in PAC Markets: Corporate and Labor Contributions Considered, 58 PUB. CHOICE 21 (1988). The authors argue that corporate PACs face bigger coordination problems because they are more numerous and represent more disparate interests. The authors present data that labor PACs are better able than corporate PACs to contribute to candidates consistent with ideology, rather than mostly, as is the case with corporate PACs, as "protection money" to more powerful incumbents.

221. See THE FEDERALIST No. 10 (James Madison).
may cause laws to be Kaldor-Hicks efficient because some interest groups offset the influence of others.\textsuperscript{222} As government subsidies rise, so do benefits to transferors from resisting the subsidies. At the same time, transferees' benefits decline because they share the increasing dead-weight costs from the subsidies.\textsuperscript{223} Thus, unless a particular group is very effective at seeking influence, the competition among groups tends to produce laws whose benefits outweigh their costs.\textsuperscript{224} For example, law efficiency may have increased as environmentalists and customers became more organized, and therefore more able to counteract the power of polluters and producers.\textsuperscript{225} Conversely, there may be significant efficiency benefits from allowing corporations to act as a counterforce against other interest groups and political agents.\textsuperscript{226}

Even if corporations' political strength is somewhat disproportionate to their popular support, this is a long way from showing that full participation of corporations would dominate other views. Rather, the argument reduces to one that corporate power should be distributed to other groups.\textsuperscript{227} Obviously the winners will prefer this outcome, but that alone does not make the laws restricting corporate speech constitutional.\textsuperscript{228}

\textsuperscript{222} See Gary S. Becker, \textit{Public Policies, Pressure Groups, and Dead Weight Costs}, 28 J. PUB. ECON. 329 (1985); Gary S. Becker, \textit{A Theory of Competition Among Pressure Groups for Political Influence}, 98 Q. J. ECON. 371 (1983) (stating that political equilibrium depends on efficiency of each group in producing pressure, effect of additional pressure on their influence, number of persons in different groups, and deadweight costs of taxes and subsidies).

Effective interest groups also can offset the tendency toward redistribution of wealth among districts. Powerful politicians may maximize votes in their own district by securing legislation that benefits their districts at the expense of nonresident voters. But money is more mobile than votes. Thus, legislators may be disciplined by the threat of losing contributions from outside the district. See W. Mark Crain, Robert D. Tollison, & Donald R. Leavens, \textit{Laissez-Faire in Campaign Finance}, 56 PUB. CHOICE 201 (1988), showing that in states that do not regulate campaign finance there are fewer government transfers than in states that do regulate campaign finance. The authors also show that there are more laws in such states, indicating that regulation of campaign finance involves a trade-off between, on the one hand, "off-budget" wealth transfers to corporations and labor from less organized interest groups and, on the other, "on-budget" wealth transfers directly from government.\textsuperscript{223} See Becker, \textit{Public Policies}, supra note 222. Note that even if subsidies measured by corporate profits are less than the transferees' costs, there still may be a net gain taking into account redistributions by the benefitting firms, including increased wages. See id. at 338.

\textsuperscript{224} \textit{Id.}


\textsuperscript{226} Crain, Tollison & Leavens, \textit{supra} note 222.

\textsuperscript{227} In terms of the graph \textit{supra} note 121, the groups to the left of and above \(P^*\) will continue to obtain wealth-transfers from the groups to the right of and below \(P^*-f\), but the identities of the two sets of groups will change in that corporations may move from the left to the right, from beneficiary to victim of interest group transfers.

\textsuperscript{228} Indeed, not only is redistributing power among groups not sufficiently desirable to
In short, it makes no sense to restrict corporate speech on “corruption” grounds in order to redress a supposed imbalance between corporate political power and voter support. There is no basis for the argument that corporate political power imposes a significant cost on society (L in the Posner formula), and corporate political speech may be a valuable way to achieve balance among interest groups (B in the Posner formula). This justification for corporate speech restrictions should be rejected.

3. Equalizing Managers’ Power

Another form of the “corruption” argument is that unrestricted corporate political speech gives “undue” power to corporate managers. In this form the argument asserts that managers can use resources contributed by shareholders and others to finance managers’ views that are not supported by other corporate participants. This argument underlies the MCFL Court’s sharp distinction between members of for-profit and of “ideological” corporations regarding their support for the organization’s political goals. But this argument merely restates the agency-cost justification rejected above. Just as there is no basis for concluding that regulation is necessary to protect shareholders of for-profit corporations from corporate speech with which they disagree, so there is no basis for distinguishing for-profit and ideological groups in this regard.

Indeed, there are several reasons for concluding that there may be an even greater agency-cost problem in ideological firms than in for-profit firms. For members of ideological groups who disagree with the group’s positions, exit often is even less an option than it is for corporate shareholders. Members who joined for idiosyncratic selective incentives may lose the benefits entirely rather than obtaining cash that is fungible with their investments. Moreover, a given group may be the only one representing a certain ideological position, so that a dissatisfied member who joined for both ideological and nonideological reasons would have to incur the significant costs of organizing another group. And even if there are available

justify interfering with a First Amendment right, but it may perversely influence the results of political competition. The reason is that differences among firms concerning their surplus available for political activity are not random, but in fact are correlated to some extent with organizational efficiency. In other words, the success of efficiently organized firms succeed in financial and product markets is transferred to political markets.

229. See supra text accompanying notes 30-32 (discussing MCLF).
230. See supra section V(A) (discussing agency-cost justification).
231. Exit from for-profit corporations is discussed infra at notes 153-158.
232. Where the optimal size of the organization is large (because marginal benefits of increased size exceed the marginal cost of additional members) compared to the number of people sharing a given ideology, any competing club would be inefficiently small. In this situation, the member of an existing organization would not be able to viably threaten exit for purposes of forming a competing organization. See Dennis C. Mueller, Public Choice II, A REVISED EDITION OF PUBLIC CHOICE at 150-54 (1989) (discussing club sizes in relation to achievement of public and private goods); James M. Buchanan, An Economic Theory of Clubs, 32 ECONOMICA 1 (1965) (same).
substitutes, they may involve significantly higher costs of joining. Additionally, members who have difficulty exiting usually do not have as effective a voting mechanism as do shareholders in for-profit firms. Accordingly, an ideological group's political goals may differ from those of most of the members, particularly those who have joined for nonpolitical reasons.

This membership support can become, in turn, the basis of political action.

Corporate power may, in fact, better represent voter support than groups that would gain from a reallocation of corporate political power through speech restrictions. Corporations are conduits to people. Managers who expend corporate funds for speech are subject to constraints by all of the contracts to which the corporation is a party. Managers risk offending not only shareholders, but also workers, consumers, and members of local communities with the power to regulate or grant concessions to the firm. Each of these groups can exercise displeasure both through voice (as with shareholders) or through exit (as with customers) by refraining from dealing with the firm. Thus, corporate speech must normally be at least generally consistent with the views of a cross-section of the community. Conversely, even in the most purely "ideological" associations wealthier voters may dominate because a member's financial "vote" for a particular organization represents not merely the strength of her commitment to the cause, but also the number of dollars the member has to available to commit.

C. A Rent-Seeking Justification for Corporate Speech Restrictions

The state interest that provides the most promising justification for corporate speech regulation is a concern with reducing the deadweight costs

233. See Lawrence S. Rothenberg, Putting the Puzzle Together: Why People Join Public Interest Groups, 60 Pub. Choice 241 (1989) (setting forth cost/benefit explanation of membership in Common Cause); HARDIN, supra note 208, at 223 (stating that Sierra Club overcomes collective action problem partly by being "prominent" choice toward which environmentally conscious people gravitate).

234. See HARDIN, supra note 208, at 122-23 (explaining that whether group works toward ideological goals depends in part on extent to which members have ideological commitment to organization); see also MOE, supra note 207, at 74:

What the by-product theory asserts, in other words, is a disjunction between member goals and group goals. There is no necessary connection between the two in latent groups. As long as members are tied into the group by means of selective incentives, it is to their advantage to continue contributing even if they disagree with associational policy, and even if the group is entirely unsuccessful in achieving goals they agree with. The leadership can pursue an independent course without fear of losing either members or their contributions and is set free of member pressure in respect to political issues and activities.

An example of this disjunction is the Farmers Union, which Moe characterizes as far more liberal than its membership. Id. at 188.

235. For a recent humorous survey of the disproportionate political strength of the farm lobby relative to the number of farmers, and how this has translated into massive wealth transfers to farmers, see P. J. O'ROURKE, PARLIAMENT OF WHORES 142-53 (1991).


237. See Malbin, supra note 129, at 259-60.

238. See HARDIN, supra note 208, at 88-89 (noting that government programs tend to benefit more affluent).
of rent-seeking. Even this interest, however, cannot outweigh the corporation's substantial speech interest at stake, because of the existence of the alternative of private contracting within the firm.

The problem of deadweight costs from rent-seeking was first identified by Gordon Tullock.\textsuperscript{239} Rent-seeking includes earning "rents," or monopoly profits, through government-engineered wealth redistributions.\textsuperscript{240} It is distinguished from rent-creation by private efforts through, for example, the invention of a new product.\textsuperscript{241} Because rent-seeking shifts rather than creates wealth, it can reduce net social wealth by at least some of the amount of the resources committed to the rent-seeking.\textsuperscript{242} These include amounts spent in seeking government action, in seeking political office, and in shifting in and out of activities for purposes of obtaining transfers.\textsuperscript{243} These and other costs may result from politicians' ability not only to serve as brokers for wealth transfers to interest groups, but also actively to extract rents by threatening regulation.\textsuperscript{244} Firms may avoid productive activity because of the risk that politicians and regulators may be able to appropriate a portion of the privately-created surplus from such activities.\textsuperscript{245}

Rent-seeking is inefficient not because of who wins and loses, but because there are significant costs in creating winners and losers. To use Gordon Tullock's colorful example, nepotism may be good because it reduces the number of people competing for a job: "Thus, if Mayor Richard Daley had confined all of the more lucrative appointments to his close relatives, the social savings might have been considerable."\textsuperscript{246} Therefore, the rent-seeking argument is promising as a justification for corporate speech restrictions in part because minimizing rent-seeking costs has been shown to be an important policy underlying several aspects of the Constitution. In

\textsuperscript{239} See Gordon Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 West. Econ. J. 224 (1967) [hereinafter Welfare Costs]. These costs were first termed "rent-seeking" by Anne O. Krueger in The Political Economy of the Rent-Seeking Society, 64 Am. Econ. Rev. 291 (1974). Other papers by Tullock on rent seeking costs include The Cost of Transfers, 24 Kyklos 629 (1971) and Rent Seeking as a Negative-Sum Game and Efficient Rent Seeking, in Toward A Theory of the Rent-Seeking Society (James M. Buchanan, et al. eds. 1980).

\textsuperscript{240} As Tullock pointed out in his initial paper, similar problems are created by private theft and monopoly. See Tullock, Welfare Costs, supra note 239.

\textsuperscript{241} For a useful discussion distinguishing rent-seeking and beneficial rent-creation, see James M. Buchanan, Rent Seeking and Profit Seeking, in Toward A Theory, supra note 239.

\textsuperscript{242} Not all rent-seeking expenditures are wasted, since payments to politicians and bureaucrats may make them better off. See Michael A. Brooks & Ben J. Heijdra, In Search of Rent-Seeking, in The Political Economy of Rent-Seeking 30-31 (C. Rowley et al. eds., 1988); Boudreaux, Imperfectly Competitive Firms, Non-Price Competition, and Rent Seeking, 145 J. Inst. & Theo. Econ. 597, 601-05 (1989).

\textsuperscript{243} See Buchanan, supra note 239, at 12-15.

\textsuperscript{244} See McChesney, supra note 116.

\textsuperscript{245} See McChesney, supra note 116, at 105-08 (discussing effects of political extraction of rents).

\textsuperscript{246} Tullock, Efficient Rent Seeking, supra note 239, at 103. Tullock was referring to Richard J. Daley, not the son, Richard M. Daley, who took office after a costly election campaign some time after the father's death.
the "veil of ignorance" in which constitutions are drafted, the parties to the constitution do not know whether they will be winners or losers from rent-seeking, but each knows that he will bear part of the deadweight costs of rent-seeking. Thus, the Constitution has been interpreted as establishing procedures that reduce rent-seeking by raising its cost, including separation of powers, election of different parts of government by different sets of voters, and limits on delegations of legislative authority to bureaucratic agencies. Additionally, the Contract Clause of the Constitution has been interpreted as invalidating a class of legislation that is particularly likely to involve deadweight rent-seeking costs.

The rent-seeking argument also is promising because it is at least plausible that corporate speakers themselves would favor statutory restrictions on their speech. Statutory restrictions, particularly insofar as they limit contributions, help corporations reduce private costs from political activity that they would not voluntarily engage in but for collective action problems. The central point is that corporations as a group may lose from rent-seeking. Fred McChesney has demonstrated how organization of non-producer interest groups may be costly because it exposes the groups to increased rent-extraction by politicians. Because firms organize as a by-product of their business activities, they cannot choose to avoid organization in order to resist rent-extraction. Also, corporations compete poorly in the political game against more coordinated groups, particularly labor groups. Both evidence and theory reveal that corporations contribute not so much to support particular legislators or legislation, but as a kind of "protection money" to avoid being hurt for not contributing.

Despite the likelihood of being net political losers, individual firms cannot afford to refuse to participate in the game because they may lose more by wealth transfers to participating firms than they save in rent-seeking costs. Prohibiting corporate political activity is a way out of this

252. See Keim & Zardkhouei, supra note 136.
253. See supra note 220.
classic prisoners’ dilemma problem. If winners and losers from corporate speech cannot be identified in advance, all firms would favor the prohibition.\textsuperscript{254} In other words, corporate speech restrictions limit speech that is, in a sense, involuntary.

Indeed, the rent-seeking theory may explain why corporate political activity is restricted, despite corporations’ ability to engage in lobbying, litigation and other activity against such regulation. This explanation has some historical support: Major legislation restricting corporate political activity followed episodes of flagrant “shakedowns” of corporations by political fund-raisers.\textsuperscript{255}

There are, however, serious problems with the rent-seeking justification. Most importantly, as with the other justifications previously discussed, a legislative solution does not offer clear benefits over private contracting. The problem of deadweight costs from rent-seeking is simply a different version of the agency cost problem discussed throughout this Article: diversified shareholders do not gain as much as managers do from expenditures to obtain intraportfolio wealth transfers.\textsuperscript{256} It is true that there is a coordination problem in that firms may not refrain from seeking wealth-

\textsuperscript{254} It might seem that large firms would oppose restrictions on corporate speech because they will consistently be winners. In an industry consisting of many firms, the industry as a whole may act collectively to obtain a particular law, but only because a few firms in the industry (perhaps the bigger firms) receive sufficiently large benefits to incur the costs of seeking collective action. These firms will influence the content of the regulation to benefit them, possibly at the expense of other companies in the industry. For example, regulation that increases costs may help an industry by providing an entry barrier, but because of scale economies the regulation may help large firms more than small firms. See Michael T. Maloney & Robert E. McCormick, \textit{A Positive Theory of Environmental Quality Regulation}, 25 J. L. & Econ. 99 (1982); B. Peter Pashigian, \textit{The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares}, 27 J. L. & Econ. 1 (1984); Ann P. Bartel & Lacy G. Thomas, \textit{Direct and Indirect Effects of Regulation: A New Look at OSHA’s Impact}, 28 J. L. & Econ. 1 (1985). For discussions of the effect of asymmetry in resolving collective action problems see Harkin, \textit{supra} note 208, at 67-89; Posner, \textit{supra} note 115; George J. Stigler, \textit{Free Riders and Collective Action: An Appendix to Theories of Economic Regulation}, 5 Bell J. Econ. & Mgmt. Sci. 359 (1974). Accordingly, while large firms in large industries may favor corporate political activity, a much larger number of small firms which would be significant net losers from rent-seeking costs may have enough at stake to oppose corporate political activity. But small firms are not necessarily losers. For example, small business joined in the populist movement favoring small institutions. See Roe, \textit{supra} note 189, at 33. Moreover, small business can form effective organizations such as the Michigan State Chamber of Commerce involved in \textit{Austin}.

\textsuperscript{255} See Sabato, \textit{supra} note 128, at 3-5 (discussing Tillman Act of 1907 following flagrant “assessments” of business on behalf of McKinley’s 1896 campaign and 1974 amendments to Federal Election Campaign Act following Watergate).

Certainly, however, there are other forces at work. Incumbents may be net gainers from corporate speech restrictions if this political capital would flow disproportionately to challengers. Also, as noted \textit{supra} notes 187-90, there was popular support for restrictions on large corporations. And managers may have selfish reasons for favoring the combination of permitting PAC activity while restricting direct corporate activity. See \textit{supra} text accompanying notes 162-66.

\textsuperscript{256} See \textit{supra} text accompanying note 94.
transfers if they fear that others will not also refrain. But legislation is unnecessary to solve this problem because shareholders can contract for bonding devices that ensure that managers do not incur deadweight rent-seeking costs.257

Moreover, even if the rent-seeking justification makes sense, it cannot be applied such that the costs of valuable speech it deters do not outweigh the benefits of reducing deadweight rent-seeking costs. Perhaps the First Amendment could be interpreted as permitting restrictions on political speech that target the most wasteful forms of rent-seeking activity in the political process.258 But all political activity involves rent-seeking. Granting legislatures a broad power to restrict rent-seeking involves a high risk of error (E in the Posner equation) in sorting out "legitimate" and "rent-seeking" legislation.259

There are several respects in which a rent-seeking justification for corporate speech restrictions would be difficult to confine. First, the rent-seeking justification offers no clear limit on corporate speech restrictions according to the type of political spending. In other words, there is no reason to stop at campaign contributions and expenditures. At the extreme, lobbying expenditures, PAC spending and all corporate political activity could be curbed.

Second, there is no clear reason to distinguish on rent-seeking grounds between for-profit and ideological firms. Under a rent-seeking theory it is necessary to show that political activity by for-profit firms is more likely than other political activity to divert resources from privately creating rents to merely seeking government-engineered transfers. But political activities of nonprofit organizations and un-organized individuals also may divert resources from wealth-creating activity or savings. If political speech by ideological groups was restricted, these groups might either substitute other forms of rent-seeking, such as litigation,260 or reduce their total expenditure of resources. The latter course of action might both return resources to productive use and reduce the need for responsive rent-seeking by for-profit groups.

Third, there is no reason to distinguish between corporate commercial and political speech. The Court has indicated that commercial speech


260. For a discussion of litigation as rent-seeking conduct see Paul H. Rubin, Common Law and Statute Law, 11 J. LEGAL STUD. 205 (1982).
generally should be given less protection than political speech. Such a distinction may not be justified as to speech generally, and the rent-seeking argument does not provide much support for reversing the direction of the distinction in the context of corporate speech. Perhaps corporate commercial speech is more likely to involve productive rent-creating activity than corporate political speech, but much commercial speech involving competition between firms in the same industry is aimed at wealth-transferring market share increases rather than wealth-creation. At the same time, there are real benefits from some political speech.

By the same token, the rent-seeking analysis does not support a distinction between expenditures by media corporations and by nonmedia firms, apart from any support for such a distinction by the "press clause" of the First Amendment. Just as with commercial speech, expenditures by media firms can be characterized as productive rent-creating activity rather than as deadweight rent-seeking. Also, media communications increase voters' information costs and, accordingly, their ability to constrain wealth transfers to interest groups. The same, however, can be said of some corporate political speech. Moreover, expenditures by media corporations can en-

For commercial speech to come within [First Amendment protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

262. Commentators have suggested that the distinction between commercial and political speech is justified, among other reasons, because commercial speech, due to its economic motivation, is less likely to be chilled by regulation; the First Amendment protects only speech relevant to our representative form of government; government is better able to determine the truth of commercial than of other forms of speech; and the "marketplace" of ideas may not be effective protection against falsehood in certain forms of commercial speech (e.g., private speech by professionals). See generally Steven Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 NW. U. L. REV. 1212 (1984); Symposium, The First Amendment and Federal Securities Regulation, 20 CONN. L. REV. 261 (1988); Symposium, Panel III, First Amendment Protections and Economic Activity, 11 GEO. MASON U.L. REV. 81-114 (No. 2) (1988). For criticisms of the distinction, see R. H. Coase, Advertising and Free Speech, 6 J. LEGAL STUD. 1 (1977); Nicholas Wolfson, The First Amendment and the SEC, 20 CONN. L. REV. 265 (1988).

263. Note, however, that the distinction between corporate commercial and corporate political speech cannot be justified on the ground that corporate political speech is more likely to be contrary to shareholders' interests, since the two types of speech involve identical agency cost problems.

264. See supra section III(B)(2).

265. This was an important point of contention in Austin, because the Michigan statute did make that distinction. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, ___ , 110 S. Ct. 1401-02 (1990).

266. This distinction between productive rent-creating activity and deadweight rent-seeking activity is discussed supra text accompanying notes 239-45.

267. See supra text accompanying notes 114-42.
hance their political influence, just like corporate expenditures for political speech generally.

Finally, the rent-seeking justification does not support a distinction between for-profit corporations and other types of for-profit firms. Perhaps the distinction could be based on a rough split between large and small firms, but it is far from clear that large firms are disproportionately responsible for wasteful political rent-seeking. Indeed, if anything, the opposite may be the case: large firms, at least in concentrated industries, do not need to act politically because they can achieve the same benefits through privately coordinated activity. In any event, there are many small corporations that are not exempted from the regulation. All of this indicates that the corporate/noncorporate distinction is really based on the outmoded state-privilege argument or is simply a holdover from the distrust of the corporate form that motivated the first corporate campaign statutes.

VI. CONCLUSION

Regulating corporate political speech significantly interferes with political expression, and so raises First Amendment concerns. These concerns should not be overlooked because the speech is attributed to an artificial entity rather than to specific people, or because people affiliated with corporations can speak outside the firm. Thus, the important question from the standpoint of the pragmatic approach applied in this Article is whether the costs of corporate speech restrictions outweigh the benefits.

The justifications that have been discussed here are weak. The shareholder-protection, "corruption," and rent-seeking justifications all assume agency problems that cannot be solved by private contracting. While this is consistent with a regulatory theory of the corporation, it is inconsistent with the substantial modern literature supporting the viability of private contracting in the firm.

One problem with the justifications for corporate speech restrictions is that they are based on untested assertions. State regulation of corporate campaign contributions might be tested by interstate comparisons. The rent-seeking justification might be tested by comparing the law output of regulating and nonregulating states. The "corruption" argument could be supported by comparing the types of laws found in regulating and nonregulating states. The shareholder-protection hypothesis, however, is difficult

268. See Michael C. Munger, On the Political Participation of the Firm in the Electoral Process: An Update, 56 PUB. CHOICE 295 (1988) (showing evidence that firms' PAC contributions are not correlated with industry concentration); Asghar Zardkhoohi, On the Political Participation of the Firm in the Electoral Process, 51 S. ECON. J. 804 (1985) (setting forth earlier study reaching similar conclusion); Posner, supra note 115; Stigler, Free Riders, supra note 254 (showing evidence that industry association size is not correlated with industry concentration).

269. See supra text accompanying notes 67-80.

270. See supra text accompanying notes 185-88.

271. For a study applying this approach, see Crain, Tollison & Leavens, supra note 222.
to test: because campaign finance laws apply irrespective of state of incorporation, and therefore apply to most large companies, it is probably impossible to do meaningful stock-price comparisons between regulated and nonregulated firms. Nevertheless, it might be useful to learn the extent of any injury to shareholders from permitting corporate PAC activity by investigating a possible correlation between PAC contributions and pro-management legislation.

In the final analysis, Justice Powell's holding in *Bellotti* that corporate speech should be protected under the First Amendment makes much more sense as constitutional doctrine than the post-*Bellotti* cases. Whether or not the Supreme Court ultimately may have reached the correct result in the later cases, the Court's analysis in reaching these results is fundamentally flawed. The Court must begin to base its decisions on well-developed modern economic theory rather than on unsupported assertions about corporations and the political process. It is particularly important to understand that any regulation of corporate speech or of the electoral process can have far-reaching consequences in terms of both the costs of governing the firm and the deadweight costs of effecting wealth transfers among interest groups. Until the Court understands these consequences, its decisions may be the proverbial bull in the china shop, particularly as pressure builds for more extensive reform of campaign financing and of corporate political activity.