ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

CITIZENS UNITED AS BAD CORPORATE LAW

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Discussion Paper No. 972

09/2018

Harvard Law School
Cambridge, MA 02138

This paper is also Discussion Paper 2018-6 of the
Harvard Law School Program on Corporate Governance

Citizens United as Bad Corporate Law

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"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."

Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 635 (1819) (Marshall, C. J.).

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Introduction

The most important constitutional case of the new millennium is based on a fundamental misconception about the nature of the corporation. *Citizens United v. FEC,*[1] which prohibited the government from restricting independent expenditures

[1] 558 U.S. 310 (2010).

for corporate communications,[2] and held that corporations enjoy the same free speech rights to engage in political spending as human citizens, is grounded on the erroneous theory that corporations are "associations of citizens"[3] rather than what they actually are: independent legal entities distinct from those who own their stock.

From an analytical perspective, the core of *Citizens United* is that "the First Amendment . . . prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech,"[4] and that corporations are properly conceptualized as "associations of citizens" that have "taken on the corporate form."[5] *Citizens United* held that the regulation of the speech of "disfavored associations of citizens—those that have taken on the corporate form" was unconstitutional.[6]

Our contribution to the literature on *Citizens United* is that the case is as much a case about corporate law, as it is about the First Amendment. None of the justices deny the importance of political speech in their various opinions about the nature, function, or scope of the First Amendment's protections of free speech. Rather, their major dispute in *Citizens United* is about the *applicability* of settled First Amendment protections to a particular juridical entity, the corporation, and the scope

[2] *See id.* at 349, 354, 356.
[3] *See id.* at 356.
[4] *Id.* at 349.
[5] *Id.* at 356.
[6] *Id.*

of the state's ability to regulate the corporations it allows to be created and gives distinct legal status.

In *Citizens United,* Justice Kennedy, writing for the majority, views the corporation as an "association of citizens" and on this basis concludes that corporations are entitled to First Amendment protections. Not just that, Justice Kennedy's opinion holds that Congress may not take into account the distinctions between corporations and human beings in regulating political speech, and that corporations must be permitted the same freedom to speak as human beings. In dissent, Justice Stevens fails directly to challenge Justice Kennedy's existential conception of the corporation notwithstanding the fact that that it constitutes the core of the majority opinion. This Article fills that void. Our challenge considers and rejects the *Citizens United* majority's conception of the corporation as an "associations of citizens" and reaffirms its status as an artificial, metaphysical, and legal construct that exists separate and apart from its investors. These investors are not "associated" either with one another or with the corporation in which they have invested any more than the various creditors of a corporation are associated with each other or with the debtor to which they have extended financing. Shareholders simply are owners of investment interests with certain contractual rights. They are not "owners" of the corporation in any sense of the word, and their relationship with the corporation is purely statutory and contractual.

The notion that the corporation is an associated group of individuals is misguided and at odds with objective reality. But this counterfactual assertion that the business organization cannot be disentangled from the human beings who are the ultimate "owners" of the corporation led the majority in *Citizens United* to the conclusion that corporations have constitutional rights equal to human beings.

Corporations are accurately viewed not as associations of citizens, but rather as distinct legal entities in their own right that have been formed under statute and authorized by law to act as autonomous "persons" with full legal responsibility. It is this view of the corporation that provides the analytical justification for allowing corporations to enter into contracts and be sued in their own right. On this account, the corporation can—and must—be distinguished analytically from its shareholders.[7] The *Citizens United* view of the corporation as an association of individuals is inconsistent with the established conception of the corporation as a juridical entity with limited liability.

Under the "association of citizens" conception of the corporation advanced by the majority in *Citizens United*, the corporation is merely an extension of its shareholders. This conception confuses the corporation with the general partnership

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[7] *See, e.g.*, LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 73 (2010) ("The corporation has been regarded from its inception as a legal entity distinct from its owners."); 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5709 (rev. vol. 2015) ("A corporation is an entity distinct from its shareholders . . .").

form of business organization. In fact, the entire point of the incorporation process is to permit the creation of a legal entity that is *not* an association of individuals, but rather a discrete legal entity whose rights and obligations are distinct from those of it its creators, investors, managers, and other constituents.

We base our argument that corporations are separate and distinct legal entities and that they are not "associations of citizens" as *Citizens United* asserts on three facts about the corporate form: (1) the treatment of corporations as separate legal entities is what distinguishes corporations from general partnerships and sole proprietorships and what justifies the legal notion of "limited liability" and other central characteristics of the corporate form, such as the ability to contract and to sue and be sued; (2) corporations do not have owners, they have investors who have contract-based, financial interests in the firms and limited management rights; and (3) corporations are not fiction, but fact only because the law makes them real and distinct entities with a legal identity.

In Part I of this Article, we discuss the nature of the corporate form by describing its core attributes and explain that one must infer from the nature of the corporate form itself that the corporation is an entity, not an association of individuals. In Part II, we expand upon the analysis in Part I by examining certain settled legal characteristics that the Supreme Court has itself recognized to distinguish the corporation from other forms of business organization that can more plausibly be viewed as associations of individuals. We conclude Part II by noting a simple, empirical reality that cuts against *Citizens United*'s conception of the corporation as an "association of citizens": stockholders are not owners of the corporation, but rather contract claimants.

In Part III, we discuss the reality that in most other areas of its jurisprudence the Supreme Court embraces the traditional entity view of the corporation, and does not treat corporations as associations of citizens. Thus, *Citizens United* and its progeny are outliers, in tension with the Supreme Court's decisional law in key areas like standing, tax law, criminal law, and other areas of constitutional law. Our analysis shows that in the great bulk of its jurisprudence, the Supreme Court adheres to our view of the business corporation, which is that it is a distinct legal entity whose rights and obligations are subject to statutory constraint. In fact, by long tradition, starting under Chief Justice Marshall,[8] corporations are the opposite of Lockean–Jeffersonian human beings endowed with inalienable rights that cannot be taken away by the government.[9] By contrast, corporations have only those rights society gives them by statutory law, and any statutory law may take into account the unique nature of corporations in limiting their ability to act.

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[8] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (Marshall, C. J.).

[9] THE DECLARATION OF INDEPENDENCE pmbl (U.S. 1776); *see also* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 890–91 (2016) (explaining the historical conception of the corporation as having only the rights given to it by society, which is the polar opposite of human beings who have natural rights that cannot be taken away without due process of law).

We then point out in Part IV profound problems with *Citizen United*'s assertion that corporations are "associations of citizens." Namely, that assertion comes without supporting legal authority and for good reason. Neither the law nor empirical fact supports the idea that stockholders are associated citizens, much less with any common political or social viewpoint.

Part V then notes the stark difference in the Supreme Court's approach when dealing with the free speech of labor unions. In the union context, the Supreme Court's principal concern has been ensuring that no union member has his dues used for political speech without his express authorization, and has held that it is a First Amendment violation to use union dues for political speech.[10] Just this year, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[11] the Court went further and held that unions could not even collect fees to cover the core costs of bargaining for higher wages from a workforce member who did not join the union.[12] In the Bipartisan Campaign Reform Act of 2002,[13] Congress embraced concerns like this and gave corporations the ability to engage in political speech by raising funds voluntarily from stockholders for this purpose. This means took into account the corporate law consensus that a stockholder's decision to invest

[10] *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 240–42 (1977).
[11] 138 S. Ct. 2448 (2018).
[12] *Id.* at 2486.
[13] 2 U.S.C. § 441b.

in a business corporation does not rationally involve any authorization for the corporation to use treasury funds for political speech, and that stockholders are of diverse political viewpoints and only have a shared interest in one thing, getting a good return on their investment. But, applying a starkly different viewpoint than it takes in cases like *Abood* and *Janus*, the Supreme Court struck down McCain-Feingold and trivialized the substantial leeway McCain-Feingold had given for corporations to speak. In analyzing this contradiction, we identify the market realities that make it even less plausible that 21st century American business corporations can be deemed "associations of citizens," especially when most of their stock is owned by institutional investors, to whom American investors are in essence compelled to turn over their capital to save for college for their kids and retirement for themselves. And we conclude Part II by noting a simple, empirical reality that cuts against *Citizens United*'s conception of the corporation as an "association of citizens": stockholders are not owners of the corporation, but rather contract claimants.

Finally, in Part VI we comment on the lack of any source for the *Citizens United* majority's view that the corporation is an association of individuals. In particular, we observe that corporations are creatures of state law, not federal law.[14] As the Court observed in *CTS Corp. v. Dynamics Corp.*, "[s]tate regulation of

[14] *Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law").

corporate governance is regulation of entities whose very existence and attributes are a product of state law."[15] Therefore, determinations about the nature of the corporation, such as whether the corporation is a distinct juridical entity or an association of individuals, should be made by reference to state law, not federal law. To further this point, we survey those forms of entities that might be more plausibly considered associational in form than corporations, and note that in the main, most of them are trending strongly toward the entity conception. After doing so, we address those corporations most rationally considered to be vehicles for the shared viewpoints of those who form them: non-profit corporations. As to them, we highlight two features that buttress our core point. To wit, most non-profit corporations are member corporations and do not even have stockholders. And as important, these corporations do not fund their speech using the entrusted capital of their members or stockholders. Rather, they speak using funds they raise specifically for that purpose from donors—exactly the method that Congress left open to corporations in McCain-Feingold and that the *Citizens United* majority said constituted a total ban on corporate speech.

We conclude by noticing an irony. It was the legislative branch, not the judicial branch that is supposedly more learned in the law, that was the one that understood corporate law when addressing political speech. Congress considered

[15] 481 U.S. 69, 89 (1987).

the nature of corporations when enacting McCain-Feingold and took into account that corporations are not associations of citizens, but separate, state-created entities formed for reasons that cannot be rationally attributed to the shared political or philosophical views of their investors. As such, Congress allowed corporations broad freedom to engage in political speech, but only by using funds voluntarily contributed for this purpose by stockholders to a corporate-controlled political action committee (PAC). By this means, Congress left ample room for the corporation to act as a collective vehicle for stockholders who wished to affiliate for that purpose, but protected other stockholders from being forced to subsidize speech that the mere decision to invest cannot plausibly be thought to endorse. By contrast, the Supreme Court ignored, or misunderstood, the traditional corporate law concept of the corporation and thereby subjected millions of American investors to suffer the involuntary use of their entrusted capital for speech that has no rational connection to their decision to buy stock. That is bad corporate law making bad constitutional law.

I. The Nature of the Corporation: Economics, Law, and *Citizens United*

Citizens United involved a test of the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold),[16] a federal law prohibiting corporations and unions from using their general treasury funds to make independent expenditures for speech that is either an "electioneering communication" or that expressly advocates the election or defeat of a candidate.[17] McCain-Feingold defined an electioneering communication as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office that is made within 30 days of a primary election and that is publicly distributed.

Much has been written about the facts of *Citizens United*. Sufficient for present purposes is to point out that the procedural history of the case makes clear that the *Citizens United* majority sought to use the case to make a broad statement about the ability of all corporations to engage in political speech. Although there were narrower ways to resolve the precise case before the Court, because it involved a non-profit corporation and unusual facts,[18] it is inarguable that the majority wanted

[16] 2 U.S.C. § 441b.

[17] *Id.*

[18] *Citizens United*, 558 U.S. at 319–22 (noting that "Citizens United is a nonprofit corporation" with "an annual budget of about $12 million" accrued mostly "from donations by individuals"). Several scholars have noted that the Court could have resolved *Citizens United* on narrower grounds. *See* Laurence H. Tribe, *Dividing Citizens United: The Case v. The Controversy* 30 CONST. COMMENT. 463, 473 (2015) ("From the initial briefing to the final argument, the Court greatly expanded the scope of the issues presented. And in its decision, the Court dodged a multitude of paths to a narrower ruling."); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 415 (2013) ("[*Citizens United*] was written with a broad brush, turning its back on several plausible narrower grounds for decision").

to issue a ruling to address the kind of corporations that are most common and most wealthy: business corporations that are formed with the goal of making profits. For our purposes, therefore, we focus much of our discussion on business corporations, as these are the corporations with massive wealth that Congress was most concerned with regulating in McCain-Feingold.

In *Citizens United*, the majority struck down the provision of McCain-Feingold that prohibited corporations from making expenditures in favor of the election or defeat of political candidates, except through corporate-sponsored PACs.[19] In so doing, the majority rejected the idea, which we will come back to, that Congress had not prohibited corporate speech, but had solely put into place regulations about how corporations could speak that took into account the factual differences between corporations and human beings. In particular, *Citizens United* did so by giving no weight to the provisions in McCain-Feingold that allowed corporations to establish and solicit contributions to "a separate segregated fund to be utilized for political purposes."[20] Under those provisions, corporations could solicit voluntary contributions from key corporate constituencies, in particular

[19] 52 U.S.C. § 30118(a) ("It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office.").
[20] 52 U.S.C. § 30118(b)(2).

stockholders and employees.[21] But, corporations could not use treasury funds directly to engage in electioneering.[22]

McCain-Feingold sought to ensure that only funds voluntarily contributed by stockholders were used by corporate speech. McCain-Feingold represented no revolution in legislative techniques designed to constrain the operation of business corporations. For much of the 19th century, corporations could only engage in a merger with unanimous consent of the stockholders, and the appraisal right arose when that stringent rule was tempered.[23] And when general incorporation statutes were enacted, courts used the ultra vires doctrine to forbid the use of corporate funds for political and charitable purposes, on the grounds that these were not purposes

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[21] *See id.* (excluding the "solicitation of contributions to a separate segregated fund to be utilized for political purposes" from the definition of "contribution or expenditure"); *id.* § 30118(b)(4)(A) (prohibiting such a separate segregated fund from soliciting contributions "from any person other than its stockholders and their families and its executive or administrative personnel and their families"); *Citizens United*, 558 U.S. at 415–16 ("Under BCRA, any corporation's 'stockholders and their families and its executive or administrative personnel and their families' can pool their resources to finance electioneering communications. A significant and growing number of corporations avail themselves of this option; during the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, and no one has suggested that the burden is severe for a sophisticated for-profit corporation.") (Stevens, J., dissenting).
[22] *See* 52 U.S.C. § 30118(a).
[23] Norwood P. Beveridge, *Interested Director Contracts at Common Law: Validation Under the Doctrine of Constructive Fraud*, 33 LOY. L.A. L. REV. 97, 109 (1999) (corporate law required unanimous consent of stockholders for "extraordinary transactions," citing *People v. Ballard*, 32 N.E. 54, 59 (N.Y. 1892), and *Abbot v. American Hard Rubber Co.*, 33 Barb. 578, 590–93 (N.Y. Sup. Ct. 1861))

within the corporation's stated purposes.[24] And once generally chartered business corporations began to get involved in politics, federal and state regulation to limit their ability to use their wealth to influence elections quickly arose and was validated by the courts.[25]

But as we will note later, the *Citizens United* majority ignored how corporations do business in general; the Court viewed McCain-Feingold as too burdensome, because the corporation had to create a distinct entity and account for it. Additionally, the Court concluded that "[a] PAC is a separate association from the corporation[,] [s]o the PAC exemption from [McCain-Feingold's] expenditure ban . . . does not allow corporations to speak."[26] That is, *Citizens United* gave dismissive treatment to Congress's authorization for corporations to engage in speech by acting as a collective action device to "associate" those stockholders who had a common desire to speak through the corporation, and insisted that the corporation as a distinct entity had to be allowed to speak directly using treasury funds. In doing so, the Court ignored the reality that most large business

[24] *See generally* Albert J. Harno, *Privileges and Powers of a Corporation and the Doctrine of Ultra Vires*, 35 YALE L.J. 13 (1925).
[25] Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 890–93 (2016) (documenting this history).
[26] *Citizens United*, 558 U.S. at 337–38 ("PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.").

corporations form specific corporations—subsidiaries—to pursue their various business lines and to achieve the benefits that come with the law's recognition of these subsidiaries as having a distinct legal identity. The McCain-Feingold PAC exemption involved no burden that corporations like Exxon-Mobil and Apple do not happily accept all the time. Having trivialized the means Congress gave to corporations to speak using its ability to aggregate contributions voluntarily from its supposedly "associated" stockholders, the *Citizens United* majority then pronounced McCain-Feingold "an outright ban" on political speech by corporations.[27] Because of its own strained conclusion that McCain-Feingold acted as a total ban, the majority then found it easy to conclude that Congress had violated the First Amendment. But as an empirical matter, the idea that before *Citizens United* corporations were subject to a "total ban" on political speech is fanciful. Whatever a "total ban" means, a situation where our politics are awash in corporate money is not a "total ban."[28]

[27] *Citizens United*, 558 U.S. at 337–38.

[28] *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 930–37 (presenting evidence of significant corporate political spending before *Citizens United*); Tilman Klumpp et al., *The Business of American Democracy:* Citizens United, *Independent Spending, and Elections*, 59 J.L. & ECON. 1 (2016) (documenting the role of corporate money in politics before and after *Citizens United*); John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657 (2012); Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974 (2016) (presenting empirical evidence from 1980 through 2012 that business interests seek short-term access to influential legislators through campaign contributions to committee members); Alexander Fouirnaies & Andrew B. Hall, *How Do Interest Groups Seek Access to Committees?*, 62 AM. J. POL. SCI. 132 (2017) (providing similar evidence in the context

Citizens United ignored the entity theory of the corporation and adopted a view that the corporation is an aggregate of its shareholders. As Adam Winkler trenchantly observed, "not once" did Justice Kennedy in his opinion "mention corporate personhood. He never said that corporations were people and nothing in his opinion turned on that notion:"[29]

> Corporate personhood—the idea that a corporation is an entity with rights and obligations separate and distinct from the rights and obligations of its members—is entirely missing from the court's opinion. The court afforded broad free speech rights to corporation, but not because they were people. Instead . . . the *Citizens United* decision obscured the corporate entity and emphasized the rights of others, like shareholders and listeners.
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> *Citizens United* repeatedly described the corporation as "an association that has taken on the corporate form."[30]

Citizens United treats the corporation as "a mere collection of men,"[31] attributing the rights and responsibilities of the corporation's shareholders to the corporation itself.[32] This analysis confuses the general partnership form of business organization, which is an association of partners, whose individual rights and

of U.S. state legislatures, using data from 1988 through 2014); HEIDI WELSH & ROBIN YOUNG, SUSTAINABLE INVESTMENTS INST., CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 2 (2011), http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf ("S&P 500 companies allocated $979.3 million (87 percent) of the $1.1 billion they gave in 2010 to [federal] lobbying. They spent a further $112 million (10 percent) on state level candidates, parties and ballot initiatives and $31 million (3 percent) on federally registered political committees.").

[29] ADAM WINKLER, WE THE CORPORATIONS 364 (2018).

[30] *Id.*

[31] *Id.*

[32] *See Citizens United*, 558 U.S. at 349, 354, 356 (referring to corporations as "associations of citizens").

responsibilities are indistinguishable from those of the entity, with the corporate form of business organization, which is a separate juridical entity with distinct rights and responsibilities. The rights and responsibilities of corporations are limited by the states that create the legal framework that allows them to come into existence and regulates their activities.

A. The Nexus of Contracts Theory

Just as the aggregate theory and the entity theory provide two ways to view the corporation through a legal lens, the "nexus of contracts" theory and the "separation of ownership and control" theory provide two ways to view the corporation through a theoretical economic lens.[33] There is a critical analytical difference, however, between the theoretical economic view of the corporation and what should be the fact-based legal view of the corporation. Specifically, the economic views of the corporation are not mutually exclusive: one can logically view the corporation simultaneously both as a nexus of contracts *and* as an organization characterized by the separation of ownership and control.

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[33] Sometimes as a matter of description, three theories of the corporation have been identified. These theories "are the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers." Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1001 (2010) (describing these as the "standard theories found in literature," and citing David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201). But both the creature of the state theory and the real entity theory view the corporations as separate entities. These theories are not logically distinguishable, and the fact is that corporations are real because the state makes them so.

In contrast, the legal conceptions of the corporation as either a distinct entity or simply an aggregation of its stockholders are mutually exclusive. As a matter of logic, the corporation may be conceptualized by law as either an entity or an aggregate but it cannot rationally be conceptualized simultaneously as both. The entity theory and the aggregate theory are not complements: they are substitutes. In fact, the entity view of the corporation serves as an *alternative* to the aggregate view. The purpose of the entity view is to provide a way to conceptualize the corporation that distinguishes it from its progenitor, the partnership form of business organization. More precisely, the entity view respects the evident core purpose of society's creation of the corporation: to give a corporation a legal identity distinct from any of its constituents, including its stockholders. Put simply, theoretical economic conceptions of the corporation are not designed to describe what corporations are as a matter of law and thus empirical fact. As we show, corporate law is clear about those basic questions, because the essential point of corporate law is to create entities distinct from their constituents.

The core of the nexus of contracts theory is that the corporation is best described as a nexus or web of bilateral contracts between inputs of capital and labor.[34] Even

[34] R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). For applications of the theory *see* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUMBIA L. REV. 1416 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency, Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 30l (1983); *see also*

under this view, however, the corporation is a "legal fiction"[35] in that its existence is dependent on the enabling authority of state legislation; that is, the law makes fact what would otherwise be fiction. The basic insight of the nexus of contracts theory is that when the corporation is deconstructed into its component parts all that one observes is a constellation of contracts that describe the relationship of the various firms and humans who have claims on the cash flows of the enterprise.

Here we make two points about the contractual theory of the corporation as it relates to the conception of the corporation embedded in *Citizens United*. First, although the nexus of contracts conception of the corporation has much to recommend it as an analytical tool, this theory is incomplete because it envisions a counter-factual world in which the state does not exist. Second, the nexus of contracts theory is not actually a theory of the corporation. Rather, it is a meta-theory that describes all forms of business organization, including partnerships and sole proprietorships. As such, the nexus of contracts theory is inconsistent with the "association of individuals" conception of the corporation found in *Citizens United* because the nexus of contracts theory treats all of the various contractual inputs to the corporation, whether they be suppliers of equity or debt or labor, as equal. In contrast, the "association of

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Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Kenneth E. Scott, *Corporate Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983).

[35] William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORN. L. REV. 407, 409 (1989).

individuals" theory inexplicably exalts the role of shareholders over other constituents of the corporate enterprise in a way that is inconsistent with the contractual approach.

Finally, and most importantly, we observe that, under the nexus of contracts theory, the various constituents to the corporation must, of course, have counter-parties. This counterparty is an entity, namely the corporation itself. As such, the nexus of contracts theory is consistent with the entity theory. In contrast, the nexus of contracts theory is inconsistent with the "association of individuals" conception of the corporation in *Citizens United*. If the corporation were an association of individuals rather than a separate and cognizable legal entity unto itself, then the contracts made by contributors of labor and capital would be with the individuals who constitute the association. But of course this is not the case: the contracts are between contributors of labor and capital and the corporation itself.

1. The Role of the State

The nexus of contracts approach to corporate law is a powerful conceptual tool. On this model, entrepreneurs hire managers to administer the affairs of the corporation. But, of course, the corporation cannot operate without labor and capital, and in order to attract these inputs, the corporation must make attractive binding contractual promises to induce suppliers of capital to agree to contribute their human or monetary capital to the business. The more credible the promise that a corporation is able to make, the better terms the corporation will obtain from investors of all sorts.

The state plays a disquietingly limited role in the nexus of contracts theory, because the leading theorists slight as mundane that which is necessary. There is no "entirely satisfactory" answer to the question of why the state's involvement in general or corporate law in particular is required or what role the state or corporate law play in the nexus of contract theory.[36] According to the nexus of contracts theory, the state's role is to fill in blanks in the inevitably incomplete contracts that contributors of labor and capital forge with the corporation. As Frank Easterbrook and Dan Fischel have observed:

> corporate law is a set of terms available off the-rack so that participants in corporate ventures can save the cost of contracting. There are lots of terms, such as rules for voting, establishing quorums, and so on, that almost everyone will want to adopt. Corporate codes and existing judicial decisions supply these terms "for free" to every corporation, enabling the venturers to concentrate on matters that are specific to their undertaking. . . . Corporate law—and in particular the fiduciary principle enforced by courts—fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance. On this view corporate law supplements but never displaces actual bargains—save in situations of third-party effects or latecomer terms.[37]

This simple and elegant portrayal of the role of the corporation is incomplete because it ignores that the key role for corporate law—and for the state—is creating

[36] Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUMBIA L. REV. 1416, 1444 (1989).
[37] *Id*. at 1444-45.

the legal infrastructure that allows for the existence of the corporation and its endowment with legal rights and duties. The nexus of contracts view of the corporation simply assumes the existence of the corporation. But corporations do not exist by any organic or natural process. Although corporations are legal entities, they are not carbon-based life forms that have evolved into sentient creatures. You and your teammates cannot call "limited liability entity" on the state of nature's business playground: It takes the law to set the rules under which you may do so.

The existence of the corporation can only be attributed to the state. Still more recently, scholars studying the theory of legal entities, particularly Henry Hansmann and Reinier Kraakman, have shown that the state is essential in providing the corporation with distinct property rights in general and, in particular, a discrete, "portioned" pool of assets that are shielded from the shareholders' personal creditors.[38]

No one can form a corporation without the acquiescence of the state, which creates the framework by which corporations can be created. The process involves filing a certificate of incorporation. But before this can happen, the state has to pass

[38] *See* Henry Hansmann and Reinier H. Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); Henry Hansmann and Reinier H. Kraakman, *Organizational Law as Asset Partitioning*, 44 EUR. ECON. REV. 807 (2000); Henry Hansmann and Reinier H. Kraakman, *Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights*," 31 J. LEGAL STUD. S373 (2002); Henry Hansmann, Reinier H. Kraakman and Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006); *see also* Jensen & Meckling, *supra* note 34, at 310 ("[M]ost organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals.").

an enabling statute that permits the corporation to be formed in the first place. For example, under Delaware law, the relevant statute provides that:

> [a]ny person, partnership, association or corporation, singly or jointly with others, and without regard to such person's or entity's residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter by filing with the Division of Corporations in the Department of State a certificate of incorporation.[39]

Corporations can be formed only after the state creates this legal framework. And, under this legal framework, corporations are legal entities that have legal personhood in the sense that they can enter into contracts, sue and be sued, pay taxes, and generally shoulder legal responsibility in their own names, without simultaneously obligating any of their constituents, including their stockholders.

2. All Firms, Not Just Corporations Are Nexuses of Contracts

As a matter of empirical, inarguable fact, corporations are creatures of the state. It is not realistic or accurate to assume that corporations somehow exist without the benefit of enabling action by the state and that people can contract with them. Thus, the state plays a larger conceptual role in the life of the corporation than the nexus of contract theoreticians recognize. It is only after the state has both: (1) permitted the formation of the corporation in the first place; and (2) recognized it as a legal entity that the contracting process can begin.

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[39] 8 *Del. C.* § 101(a).

As important, the nexus of contracts theory is not a theory of corporations in particular, but rather a general theory of business organizations. It therefore does not even speak to what corporations specifically are as a matter of law. The nexus of contracts theory applies with equal force to all forms of business organization, including partnerships and limited liability companies, and even sole proprietorships.

Notably, some of these forms of business organization require state intervention for formation and others do not. Those forms of business organization that do not require state intervention can be plausibly viewed as "associations of individuals," but those forms of business organization that do require intervention and can only be created under the authority of a state statute are fundamentally different. These state statutes grant individual entrepreneurs the right to create new legal entities that are categorically distinct from their investors and from their creators.

Without an enabling state statute, a corporation cannot be formed. These statutes operate to give corporations their central defining characteristic, which is their status as distinct legal entities. By contrast, general partnerships and sole proprietorships, which, unlike corporations are associations of individuals, cannot claim the attributes of "corporateness" that legally emanate from corporations' status as distinct legal entities.

3. The Separation of Ownership and Control

Before the modern conception of the corporation as a nexus of contracts, the most innovative theoretical perspective on corporations was based in the emergence of corporations that had grown large, and whose dispersed stockholders were seen as unable to constrain the managers, directors, and officers who ran corporate affairs. In their classic work, *The Modern Corporation and Private Property*, Berle and Means identified this growing reality and its consequence, a phenomenon they called the "separation of ownership and control."[40] This phrase captured the notion that shareholders, who were characterized as the "owners" of the corporation, were generally passive investors who ceded ownership of the business to professional managers who "control" the corporation in ways that often served only their own private interests and caused mischief for shareholders and society.

The conception of the corporation as characterized by a separation of ownership and control is undeniable as a descriptive matter, but somewhat controversial from a normative perspective. Berle and Means and their adherents took the view that the separation of share ownership and managerial control raised profound challenges that justified imposing limitations on the scope of business corporations' powers and

[40] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

activities. One characterization of the legal implications of the Berle and Means view of the corporation was articulated by Justice Brandeis as follows:

> Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable. It may be granted as a means of raising revenue; or in order to procure for the community a public utility, a bank or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm.[41]

Although the concept of the separation of ownership and control is merely descriptive, at some point, the term "separation of ownership and control" and the phrase "Berle and Means corporation" came to stand for the proposition that corporations posed big problems for society. Eventually, scholars more narrowly focused on the interests of stockholders arose to respond to the normative implications raised by those who described the corporation as characterized by a separation of ownership and control.[42] Significantly, scholars associated with the law and economics movement accepted the descriptive fact that the corporation can be characterized as a separation of functions akin to the separation of ownership and

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[41] *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 545 (1933) (Brandeis, J., dissenting).

[42] *See, e.g.,* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 30l (1983).

control. But these scholars described the ownership function of shareholders in economic terms as being characterized by their role as risk-bearers and residual claimants.[43]

On the law and economics revisionist view of the separation of ownership and control conception of the corporation, the shareholders invested their money, and therefore assumed some of the risks associated with the failure of the firm and, on the flip side, were entitled to the excess cash flows from the earnings of the firm once suitable provision had been made for the prior claims of creditors. Although the shareholder "owners" assumed this risk-bearing function, the control function was carried out by professional managers who had developed a specialized set of skills, known as human capital that enabled them to excel at management and decision-making. On this view, professional managers were compensated for these management and decision-making skills, which shareholders did not possess. Thus, the law and economics movement transformed the Berle-Means separation of ownership and control, with its negative connotations, into a slightly different conception of the corporation as being characterized by a "separation of decision (management) and risk-bearing (ownership) functions" that exists in part "because of the benefits of specialization of management and risk bearing" but also "because of

[43] *See e.g.*, *id.* at 302–03 (describing agents "who contract for the rights to net cash flows" as "residual claimants or residual risk bearers").

an effective common approach to controlling the agency problems caused by separation of decision and risk-bearing."[44]

The key difference between the Berle-Means "separation of ownership and control" view of the corporation and the law and economics "separation of decision-making and risk-bearing" view of the corporation is about how wide a lens from which to view the dangers of the separation of ownership and control. Berle himself viewed these dangers as involving more than stockholders, and thus he and others like him worked to strengthen external constraints on corporate managers in a way that reduced their ability to abuse their power.[45] Berle, for example, was a key author of the New Deal,[46] many of the provisions of which had the effect of creating external regulation that limited the extent to which corporate managers could use corporate power to

[44] Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 30l, 301–302 (1983); Jensen & Meckling, *supra* note 34. Although Jensen and Meckling's work is considered innovative, it must be remembered that their economic gloss was not novel. The governance of corporations in the United States resembles real polities for a good reason. Corporate statute writers grappled with the same concerns that animated Locke, Montesquieu, and the Founders of our Republic: How could we create structures under which the governed benefit from centralized managements? How do we balance effective governance with accountability to the interest holders? Corporate law thus uses a combination of tools of republican democracy (*e.g.*, elections of directors) and direct democracy (*e.g.*, the right to vote on certain essential items such as charter (*i.e.*, constitutional changes) or mergers). Jensen and Meckling is considered brilliant law and economics, but in many ways is a restatement of principles elementary to any student of our constitutional history.

[45] Adolf A. Berle, Jr., *Corporate Decision-Making and Social Control*, 24 BUS. LAW. 149, 152 (1968) ("The corporate system of our time . . . can and should conform to social requirements; it can and should lend help to government and to quasi-public and other institutions whose task is to develop a society both good and just.").

[46] *See generally* Adolf A. Berle, Jr., *Reshaping the American Economy*, 9 CENTENNIAL REV. 209 (1965).

harm, not just investors,[47] but workers,[48] and consumers, and society generally. By the time more stockholder-focused law and economics scholars began theorizing, they accepted as a foundational fact that external law, exemplified by the New Deal, existed to protect other corporate constituents.[49] They therefore focused on the implications of the separation of ownership and control, and the limited rights of stockholders.[50] Why would investors entrust their capital to corporations over which they only had limited influence?[51]

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[47] For example, the New Deal created a system of securities regulation to deter fraud and self-dealing. *See* Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74, codified as amended at 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881, codified as amended at 15 U.S.C. § 78a *et seq*.

[48] *See* National Labor Relations Act of 1935, Pub. L. 74-198, 49 Stat. 449, codified as amended at 29 U.S.C. § 151–69; Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (establishing the right to a minimum wage).

[49] *See, e.g.*, Friedman, *supra* note 51 ("[P]olitical mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scare resources to alternative uses."); Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y 303, 310 (1973); STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 429 (2002) (taking this view and noting that "the federal government has intervened" to protect workers, such as through Family and Medical Leave Act provisions requiring unpaid leave for family and medical problems, Occupational Health and Safety Administration regulations requiring safe working conditions, and civil rights laws prohibiting discrimination). *See also* Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL. L. REV. 335, 352–54 (2015) (documenting the view among conservative corporate law theorists that business should focus on profits because political processes protect other interests).

[50] *See, e.g.*, Jensen & Meckling, *supra* note 34; Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) [hereinafter Bebchuk, *The Case*] (proposing increased shareholder power based on an efficiency rationale).

[51] Law and economics scholars have been concerned about the relative weakness of stockholders in comparison to corporate managers because they normatively believe that business corporations generate the most societal value by focusing on making profits for their investors in a lawful manner. *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33; Arrow, *supra* note 49, at 132; Michael C. Jensen, *Value Maximisation, Stakeholder Theory, and the Corporate Objective Function*, 7 EUR. FIN.

On either the broader or narrower view, however, there is a clear and sharp line of demarcation between managers who control and make decisions for the corporation and the shareholders who allocate risk capital to the corporation in the hope of a return on their investment. This notion of the corporation appears to be understood at least partially by the justices in *Citizens United.* Justice Scalia, in concurrence, addresses the dissent's argument that "'speech' refers to oral communications of human beings, and since corporations are not human beings they cannot speak."[52] Scalia's response is that corporations speak through agents: "The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members."[53]

This treatment of the corporation is logically and factually flawed. The fact that an inanimate object such as a corporation has a human spokesman does not

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MGMT. 297, 302 (2011); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15–22 (1991). They share with other scholars the premise that the corporation is in fact distinct from its stockholders and that those stockholders only have limited rights to constrain corporate action. Scholars who believe business corporations should be obliged to act with equal regard toward all their constituents, and not put profit over social responsibility, embrace the weakness of stockholders and the distinct nature of the corporation as an entity for another reason. They view the fact that the corporation is not an association of stockholders as the key "attribute" not "deficiency" of corporate law, because it allows for business corporations that conduct their affairs in a socially responsible manner. *See* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 38 (2018). For that reason, they fear that developments that make corporate managers more subject to stockholder direct influence are dangerous. *Id.* *See generally* LYNN STOUT, SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

[52] *Citizens United*, 558 U.S. at 392 n.7 (Scalia, J., concurring).

[53] *Id*.

somehow transform the inanimate object into an animate object. After all, a person who takes her cat to the veterinarian is speaking on behalf of the cat, but doing so does not transform the cat into a person. In other words, the fact that a corporation can only speak through agents undermines rather than supports the claim in *Citizens United* that a corporation is an association of individuals.

Moreover, in the face of the ubiquitous and pervasive agency costs that inevitably come with the separation of management and risk-bearing, there is never any assurance that those who purport to speak on behalf of investors are truly doing so.[54] This point appears particularly strong in light of the fact that shareholders are not a monolithic group. Shareholders may all agree that they would prefer that the value of their shares increase in value rather than decrease in value, but the notion of shareholder homogeneity goes no further than this. Shareholders are as heterogeneous as society as a whole, and the notion that a corporate spokesperson can "represent" the shareholders in a non-commercial realm such as speech is farcical. As Ronald Gilson and Michael Klausner have observed:

> Under existing corporate law stockholders' ability to influence how management runs a corporation's business is largely limited to annually electing a board of directors. Stockholders' interests are supposed to be solely financial: Management maximizes the return on stockholders' investment and stockholders pass judgment on management performance when they elect directors. When stockholders share this

[54] John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. OF EMPIRICAL LEGAL STUD. 657, 667 (2012).

> common concern with profits a simple governance system serves them and the economy well.
>
> But stockholders do not have a common interest in political activity. They may be Republicans or Democrats, pro-choice or pro-life, for or against the Senate's health care bill. A stockholder of a pharmaceutical company, for example, could oppose a politician who promises to favor the pharmaceutical industry because of the politician's views on financial sector reform.[55]

Significantly, in our view, both of the economic approaches to the corporation, the nexus of contracts approach and the separation of risk-bearing ("ownership") and management ("control") reflect the fact that a defining feature of the corporation is the sharp distinction between the active strategic and tactical functions of management and the passive investment and risk-bearing functions of the shareholders. These competing conceptions of the corporation reflect a consensus among economists of all ideological stripes that corporate managers often do not speak for shareholders, but instead speak for themselves.[56]

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[55] Ronald Gilson and Michael Klausner, *That's My Money You're Using*, FORBES (Mar. 11, 2010), https://www.forbes.com/forbes/2010/0329/opinions-citizens-united-corporate-shareholders-on-my-mind.html#21f6fb0b586c; *see also* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (pursuit of goals other than profit maximization as "especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity"); Henry N. Butler & Fred S. McChesny, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1224 ("[S]hareholders may have very different views on what is good for society."). *See generally* Strine & Walter, *Conservative Collision Course*, *supra* note 49, at 364–65 (gathering authorities for this proposition).

[56] *See, e.g.*, Jensen & Meckling, *supra* note 34 (presenting a model in which managers act in ways that serve their own interests at stockholders' expense); Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1200–02 (2002) (raising concerns about agency costs in corporate charitable giving); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political*

Moreover, the very concept that corporate managers speak for shareholders obscures the fact that shareholders are by no means monolithic in their views about politics. In fact, the heterogeneity of shareholders is such that it is inevitable that corporations who purport to speak on behalf of their shareholders are speaking only on behalf of a subset of such shareholders. Further, both of the economic views of the corporation are based on the assumption that a corporation is a separate entity distinct from its shareholders.

This shared belief is also based on another stubborn legal fact that *Citizens United*'s associational theory fails to acknowledge. Stockholders do not get to choose the message and send out a human corporate spokesperson to deliver it on their associated behalf. That is not how corporate law works. Except as to limited issues on which they have a direct vote,[57] stockholders only vote for directors. Under a majority of states' corporate laws, directors are not required to give stockholders' interests primary weight, they are entitled to consider the interests of other corporate

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Speech: Who Decides?, 123 HARV. L. REV. 83, 90–93 (2010) ("[T]here is no reason to expect that the preferences of the particular individuals who make the company's political speech decisions will match those of shareholders" because shareholders usually "do not sort themselves among companies according to their political preferences"). There is also empirical literature on the potential for agency costs in corporate charitable giving and political donations. *See, e.g.*, Ronald W. Masulis, *Agency Problems of Corporate Philanthropy*, 28 REV. FIN. STUD. 592 (2015); Hao Liang & Luc Renneboog, *Corporate Donations & Shareholder Value*, Eur. Corp. Governance Inst. Finance Working Paper No. 491/2016, at 22–23, 25–26 (2016), https://ssrn.com/abstract=2885936.

[57] *See* 5 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2097, Westlaw (last updated Sept. 2017) ("[T]he powers of management vesting in the shareholders as a body are very few . . . .").

constituencies.[58] In speaking for the corporation, therefore, it is the board that sets corporate policy and that policy is not one that must be based on what the stockholders view as the correct perspective. And, even in states like Delaware with a strong focus on stockholders, the directors, not stockholders, determine policy, and they do not have a duty to satisfy momentary stockholder demands.[59] Stockholders have limited influence and have to throw the bums out to change policy, a difficult and expensive proposition.[60] Shareholders' traditional power relative to managers is captured by the title of Professor Roe's book: *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance*.[61] Stated simply, it is precisely because corporations are distinct from, and cannot be relationally considered as an association of any of them, that theorists like Berle,[62] Friedman,[63] Easterbrook and Fischel,[64] and Bebchuk[65] have spent so much time considering how to constrain the

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[58] *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85; Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *Land?*, 42 LOYOLA L. REV. 765, 768 n.13 (2009).

[59] *See* Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1762–64 (2006).

[60] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–94 (2007) (documenting the costs and hurdles to running a proxy contest). For a classic work examining shareholder access to the proxy machinery, see Melvin Eisenberg, *Access to the Proxy Machinery*, 83 HARV. L. REV. 1489 (1970).

[61] MARK ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1996).

[62] *See generally* BERLE & MEANS, *supra* note 40.

[63] *See generally* Friedman, *supra* note 51.

[64] *See generally* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

[65] *See generally* Bebchuk, *The Case*, *supra* note 50.

power of corporate management to ensure that corporations further, rather than erode, public welfare as they diversely view it.

II. The Core Attributes of Separate Legal Entities

The preceding section of this Article details how economists understand the corporation not as an "association of individuals" but as a distinct legal entity separate from its shareholders. In this section, we examine *Citizens United*'s assertion that the corporation is an association of individuals from a legal perspective. The core of our argument is that there are forms of business organization that are associations of individuals, but that the corporation is not one of them. Indeed, we show that the entire point of the corporate form is to allow for the creation of organizations that are distinct from their shareholders. Thus, not only is the notion that corporations are associations of individuals misguided and inconsistent with corporate law's conception of the corporation, it is antithetical to the state law conception of the corporation. If the corporation were merely an "association of individuals," rather than an actual legal entity in its own right, the justification for immunizing shareholders from liability for corporate debts would disappear. After all, if corporate speech is shareholder speech, then by parity of reasoning, corporate debts are shareholder debts.

For thousands of years, human commerce took the form of sole proprietors bartering goods and services.[66] Over time, the dominant form of business

[66] *See* JONATHAN MACEY, DOUGLAS MOLL & ROBERT HAMILTON, THE LAW OF CORPORATIONS 1 (13th Ed. 2017).

organization became the partnership.[67] Under state law, partnerships are associations of "two or more persons" who organize to carry on as co-owners "a business for profit."[68] As a consequence of their status as associations of persons, partners are agents of the partnership and are jointly and severally liable for the debts of the partnership. Unlike corporations, partnerships truly are associations of individuals. Simply put, the organizational form that the Court describes in *Citizens United* is a general partnership, not a corporation.

In the west, the idea of the corporation began with the Romans. Indeed, Roman law introduced the very idea that "organizations could be legal entities in their own right with a legal personality that was distinct from the individual who comprised them."[69] The very term "corporation" derives from the Latin word corpus which translates into English as the word "body," which presents an entity that is authorized by the state to act as an individual. Initially, cities were organized by the Romans as corporations. Gradually the concept was extended to certain community organizations called "collegia" that served community groups or religious societies. There is some evidence that an early form of business organization called the "publicani," which was organized to build aqueducts, manufacture arms, construct temples, collect taxes, and perform certain governmental functions, received a corporate status (habere corpus)

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[67] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 130 (3d Ed. 2005).
[68] Unif. Partnership Act § 102(10); Rev. Unif. Partnership Act § 202(a).
[69] MAYER, *supra* note 51, at 65.

that included a grant of limited liability for investors as early as the third century. Although this feature did not persist over time, it reemerged in the early 19th century in the U.S. and England.[70] As both a matter of law and of history, because partnerships were associations of individuals, individual investors could control their investment by their right to withdraw their investments at will.[71]

As recent important work by Dari-Mattiacci, Gelderblom, Jonker, and Perotti has shown, this ability easily to withdraw capital subjected partnerships to runs by investors and made the organizations unsuitable for carrying out long-term strategies or for raising debt:[72]

> Traditional Roman partnership law adhered strictly to the principle of exit at will, which gave each individual partner the right to force the liquidation of the partnership. This principle prevented parties from credibly agreeing to remain in a partnership for the long term: lock-in contracts were not fully enforceable in court. Overcoming this limitation required a legal innovation, not merely a contractual one. Only the law could grant capital permanence to private corporations, extending a privilege until then enjoyed by public corporations such as townships, monasteries, and hospitals.[73]

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[70] RONALD COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION 31–32 (2014). *See also* Ulrike Malmendier, *Law and Finance at the Origin*, 47 J. ECON. LIT. 1076, 1076–1108 (2009); WILLIAM BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 282–288 (2004).

[71] Giuseppe Dari-Mattiacci, Oscar Gelderblom, Joost Jonker, & Enrico C. Perotti, *The Emergence of the Corporate Form*, J. L. ECON. & ORG. 193, 195 (2017).

[72] *Id.* at 195.

[73] *Id*.

The problem outlined by Dari-Mattiacci, Gelderblom, Jonker and Perotti persists in modern times. Take for example a 1985 case concerning a general partnership consisting of three partners, Thomas Bernabei, James Serra, and Howard Wenger.[74] As is typically the case in partnerships, each of these individuals contributed capital to the partnership and shared in the partnership's profits and losses. Sometime after the partnership purchased a title insurance policy, two of the partners, Bernabei and Serra, sold and transferred their partnership interests to the third partner Wenger and to a new partner, one James Valentine. When the partnership attempted to collect on the title insurance policy, the insurance company rejected the claim on the grounds that when Bernabei and Serra left the partnership and Valentine joined the partnership, the old partnership was dissolved and a new partnership was formed. The insurance company argued that the insurance policy was with the defunct former business entity not with the latter business entity, which automatically formed when the old partnership was dissolved following the withdrawal of the two partners. The court agreed, observing that the common law rule that a dissolution occurs and a new partnership is formed whenever a partner retires or a new partner is admitted was still in place after the enactment by the state of Ohio of the Uniform Partnership Act, which reflects the "aggregate theory of partnership."[75] As such, the original partnership was

[74] *Fairway Development Co. v. Title Insurance of Minnesota*, 621 F. Supp. 120 (N.D. Ohio 1985).
[75] *Id.* at 122.

the party to the insurance contract and the new partnership was not, and the new partnership had "no standing to sue the defendant" for breach of contract.[76] For hundreds of years, the tactic used by business people for avoiding the results like this is to form a corporation, which is a separate and distinct legal entity capable of contracting in its own name and of surviving the withdrawal of partners or the passing of partnership interests.

The point here is simple: the state intervened to permit the formation of the corporation, a form of business organization that was specifically designed to be a legal entity separate and distinct from its investors. Corporations are legal entities and not associations of individuals because if they were associations of individuals, they would not be able to raise equity or to attract lenders or to operate with any sort of regularity or stability.

The remainder of this Section explores the implications of the entity theory and demonstrates that the organizational form known as the corporation must be considered an entity and cannot be considered an association of individuals. In contrast, the partnership is an association of individuals or an "aggregate of the individual partners with no legal differentiation between the business and the partners themselves."[77]

[76] *Id*. at 123–25.
[77] MACEY, MOLL & HAMILTON, *supra* note 66, at 4.

As we show, all of the fundamental characteristics of the corporation are consistent with the separate legal entity conception of the corporation and inconsistent with the association of individuals conception of the corporation to which the majority in *Citizens United* subscribed.

A. Limited Liability and Piercing the Corporate Veil

Perhaps the greatest logical flaw in the conception of the corporate form embraced by the majority in *Citizens United* is its implications for the concept of limited liability. If the corporation were in fact an association of individuals rather than a discrete legal entity in its own right, then, just as the shareholders would enjoy free speech rights, so too would they be legally responsible for the debts of the entity because limited liability is a consequence of the entity theory of the corporation and the law's rejection of the associational theory of the corporation.

The relationship between the Supreme Court's notion that corporations are associations of individuals and the doctrine of piercing the corporate veil was clearly articulated by Adam Winkler in his book *We the Corporations: How American Businesses Won Their Civil Rights*.[78] As Winkler observes, treating the corporation as an association of citizens collapses the distinction between the corporation and its

[78] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

members, "suggesting the courts see right through the corporation and focus instead on the people who compose it."[79] Winkler further observes that:

> Corporate lawyers have a name for this way of thinking about corporations. They call it "piercing the corporate veil." The ordinary rule, ever since the days of Blackstone, is that there is a strict separation between the corporation and the people behind it. That is why the corporation, not the stockholders, is liable if someone is injured using the company's products. In a small number of highly unusual cases, however, the courts will pierce the corporate veil, ignoring the separate legal status of the corporation and imposing liability on shareholders personally.[80]

Professor Winkler's notion that treating the corporation as an association of citizens is the equivalent of piercing the corporate veil is inaccurate.[81] The doctrine of piercing the corporate veil presupposes that a corporation is a "juridical entity with the characteristic of legal 'personhood.'"[82] The legal recognition that corporations are distinct legal entities that are not associations of shareholders is reflected in the fact that courts recognize that it is legitimate to create a corporation or other form of limited liability business organization such as a limited liability company "for the very purpose of escaping personal liability" for the debts incurred by the enterprise.[83] And

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[79] *Id*. at 54–55.
[80] *Id*.
[81] Joshua Macey, *Reevaluating Veil Piercing*, MICH. L. REV. (forthcoming) (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)).
[82] Jonathan Macey & Joshua Mitts, *The Three Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 100 (2014).
[83] *Bartle v. Home Owners Co-op*, 127 N.E. 2d 832, 833 (N.Y. 1955).

it is precisely because corporations have legal status as juridical entities with the characteristic of legal personhood that courts' equitable authority to pierce the corporate veil is to be exercised "reluctantly" and "cautiously." [84]

Rather than viewing *Citizens United* as a case that pierces the corporate veil, it would be more accurate to view the decision as reflecting a view that there is no corporate veil in the first place. Viewing the corporation as an association of shareholders eliminates the separation between the corporation and its shareholders.[85] Although piercing the corporate veil is "limited to rare cases involving fraud and abuse,"[86] viewing the corporation as an "association of shareholders" is not a legal remedy, rather it reflects an existential view of the corporation.[87]

Piercing the corporate veil is a legal remedy that rectifies some wrong perpetrated by shareholders through their improper use of the corporate form.[88] The wrongdoing by shareholders that leads to piercing may take the form of undercapitalizing the corporation, failing to observe corporate formalities, committing fraud, paying illegal dividends, or making other prohibited distributions

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[84] *Dewitt Truck Brokers v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976).
[85] Joshua Macey, *supra* note 81.
[86] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 67–68 (2018).
[87] Joshua Macey, *supra* note 81.
[88] *See Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003) ("To state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors.").

on the eve of bankruptcy.[89] In sharp contrast, conceptualizing the corporation as an association of shareholders does not require any wrongdoing by shareholders. In fact, it does not require any action by shareholders at all. Indeed, conceptualizing the corporation as an association of shareholders, as was done in *Citizens United*, does not require that any shareholder even be aware that the corporation is doing anything. Thus, it is inaccurate to equate the treatment of the corporation as an association of individuals with the corporate law doctrine of piercing the corporate veil.

More generally, the limited remedies of other constituencies against stockholders also undercut the associational model. Consistent with the counterparty argument, when workers and debtholders do not have their promises honored, they generally have to rely upon the *entity*, not stockholders, for relief. Piercing the veil is one example of how difficult it is to clawback against equity,[90] but so too are fraudulent conveyance laws, which are not easy to use.[91] This illustrates another point about using models as a way of examining how corporations work and why they should function in certain ways, as opposed to objective law. Under arguments about residual claimants, the simplifying assumption is that legal claimants get paid first. But of course, that assumption, which assumes no pie gets eaten until a final feast, is

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[89] Macey & Mitts, *supra* note 82.
[90] *See generally id.*
[91] *See generally* GLENDA K. HARNAD & SONJA LARSEN, AMERICAN JURISPRUDENCE § 6, Westlaw (last updated Aug. 2018).

wrong. All the time there are transfers to equity, and if down the line, those transfers do not leave enough to feed the others, the others generally have to look just to the *entity*, not the stockholders, to be made whole. This is because the entity is by law a unique person, not an association of its stockholders.

B. Not So Special: Stockholders Are At Most Fellow Contract Claimants, Not Corporate Owners

As significantly, shareholders are not owners of the corporations in which they own shares. Rather, they are merely owners of investment contracts that give them certain contractual claims on the cash flows generated by the corporation. As a matter of logic, the corporation is a legal person, and it does not have owners any more than natural persons have owners. The notion that shareholders own the corporations in which they have invested is a myth.[92] The fact of the matter is that shareholders' rights sound in contract not in property. Shareholders have contractual rights to vote for directors, though voting rights may be skewed by contract so as effectively to deprive the majority of shareholders of the right to vote. Shareholders have no right to enter corporate property or to command that corporate resources be allocated or not allocated in any particular way. Even shareholders' rights to the cash flows generated by the firm are highly ephemeral. Shareholders are entitled to dividends if and when

[92] John Kay, *Shareholders Think They Own the Company: They are Wrong*, FIN. TIMES (Nov. 10, 2015), https://www.ft.com/content/7bd1b20a-879b-11e5-90de-f44762bf9896; Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 564-65 (2003).

the corporation's boards of directors exercise their virtually unfettered discretion to declare a dividend.

Certainly conceptions of property have moved beyond the strict view often attributed to Blackstone that defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[93] But even under the more modern view that property rights are not absolute, those claiming a property interest in something must have a claim of dominion and control more substantial than do shareholders. Certain legal realists and their intellectual heirs have defined ownership rights as consisting of a "bundle of rights."[94] But even under this expansive view of property rights,[95] the meager bundle accorded to shareholders, which does not include any rights to enter, much less to possess property or to allocate property in

[93] 2 WILLIAM BLACKSTONE, COMMENTARIES *2. Blackstone's own view was more nuanced. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) ("Blackstone's sweeping definition . . . overstated the case; indeed, he devoted the succeeding 518 pages of book 2 of his *Commentaries* . . . to qualifying and specifying the exceptions to his definition.").

[94] A.M. Honore, *Ownership, in* Oxford Essays In Jurisprudence 107, 113 (A.G. Guest ed., 1961); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21-24 (1913); *see also* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 2-3 (2d ed. 2005).

[95] *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*,111 YALE L.J. 357, 365 (2001) ("[T]he motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare.").

any way, is not sufficiently broad to sustain an assertion that shareholders somehow are owners. Clearly they are not.

Shareholders, for example, have no ability, even collectively, to determine executive compensation. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was thought to expand shareholder rights considerably because it contained a provision requiring that shareholders be allowed to cast a purely precatory, advisory vote on executive compensation at least once every three years. These votes, colloquially called "say-on-pay" ballots, are non-binding and do not create or imply any change to the fiduciary duties governing corporate directors' conduct under applicable state laws.

Recognizing shareholders for what they are, which is mere contractual counter-parties with the firms in which they have invested, undermines the romantic notion that corporations are associations of shareholders. For example, one would imagine that if shareholders were in fact members of an association of shareholders in the companies in which they have invested, then they would be permitted at the very least to communicate with one another in a free and unfettered way. But this is not the case. Shareholder communication with other shareholders, while possible, is strictly regulated, and it appears that the Securities and Exchange Commission has virtually unfettered rights to regulate corporate communications.[96] Thus, the notion that corporations are "associations of shareholders" is further undermined by the fact that shareholders lack even the most basic associational rights.

III. The Supreme Court's Treatment of the Corporate Entity in Other Areas of Law

In this section we demonstrate that treating the corporation as an association of individuals is a radical, existential assertion about the nature of the corporation, and one that is counter-factual and at odds with the foundational principles of American corporate law. The following sections demonstrate the spuriousness of treating corporations as associations of individuals by showing how they interact with several core doctrines of corporate law and federal jurisdiction.

Put even more starkly, we show that in almost every other area of jurisprudence, the Supreme Court has accepted the conception of the corporation that we advance in this article. To wit, the Supreme Court generally accepts the conception of corporations as being established by the state laws which create them. In deciding cases before it, the Supreme Court does not theorize about associations of stockholders or nexuses of contracts, it accepts the perhaps mundane, but profoundly important and true, fact that legal reality drives corporate reality. That is, in other

[96] Ronald Gilson, Lilli Gordon & John Pound, *How the Proxy Rules Discourage Constructive Engagement: Regulatory Barriers to Electing a Minority of Directors*, 17 J. CORP. L. 29 (1991).

contexts, as distinguished commentators have also noted,[97] the Supreme Court hews to the view of the corporation that we have argued is required by the state laws that establish business corporations in our nation.

A. The Basics: A Corporation Cannot Proceed *Pro Se* Through a Stockholder or Officer

An early and seemingly mundane, but important, example, deals with whether a corporation, like a human being, may represent itself in court "pro se." Because a corporation is not identifiable with any of its human constituents, be they stockholders or managers, the Supreme Court in an early case and consistent with English law on the point, recognized that "a corporation, it is true, can appear only by attorney, while a natural person may appear for himself."[98]

In other areas dealing with standing, the Supreme Court has refused to allow stockholders to ignore the corporate form. When the sole stockholder of a small corporation tried to sue Domino's Pizza for refusing to contract with his corporation, allegedly because he was black, the Supreme Court found against him stating:

> It is fundamental corporation and agency law—indeed it can be said to be the whole purpose of corporation and agency law—that the shareholders and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts.[99]

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[97] *See* Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333889; Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014).
[98] *Osborn v. Bank of the United States*, 22 U.S. 738, 830 (1824).
[99] *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (1986).

Or as the Supreme Court said in a case dealing with a parent corporation attempting to complain about the Interstate Commerce Commission's denial of permit for its subsidiary, "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purpose, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."[100]

B. Diversity Jurisdiction

Treating the corporation as an association of shareholders is inconsistent with the well understood legal rule that corporations are separate juridical entities in their own right for purposes of establishing jurisdiction for federal courts on the grounds of diversity of citizenship. Federal diversity jurisdiction under 28 U.S.C. § 1332 affords jurisdiction to federal courts in disputes that involve more than $75,000 and in which there is "complete diversity," which means that no defendant can be a citizen of any state of which a plaintiff is a citizen.

It is hard to imagine a clearer statement of the proposition that corporations are not "associations of shareholders" than 28 U.S.C. § 1332(c)(1), the federal diversity jurisdiction statute, which provides that "a corporation shall be deemed to be a citizen

[100] *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) (per curiam).

of any State by which it has been incorporated and of the State where it has its principal place of business."[101]

In *Hertz Corp. v. Friend*,[102] lawyers brought a class action suit against Hertz in a California state court on behalf of certain residents of California. Hertz moved to remove the case to a California federal district court based on diversity jurisdiction. The plaintiffs argued that there was no diversity jurisdiction as Hertz's principal place of business was California and not Florida. The federal district court agreed and remanded the case to the state court.[103] On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the federal district court holding that the district court correctly applied the "place of operations test" and concluded that Hertz's principal place of business was California and consequently diversity jurisdiction did not exist and the case could not be brought in federal court.[104] The Supreme Court in *Hertz* held that the phrase principal place of business in § 1332(c)(1) "refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities," or its "nerve center," which "will typically be found at [its] headquarters."[105] Business organizations that are viewed as associations of their investors, including partnerships, limited partnerships, and LLCs have been

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[101] 28 U.S.C. §1332(c)(1).
[102] 559 U.S. 77 (2010).
[103] *Friend v. Hertz Corp.*, 2008 WL 7071465, at *1 (N.D. Cal. Jan. 15, 2008).
[104] *Friend v. Hertz Corp.*, 297 Fed. Appx. 690, 691 (9th Cir. 2008).
[105] *Hertz*, 559 U.S. at 80.

determined by courts to be citizens of the states in which the organization's partners or members are citizens.[106] Thus, the Court's decision in *Hertz v. Friend* and indeed the federal diversity of citizenship statute itself is inconsistent with the "association of stockholders" view of the corporation reflected in *Citizens United*. Logically, if a corporation were an association of shareholders, then the corporation would be present wherever the shareholders resided. Because shareholders of large publicly held corporations generally reside in all fifty states, this would undermine the plain meaning of the federal diversity of citizenship statute for corporations.

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[106] WRIGHT & MILLER, 13 FEDERAL PRACTICE & PROCEDURE § 3630.1 (3d ed.) ("[T]he Supreme Court has held that the state citizenship of all members of an unincorporated association will be taken into account in determining the association's citizenship when a question of diversity jurisdiction arises. In the words of the Supreme Court in its seminal decision in *Carden v. Arkoma Associates*, a federal court should count 'the citizenship of all [an entity's] members.' That basic principle has remained intact since 1990.") (citations omitted). *See, e.g.*, *3123 SMB LLC v. Horn*, 880 F.3d 461, 465 (9th Cir. 2018) ("For purposes of diversity jurisdiction, a limited liability company "is a citizen of every state of which its owners/members are citizens."); *Mut. Assignment & Indem. Co. v. Lind-Waldock & Co., LLC*, 364 F.3d 858, 861 (7th Cir. 2004) ("Lind-Waldock is a limited liability company, which means that it is a citizen of every state of which any member is a citizen; this may need to be traced through multiple levels if any of its members is itself a partnership or LLC."); *Hale v. M.J.J.K., LLC*, Civil Action No. 12–1515, 2013 WL 6287823, at *2 (E.D. La. 2013) ("Accordingly, the party invoking federal jurisdiction 'must list the citizenship of each member of each limited liability company to properly allege diversity of jurisdiction.'"). Courts sometimes allow a party seeking to establish diversity jurisdiction to take limited discovery into the citizenship of an unincorporated association's members. *See, e.g.*, *Dougherty Funding, LLC v. Gateway Ethanol, LLC*, No. 08-XC-2213-JWL, 2008 WL 2354965 (D. Kan. June 5, 2008) (permitting defendant to take written discovery of the plaintiff's citizenship in order to ascertain if diversity jurisdiction exists). *But see MCP Trucking, LLC v. Speedy Heavy Hauling, Inc.*, Civ. Act. No. 14-CV-02427-PAB, 2014 WL 5002116 (D. Col. Oct. 6, 2014) (denying jurisdictional recovery and remanding action to state court even after acknowledging that further discovery could demonstrate that diversity of citizenship existed); *Osborn & Barr Comm., Inc. v. EMC Corp., Inc.*, No. 4:08-CV-87 CAS, 2008 WL 341664 (E.D. Mo. Feb. 5, 2008) (denying motion for discovery).

C. Corporate Taxation and Corporate Restructuring

In the world of business, as a general rule, juridical entities pay taxes and associations of investors do not. Since 1909, corporate income has been subject to a federal tax. This income is typically taxed a second time when it is distributed as dividends that are liable to the individual income tax. The corporate income tax reflects the view that a corporation is a legal entity separate and distinct from its shareholders.

Under certain circumstances it is possible to organize a corporation under Subchapter S of the Internal Revenue Code requirements. Subchapter S gives corporations with 100 or fewer shareholders that meet certain other requirements the limited liability benefit of incorporation while allowing them to be taxed as associations of members such as partnerships. The ability of the state to waive the taxes imposed on corporate entities does not undermine our argument that the existence of corporate income tax indicates that corporations are juridical entities separate and apart from their shareholders. After all, individuals who earn less than a certain minimum income are exempt from the income tax, but such an exemption does not render such people non-entities.

Rather, the system of Subchapter S reflects another manifestation of our core premise: corporations as a factual matter depend on legal authorization and are historically subject to legislation tailored to the unique issues that flow from their status as distinct legal persons. As we continue to explain, the Supreme Court has long recognized this reality, and allowed legislators wide leeway to regulate the conduct of their powerful creators.

Thus, in applying the tax laws, the Supreme Court has made clear that neither the government nor stockholders may ignore the corporate form. In *Moline Properties, Inc. v. Commissioner*,[107] a stockholder who owned all the stock of the corporation attempted to ignore the corporate form and be taxed directly on a corporate transaction, to his economic benefit. The Supreme Court did not oblige. In *United States v. Cumberland Service Co.*,[108] the government was the party seeking to ignore the separate legal existence of the corporation and treat the stockholders as the parties subject to tax. The Supreme Court was not sympathetic and adhered to a consistent view: under the state laws that create corporations, they are separate entities from those who own their equity.

Similarly, the way that corporate governance changes when a corporation becomes insolvent undercuts associational claims. If the corporation is an association of individuals in part for expressive purposes, it is strange that if the *entity* becomes insolvent, most of the governance rights of the stockholders can be defeased.[109] Under

[107] 319 U.S. 436 (1943).
[108] 338 U.S. 451 (1950).
[109] *See N. Am. Catholic Educ. Programming Found. v. Gheewalla*, 930 A.2d 92, 101–02 (Del. 2007) (noting that a corporation's "creditors take the place of the shareholders as the residual beneficiaries of any increase in value" and therefore "have standing to bring derivative claims

corporate law itself, upon insolvency, the focus of the equitable duties of the directors shifts to preserving the value of the entity for the benefit of another input—the debtholders.[110] These debtholders, of course, are in reality extant before insolvency, and under the law, have to be paid first. Yet, they spring into greater life only when a company cannot pay its bills. In insolvency, therefore, would the *Citizens United* majority consider the entity an association of debtholders?

D. Corporate Criminal Liability

The existence of corporate criminal liability is also inconsistent with the assertion in *Citizens United* that corporations are associations of shareholders rather than distinct juridical entities. It is established that a corporation is "criminally liable for the federal crimes its employees or agents commit in its interest."[111] Corporate officers, employees, and agents are individually liable for the crimes they commit, for the crimes they conspire to commit, for the foreseeable crimes their coconspirators

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against directors on behalf of the corporation for breaches of fiduciary duties"); *In re Potter Instrument Co.*, 593 F.2d 470, 474–75 (2d Cir. 1979) (affirming the bankruptcy court's decision to deny a major shareholder's petition for a special meeting to elect new directors because the "election might result in unsatisfactory management and would probably jeopardize both [the corporation's] rehabilitation and the rights of creditors and stockholders"); *cf.* Lynn M. LoPucki & William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125, 127–30 (1990) (noting shareholders' limited ability to object to a plan under the Bankruptcy Code's "cram down" provisions).

[110] *Gheewalla*, 930 A.2d at 101–02.

[111] CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW (2013), https://fas.org/sgp/crs/misc/R43293.pdf.

commit, for the crimes whose commission they aid and abet, and for the crimes whose perpetrators they assist after the fact.

The existence of corporate criminal liability is an example of the corporation being considered a legal person. At common law, corporations were viewed as incapable of committing crimes. For example, according to Blackstone, "a corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may, in their distinct individual capacities."[112] Thus the view that corporations cannot commit crimes is rooted in a conception of corporations as "associations of shareholders." Once the corporation came to be perceived as a distinct juridical entity, courts recognized that corporations could be criminally liable for first for "failure to honor certain legal obligations (nonfeasance); then for the inadequate manner in which it performed certain legal obligations (malfeasance)."[113]

By the early 20th century, the idea of a corporation as a juridical entity had become firmly entrenched and the Supreme Court officially recognized corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*:

> It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go

[112] 1 BLACK. COMM., 476.
[113] *Id.*

> unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.[114]

The reference in *Central & Hudson River Railroad Co*. to corporations as corporate "persons" is wholly inconsistent with the conception in *Citizens United*. Contemporary corporate criminal law is modeled on individual criminal law, and is rooted in notions of personal responsibility:

> Substantive bases of liability, evidence, procedure and rationale have been constructed initially for individuals. Over the years, doctrine has been transposed to corporations. The model contains two features. One is an identification of persons as the subjects of criminal law. The other feature is an assumption that the elements of criminal law applicable to individuals also apply to all persons. . . . [P]redominant practice remains individualistic: corporations are treated as persons in the way that individuals are treated.[115]

Thus, corporate criminal liability uniformly treats culpable entities as individuals, not as associations of persons. Corporate criminal law requires that the corporation be an entity.[116] Treating the corporation as an association of individuals would require either abandoning the notion of corporate criminal responsibility or it would require assigning such responsibility to the "associations of citizens" who constitute the corporation.

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[114] 212 U.S. 481, 494–95 (1909).

[115] Steven Walt & Wililiam S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263 (1991).

[116] *Id.* at 264.

The Supreme Court also has refused the plea of someone who owned all the stock of a corporation to quash a subpoena directed towards the corporation. That singular equity owner attempted to assert his own privilege under the Fifth Amendment to stop the government from procuring information from the corporation he dominated and controlled. The Supreme Court refused to allow his claim that the corporation was indistinct from him, stating in *Braswell v. United States*, "petitioner asserts no self-incrimination claim on behalf of the corporations; it is well established that such artificial entities are not protected by the Fifth Amendment."[117]

Braswell was no novelty; it built on longstanding case law denying corporations the ability to assert Fifth Amendment rights, while allowing their officers and stockholders to do so in their personal capacities.[118] The Court has also recognized that the corporation is distinct from its officers and stockholders in applying substantive criminal statutes, such as RICO. In *Cedric Kushner Promotions Ltd v. King*, for example, the Supreme Court held that the president and only stockholder of a corporation was a different "person" from the corporate enterprise under the RICO statute.[119]

[117] 487 U.S. 99, 102 (1988).
[118] *See Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. White*, 322 U.S. 694, 700 (1944); *Bellis v. United States*, 417 U.S. 85 (1974) (applying same concept of distinctiveness to deny a partnership the ability to assert Fifth Amendment privilege).
[119] 533 U.S. 158, 160 (2001) ("[W]e conclude that the 'person' and 'enterprise' here are distinct and that the RICO provision applies.").

And the punishments meted out to corporations highlight the distinct nature of a corporation from a human—corporate criminal law takes seriously the distinction and therefore the punishment scheme is far different.[120] There have been many situations where corporations have in fact caused death or mass destruction.[121] If the same conduct were committed by a human being, she might have been executed, or as fatal from a business perspective, "incapacitated" by incarceration for decades. Corporations are not treated this way.

They "live" on. For instance, because of the Deepwater Horizon oil spill in 2010, BP pled guilty to felony manslaughter and was fined $4 billion.[122] Yet only 7

[120] For instance, the Federal Sentencing Guidelines Manual has a specific, separate section for the "Sentencing of Organizations." U.S.S.G. Ch. 8. Unlike the rest of the Sentencing Guidelines, which focus on determining the amount of prison time to sentence an individual to based on the level of the crime and any mitigating or criminal history, the "Sentencing of Organizations" chapter focuses on fines, remedies for the harm, special assessments, and forfeitures. *Id*.

[121] *E.g.*, Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 813–14 (2010) (documenting the environmental costs of the Exxon Valdez spill that, although it did not cause any human deaths, harmed the Alaska ecosystem for decades); Josh Barbanel, *Fatal Explorer Accidents Involving Bad Tires Soared in '99*, N.Y. TIMES (Sept. 19, 2000), https://www.nytimes.com/2000/09/19/business/fatal-explorer-accidents-involving-bad-tires-soared-in-99.html ("52 people died in 40 fatal crashes of Explorers in which police reports listed tire problems as a contributing factor . . . [and] the trend could have been detected long before, if officials had used the federal fatality data as an early-warning system to identify possible manufacturing defects.").

[122] *See* Press Release, Office of Public Affairs, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes, and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), https://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental.

years later, in 2017, BP's revenues exceeded $240 billion,[123] despite the fact that a human convicted of federal voluntary manslaughter would likely still be incarcerated and unable to earn a living during incarceration.[124] If a corporation's human agents acted with the requisite mens rea, they can be imprisoned or executed.[125] But notably, these human agents are not the stockholders, typically, but managers. The criminal law has a distinct regime of punishment for these human actors. This distinction between corporations and flesh-and-blood human beings in the high-stakes area of criminal law is important and further supports our thesis.

IV. The Core Assertion in *Citizens United* Is at Odds with Law and Empirical Fact: Shareholders in Corporations Are Not Associated with Each Other

A frustrating aspect of *Citizens United* is that the core concept—that corporations are associations of shareholders—is never developed in the opinion. It stands as a mere assertion. Here, we consider the extent to which this assertion is an accurate description of the corporation. The notion in *Citizens United* that corporations are associations of shareholders reflects the view that corporate

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[123] BP Annual Report, Form 20-F, at 125, https://www.bp.com/content/dam/bp/en/corporate/pdf/investors/bp-annual-report-and-form-20f-2017.pdf

[124] Voluntary manslaughter carries a base offense level of 29, resulting in a recommended sentence of between 87 and 108 months, based on an offender with no criminal history and no downward departures. *See* U.S.S.G. § 2A.1.3.

[125] *See, e.g.*, Press Release, Department of Justice, Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate with Enron Investigation (Jan. 14, 2004), https://archives.fbi.gov/archives/news/pressrel/press-releases/former-enron-chief-financial-officer-andrew-fastow-pleads-guilty-to-conspiracy-to-commit-securities-and-wire-fraud (Fastow sentenced to 10 years in prison for his plea).

shareholders have something in common, but there is nothing in the actual, real world relationship among corporate shareholders that suggests that this is the case.

Corporate law scholars of all persuasions, but particularly those associated with the political right, have long been suspicious of arguments that corporate managers should be allowed to use corporate funds for non-business purposes, such as for advancing pet causes or political views.[126] In fact, Justice Scalia made this point succinctly at a stage in his jurisprudence earlier than *Citizens United* when he said, "[t]he Campbell Soup Company does not exist to promote a message."[127]

A principal concern among those taking this accepted position is that stockholders are in fact weak in comparison to the managers of corporations, and poorly positioned to constrain them even when it comes to central issues, such as the nature of the company's profit making strategy and executive compensation.[128] They, therefore, argued that managers should be required to focus, within the

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[126] Strine & Walter, *Conservative Collision Course*, *supra* note 49, at 346–52 (showing that conservatives like Hayek, Friedman, Arrow, Easterbrook, Maine, Jensen, Henry Butler, Stephen Bainbridge, and Roberta Romano all take this view).

[127] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting).

[128] Strine & Walter, *Conservative Collision Course*, *supra* note 49, at 352–53; Henry Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 107 n.20 (1989); Henry N Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1223–24 (1999) ("Corporate managers have enough trouble meeting the challenges of maximizing shareholder value without diverting their attention to saving the world."). *See generally* MARK ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1996).

boundaries of external law and ethics, solely on increasing the profitability of the firm, because that was the only common objective of the stockholders and it was difficult enough to hold managers accountable on that dimension alone.[129] If managers were instead allowed to act for diffuse purposes, these commentators viewed them as being freed from accountability, because they could then justify their actions on so many grounds, that the rights given to stockholders would not be potent enough to keep them loyal to the stockholders.[130] For stockholders therefore to be viewed as effective in checking the use of corporate funds for political spending, requires assuming away long accepted realities held by most corporate law commentators, especially those coming at the question from a conservative perspective.

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[129] EASTERBROOK & FISCHEL, *supra* note 51, at 70 ("[W]hen voters hold dissimilar preferences it is not possible to aggregate their preferences into a consistent system of choices. . . . [S]ingle-objective firms are likely to prosper relative to others. This suggests . . . why the law makes no effort to require firms to adhere to any objective other than profit maximization (as constrained by particular legal rules)."); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (pursuit of ends other than profit maximization is "especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity"); *see also* Strine & Walter, *Conservative Collision Course*, *supra* note 49, at 351–52 (collecting sources highlighting that investors' only common trait is a focus on returns).

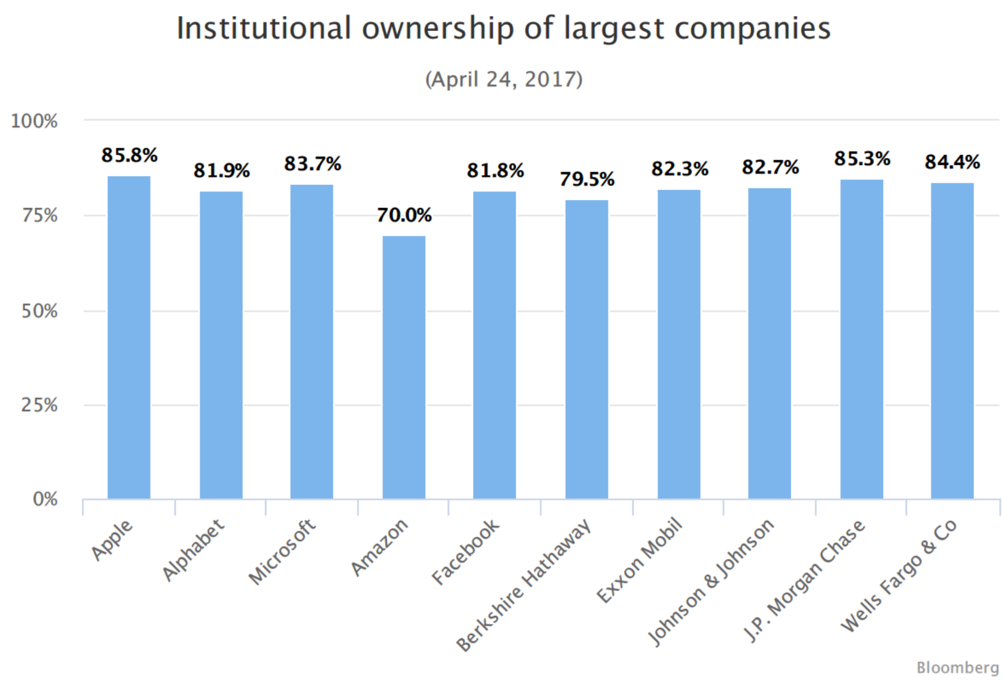
[130] Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1191–92 (1981) ("A manager responsible to two conflicting interests is in fact answerable to neither."); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 32 (1991) ("[T]he primary beneficiaries of nonshareholder constituency statutes are incumbent managers, who can justify virtually any decision they make on the grounds that it benefits some constituency of the firm.") (emphasis omitted).

The reason all commentators agree is that there is no empirical basis on which to assume that the stockholders of a business corporation have any common interest other than obtaining a good return on their investment. Put simply, their only shared interest is profiting on their stock investment. For that reason, many conservative corporate law scholars have argued that corporate directors should be required to focus solely on advancing the best interests of stockholders, within the bounds of the law and ethics, as they have no legitimate basis for using corporate funds for any purpose unrelated to generating profits. If there is surplus that can be used for that purpose, these commentators argue that it ought to be returned to the stockholders themselves, who can then use it individually and legitimately for their own purposes, which might include advancing the diverse charitable and political causes they support.[131] *Citizens United* ignored the reality that no corporate law scholars or practitioners take the position that stockholders invest in the stock of business corporations for expressive purposes.

As important, *Citizens United* ignored another undeniable reality about public business corporations: most of their investors are not human beings who can at least be plausibly thought to have joined together for associational reasons unrelated to

[131] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 135 (2002).

profit, albeit through the strange means of co-investing in a for-profit business.[132] Contrary to the inference in *Citizens United*, the vast majority of shares in U.S. public corporations—approximately 80%—are primarily owned by institutions, such as pension funds and mutual funds.[133] These institutional investors are organized as separate juridical entities (corporations, LLCs, LLPs, LPs, and statutory trusts). Most shareholders are not individuals. And the institutions and individuals who own shares are not "associated" with each other in any meaningful sense.



[132] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1521–22 (2007) (the concentration of equity ownership in the hands of a few large institutional investors has "created a class of shareholders singularly focused on shareholder value").
[133] Charles McGrath, *80% Of Equity Market Cap Held By Institutions, Pensions & Investments*, PENSIONS & INVESTMENTS (Apr. 25, 2017, 11:45 AM), http://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions; *see also* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922 (2013).

Corporations are comprised of a mix of passive and active investors. And as Roberta Romano has shown, these institutional investors are riddled with conflicts of interest that undermine the assumption that shareholders are an association or community in any sense of the word.[134] Managers of corporate pension funds and financial institutions have other business relations with the companies in which they own shares, and those relationships generate conflicts of interest that prevent them from opposing corporate management.[135] Public pension funds (the pension funds of state and local government employees) are similarly riddled with conflicts.[136] And the conflicts among the various groups of shareholders is acute. Discrete shareholder groups will have idiosyncratic preferences over almost every conceivable issue from environmental issues, plant re-locations and closings, in-state employment, and leveraged buyouts,[137] to name but a few.

What is common about all of these institutional investors is that almost none of them have the capital of human, end-user investors because those investors have chosen to give it to them to join an association of investors committed to a common

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[134] Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993); John Brooks, *Corporate Pension Fund Asset Management*, *in* Twentieth Century Fund, ABUSE ON WALL STREET: CONFLICTS OF INTEREST IN THE SECURITIES MARKETS 224 (1980).
[135] Brooks, *supra* note 134, at [NTD: ADD PINCITE].
[136] *See* Romano, *supra* note 134, at 799–839.
[137] *See id.* at 807 (describing an episode in which the Illinois state treasurer threatened to withhold investments by the state pension fund in a leveraged buyout fund if the buyout firm did not ensure that an in-state printing plant continued to operate without reduced employment).

set of social or political values.[138] These funds, however, do not advertise themselves as vehicles for political expression, and have their own agency problems. To wit, some of them vote their stock on stockholder proposals without reference to their stated values and instead just vote with all the other funds in the fund complex.[139] Most investors save to pay for two things: college for their children and retirement for themselves. As to each, Americans are, by dint of economic pressures and tax incentives, required to give over their wealth to institutional investors. With the decline of defined benefit pension plans, most Americans have no practical choice but to give over a substantial portion of their earnings every month to the mutual funds in

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[138] There is a the small subset of investors who have chosen to invest in so-called socially responsible mutual funds, which do pick stocks based on criteria like the social responsibility of the corporations in which the funds invest.

[139] By way of observation, in a prior work, one of us looked at the behavior of Vanguard's FTSE Social Index Fund, which is marketed to socially conscious investors and only invests in companies that meet certain social, human rights, and environmental criteria. That investigation revealed that the Vanguard FTSE Social Index Fund is subject to the same voting guidelines that govern all Vanguard funds and votes identically to other Vanguard funds. Leo E. Strine, Jr. *Making It Easier for Directors to "Do The Right Thing"?*, 4 HARV. BUS. L. REV. 235, 250 (2014) (documenting this reality and stating that "there are socially responsible investment funds that appear to vote their shares in line with all the other funds of their mutual fund family, and to take no special efforts to vote in a way that is consistent with the fund's supposed commitment to social responsibility"). A look at the up-to-date voting data suggests that the FTSE Social Index fund continues to vote in exactly the same manner as all other Vanguard funds. *Compare* Vanguard FTSE Social Index Fund, Form N-PX, Aug. 31, 2017, https://about.vanguard.com/investment-stewardship/supportingfiles/proxyvote0213.pdf?v=1506 522482522, *with* Vanguard 500 Index Fund, Form N-PX, Aug. 31, 2017, https://about.vanguard.com/investmentstewardship/supportingfiles/proxyvote0040.pdf?v=15065 22482519; *see also* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1914 n.150 (collecting sources showing that multiple institutional investors vote as a complex).

the menu selected for them by their employer.[140] These investments must remain with institutions until the worker is near retirement age, at the price of a severe tax penalty.[141] Most workers cannot choose individual companies but must as a practical matter give their money to a mutual fund.[142]

As a result of this incentive system, it is now the case that five to ten mutual funds control a large percentage of the stock in American public companies.[143] For instance, "[i]n 2015 the Big Three [BlackRock, Vanguard, and State Street] together constituted the largest owner of nearly 90% of public companies in the S&P 500."[144]

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[140] Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1485 (2015) ("The menu of mutual funds from which employees choose is ultimately constructed by the employer . . . ."). "In the largest 200 defined contribution plans, the average number of funds on the menu is twenty-two." William A. Birdthistle, EMPIRE OF THE FUND 143 (2016).

[141] I.R.C. § 72(t)(2)(A)(i) (distributions from 401(k)s cannot be made until the employee attains the age of 59 ½); *id*. at § 72(t)(1) ("If any taxpayer receives any amount from a qualified retirement plan . . . the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent . . .").

[142] Ayres & Curtis, *Beyond Diversification*, *supra* note 140, at 1485 ("The most common type of investment options in 401(k) plans are mutual funds or similar investment vehicles that pool funds managed by a professional fund manager."). One important reason investment options are restricted is the structure of the liability safe harbor that plan sponsors can take advantage of by offering only certain investments. *See* 29 U.S.C. § 1104(c)(1) (2012); 29 C.F.R. § 2550.404c-1.

[143] Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 498–99 (2018) ("From 1980 to 1996, large institutional investors nearly doubled their share of ownership of U.S. corporations from under 30% to over 50%. By 2010, institutional investors held approximately 80% of the U.S. stock market. . . . Mutual funds have been the largest drivers of this growth: in 1980, they owned $70 billion in assets, and in 2009, that number was up to $7.2 trillion. ").

[144] *Id.* at 509 ("[T]he passive fund industry is remarkably concentrated—BlackRock, Vanguard, and State Street (the "Big Three") together hold 70% of the ETF market. Index fund market share data are not publically available, but recent estimates put Vanguard as holding 75% of the market. As a result of the growth of passive investing, the Big Three have become significant players in governance.").

None of these mutual funds pretend that the funds they receive result from the desire of their worker-investors to empower the mutual fund to engage in speech or advance good causes on their behalves. In fact, major institutional investors recognize that the only common interest of their investors is in a good return, and they assume, rightly, that they hold funds of investors with widely disparate political and social views and that the funds cannot reconcile those views in any rational way other than by focusing the fund solely on getting a solid profit for them from its investing activities.[145] And even as to pension funds that might be affiliated with labor unions or state

[145] Likely because their diverse group of investors have different political views, Vanguard believes that decisions on corporate and social policy should be left up to the board. VANGUARD, STEWARDSHIP POLICY 11 (2016), https://global.vanguard.com/documents/stewardship-policy.pdf ("Proposals in this category [i.e., "corporate and social policy issues"], initiated primarily by shareholders, typically request that the company disclose or amend certain business practices. . . . [These] proposals may address concerns with which the Board philosophically agrees, but absent a compelling economic impact on shareholder value (e.g., proposals to require expensing of stock options), the funds will typically abstain from voting on these proposals. This reflects the belief that regardless of our philosophical perspective on the issue, these decisions should be the province of company management unless they have a significant, tangible impact on the value of a fund's investment and management is not responsive to the matter."). Blackrock's explicit policy is not to vote on corporate political activities. BLACKROCK, PROXY VOTING GUIDELINES FOR U.S. SECURITIES 13–14 (2018), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf ("Finally, we believe that it is not the role of shareholders to suggest or approve corporate political activities; therefore we generally do not support proposals requesting a shareholder vote on political activities or expenditures."). Fidelity and State Street do not have explicit policies. *See* Yafit Cohn, *Political Contributions and Lobbying*, HARV. CORP. GOV. & FIN. REG. BLOG, (Aug. 18, 2016), https://corpgov.law.harvard.edu/2016/08/18/political-contributions-and-lobbying-proposals/ ("Not all large institutional shareholders disclose official positions on political contributions/lobbying proposals. Fidelity and State Street Global Advisors, for example, do not expressly discuss such proposals in their proxy voting guidelines."). But data complied by Professor Hirst supports the notion that institutional investors routinely vote no or abstain from votes on corporate political activities. Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217, 244 (2018) (observing that Vanguard did not vote for any political spending resolutions in 2014).

governments, the fiduciaries do not have free license to use the fund's investment capital as they wish. Rather, basic concepts of fiduciary duty and the relevant federal statute,[146] require that pension trustees focus on prudent investing to generate returns sufficient to pay the pensioners the pensions due to them.[147]

Because of these developments, the long understood reality that the stockholders of business corporations do not invest for any common interest other than receiving a good return, and certainly not because of any shared associational interest in particular political or social goals, has become even more inarguable. The largest and most influential stockholders of American public companies have names like Vanguard 500 Index Fund, Fidelity Contrafund, iShares Core S&P 500, and American Funds Investment Company of America.[148] Those names make clear that those funds are focused on styles of investing designed for one purpose: to generate a good, risk-adjusted return.

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[146] *See* Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, 88 Stat. 829, codified as amended at 29 U.S.C. § 1001 *et seq*; *see also* Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 FR 61734-01, 35. ("ERISA's plain text thus establishes a clear rule that in the course of discharging their duties, fiduciaries may never subordinate the economic interests of the plan [participants and beneficiaries] to unrelated objectives [ ].").

[147] *See* Paul Brest, Ronald J. Gilson, & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value*, at *7–8 (ECGI Working Paper, Mar. 2008), http://www.ecgi.global/sites/default/files/working_papers/documents/finalbrestgilsonwolfson.pdf ("Plan fiduciaries that are subject to ERISA may take ESG considerations into account in making portfolio decisions *only* if doing so does not negatively impact investment returns.").

[148] *See The 25 Largest Mutual Funds*, MARKET WATCH (2018), https://www.marketwatch.com/tools/mutual-fund/top25largest.

By contrast, *Citizens United* was a case the Supreme Court majority used to change the law as to business corporations but that involved an unusual situation having nothing in common with the key issues motivating the restriction on corporate political spending in McCain-Feingold. Citizens United was a non-profit whose express purpose, by its name, was to "promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society."[149] Citizens United had an annual budget of around $12 million collected from individuals and for-profit corporations.[150] Citizens United released a 90-minute documentary that was highly critical of Hillary Clinton, depicting interviews with political commentators and other interested people. The film was promoted with advertisements that contained pejorative statements about Senator Clinton. As a not-for-profit entity with a particular political point of view, Citizens United's contributors are hardly representative of the diverse shareholding population of a large, public, for-profit corporation.[151]

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[149] *Citizens United v. Fed. Election Comm'n*, Joint Appendix at 10A, 2009 WL 62995 (Jan. 8, 2009) (Amended Verified Complaint for Declaratory and Injunctive Relief (Dec. 21, 2007)).

[150] *Citizens United*, 558 U.S. at 320.

[151] In some of its jurisprudence dealing with entities, the Supreme Court seems tempted to give greater credence to arguments by closely held business corporations arguing that they should be able to make claims to constitutional protection, such as in arguing that a corporation's religious freedom has been impinged, than it would indulge from a public corporation. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (holding that the Affordable Care Act contraception mandate, as applied to a closely held for-profit corporation, violated the Religious

V. The Supreme Court's First Amendment Jurisprudence Addressing Unions Supports the Reasonableness of McCain-Feingold's Approach to Corporate Speech

The Supreme Court's failure to take into account these basic facts about the relationship of stockholders to business corporations is in irreconcilable tension with another strand of its First Amendment jurisprudence. In the case of labor unions, where there is much greater reason to think that there may be shared viewpoints among employees even if they do not all wish to join the union, the Supreme Court's

Freedom Restoration Act). Even corporate law scholars sympathetic to the notion that all corporations should be able to advance such claims view it as bad corporate law to use the number of stockholders as a dividing line for the exercise of rights. Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333889. The reason for that is inarguable: corporate law itself makes no distinction on this ground and there is little basis to believe that the stockholders of more closely held businesses tend to be more united around a religious or other non-monetary purpose than those of public corporations. Their argument for the corporate exercise of rights is simple and different: they contend that corporate boards are elected and have broad discretion while in office to advance any lawful purpose, unless constrained by the charter from doing so. Lyman P.Q. Johnson and David K. Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 10 (2015) ("State corporate law does not require corporations to prioritize profits over competing considerations. This fact has ramifications that extend far beyond the particular activities—religious observance—at issue in the Hobby Lobby cases. All business corporations (and non-profits too, for that matter) must generate profit in order to survive. That is simply a fact of life. But corporate law confers on [boards] broad discretion to determine the extent to which they choose to temper the pursuit of profit by regard for other values."). *But see* Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in* Hobby Lobby *and* Conestoga Wood, 100 VA. L. REV. ONLINE 1, 4–5 (2014) ("The law thus has long recognized William Klein's point that, despite the utility of the fiction of corporate legal personhood, it is critical to remember that treating the corporation as an entity separate from the people making it up bears no relation to economic reality."). They do not conflate the corporation with its stockholders or view it as an association of them. Rather, these scholars just believe corporations, although distinct from their human constituents, should have all the rights of human beings, while recognizing that they do not have all of the obligations that come from being a human citizen.

focus has been on ensuring that no worker in a union workplace has her dues used by the union for any form of political speech.

This jurisprudence—restricting unions from using dues for political purposes—arose because collective bargaining agreements often contain "agency shop" clauses, which require each employee to pay union dues.[152] In *Abood v. Detroit Board of Education*, the Court addressed whether agency shop clauses violated "the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees."[153] Adopting the view that freedom of association includes "refusing to associate," the Supreme Court took the view that the dues of union members could not be used to fund political expenditures, but only the costs of collective bargaining and representing workers in disputes with the employer.[154] To the extent the union wished to act as a collective action mechanism for speech—an association for speech, to use the linguistics of the *Citizens United* majority[155]—it had to

[152] *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 212 (1977).
[153] *Id.* at 211.
[154] *Id.* at 233–36 ("We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").
[155] *Citizens United*, 558 U.S. at 356 ("Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.").

specifically solicit donations from members for that purpose or otherwise run afoul of the First Amendment.[156] And as to non-union members in the workplace, the union could only demand a payment that could be directly traced to "collective bargaining activities."[157]

In adopting McCain-Feingold's provisions requiring corporations to act through PACs using only the voluntary contributions of stockholders, rather than treasury funds, Congress took into fair account accepted principles of corporate law, which recognized that stockholders in business corporations did not buy stock so their entrusted capital could be used for political speech. Indeed, in recognizing that reality, Congress also borrowed from the Supreme Court's own concern about compelled speech, as exemplified in *Abood* and its progeny.[158] Even less than fellow workers, fellow stockholders cannot be plausibly deemed, by virtue of simply investing in the same stock, to have any shared political interests, much less to be

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[156] *Abood*, 431 U.S. at 233–36.
[157] *Id.* at 236.
[158] *See* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 269–74 (1981) (reasoning on the basis of *Abood* that a requirement that corporations use separate segregated funds, raised by stockholder solicitation of others, rather than corporate assets, would be constitutional); Strine, *Corporate Power Ratchet*, *supra* note 167, at 451 ("In McCain-Feingold, Congress actually took an approach to corporate political activity that was consistent with the Supreme Court's own reasoning in *Abood*. . . . McCain-Feingold gave strong consideration to the expressive rights of stockholders not to have corporations use corporate funds for political purposes without their consent, just as the Supreme Court had given primacy in *Abood* and other cases to the right of workers not to have their dues used for political purposes without their consent.").

said to be associated for the purpose of using the corporation as a shared vehicle for political expression.

But in the past decade, members of the Supreme Court began to express the view that even requiring a non-union member to contribute to core collective bargaining costs violated the First Amendment because it compelled the non-union member to contribute to speech he did not support.[159] These vocal expressions almost seemed to solicit the aptly named case of *Janus v. American Federation of State, County, and Municipal Employees Council 31*,[160] which was decided just this year. In *Janus*, the Supreme Court overturned the aspect of *Abood* and its progeny that allowed unions to compel employees to fund activities associated with collective bargaining but allowed members to opt-out of funding the union's political activities, and held that the First Amendment gave a non-union employee a right to decline to pay anything at all to the union, even for the costs of bargaining for a raise that would benefit all employees and even though the union was bound by law to represent all employees in the workplace.[161] That is, under *Abood*, employees who declined to

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[159] *See Friedrichs v. California Teachers Assn.*, 136 S.Ct. 1083 (2016) (per curiam); *Harris v. Quinn*, 134 S.Ct. 2618 (2014); *Knox v. Service Employees*, 132 S.Ct. 2277 (2012); *see also Janus v. Am. Fed. Of State, County, and Municipal Employees Council 31*, 138 S. Ct. 2448, 2487 (2018) ("Today, the Court succeeds in its 6–year campaign to reverse *Abood*.") (Kagan, J., dissenting).
[160] 138 S. Ct. 2448 (2018).
[161] *Id.* at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver

join the union that was designated to conduct collective bargaining on their behalf were not assessed full union dues but must instead only pay what was known as an "agency fee."[162] In overturning *Abood*, the *Janus* Court found that "[f]orcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns."[163] *Janus* involved an Illinois law that required public employees to pay fees to subsidize a public employee union, even if they chose not to join and objected to the positions the union took in collective bargaining and related activities. This law was held to violate the free speech rights of nonmembers of the union by compelling them to subsidize private speech on matters of substantial public concern.

must be freely given and shown by 'clear and compelling' evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.") (citations omitted); *id.* at 2487 (Kagan, J. dissenting) ("For over 40 years, *Abood* struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. . . . The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an 'anomaly,' the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.") (citations omitted).

[162] The agency fee was a percentage of the union dues that reflected the portion of union dues attributable to activities that are "germane to [the union's] duties as collective bargaining representative," but nonmembers could not be required to fund the union's political and ideological projects. *Abood*, 431 U.S. at 235–36. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

[163] *Id.* at 2464.

The same of course is true for shareholders of corporations that make political contributions. Shareholders in such companies are compelled either to disassociate from these firms or to subsidize the private speech in which these companies choose to engage. In fact, the harm of compulsion in campaign expenditures by corporations validated in *Citizens United* is, if anything, even more egregious than the extent of the compulsion in *Janus*.

In *Janus*, Mark Janus and his counsel were unable to argue that the union was using his dues for political speech; under *Abood*, the union could not do so and was not doing so. All that the union was able to use the dues for was for the core purpose of negotiating for higher wages and benefits of its workforce, and representing members of the workforce in disciplinary proceedings with the employer. If, as the Supreme Court found, that was not a sufficiently common purpose to allow the use of Mr. Janus's funds without running afoul of the First Amendment, it seems inconceivable how one can rationalize allowing Exxon-Mobil or Walmart to use corporate funds for political speech when no basis exists to think that their stockholders have any common political viewpoint or have invested to have them speak on their behalf. Even less is there a basis for not giving deference to a congressional statute that allowed Exxon-Mobil and Walmart to act in that capacity, but only on behalf of those stockholders who affirmatively chose to give them funds for that purpose.

Janus is aptly named because the policy concerns that animated the case's outcome apply with even more strength to corporations than to unions. For starters, under *Abood*, union members were only required to pay for core services that did not involve political speech, and candidly can be analogized to the stockholders' shared interests in a profit. Non-union workers would like a raise, just like union members, and absent in *Janus* was any indication of refusal by non-union members to accept increases in benefits secured by their union. As important, stockholders are no better positioned to escape compelled corporate speech than workers are to escape union bargaining costs. In fact, on balance escape is harder for ordinary investors. As a practical matter, American workers cannot avoid participating in giving their funds to institutional investors or pension funds to save for retirement.[164] None of them do so for expressive purposes.[165] The percentage of Americans who invest in 401(k) plans is much higher than the percentage of unionized workplaces.[166] And American investors cannot exit their 401(k) investments, unless

[164] Ayres & Curtis, *Beyond Diversification*, *supra* note 140, at 1485 ("The menu of mutual funds from which employees choose is ultimately constructed by the employer" and "[t]he most common type of investment options in 401(k) plans are mutual funds or similar investment vehicles that pool funds managed by a professional fund manager.").

[165] EASTERBROOK & FISCHEL, *supra* note 51, at 70 (investors do not invest for expressive purposes but rather to realize a return on their investment).

[166] As of 2010, over 73 million Americans participated in 401(k)–type plans, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 361 (2010), https://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf, but only 14.5 million workers belonged to unions, Press Release, Bureau of Labor Statistics, Union Members Summary (Jan. 19, 2018), https://www.bls.gov/news.release/union2.nr0.htm.

they do not wish to save for retirement in a tax-efficient way.[167] Furthermore, the data would suggest that the amount of compelled speech extracted from a worker by use of his retirement funds without his consent for political purposes is much greater than would be extracted in core bargaining costs.[168]

For present purposes, what is striking is how sensitive the Supreme Court is in the case of unions to avoid compelled speech, while ignoring the even stronger factors that make clear that corporate political speech cannot rationally be deemed

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[167] I.R.C. § 72(t)(1) ("If any taxpayer receives any amount from a qualified retirement plan . . . the taxpayer's tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent . . ."); *see also* Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L.L. REV. 423, 444 (2016). *Citizen United* actually suggested that "if stockholders did not like the way in which corporations were spending their funds, they could use the 'procedures of corporate democracy' to elect different directors, amend the charter, or file a derivative suit to challenge the expenditure." Strine & Walter, *Conservative Collision Course*, *supra* note 49, at 363 (quoting *Citizens United*, 558 U.S. at 362). But the Court's theory cannot be reconciled with a messy reality where stockholders are required to invest their savings in stocks with little say on which stocks they are invested in. Strine, *Corporate Power Ratchet*, *supra* note 167, at 444. Indeed, the practical reality may suggest that a small-government union member may have better odds at changing union leadership than a shareholder has in changing corporate governance.

[168] The Heritage Foundation, an organization with a vested interest in overstating union dues, suggests that unions charge average and median compulsory dues of $610 and $523 per year, respectively. JAMES SHERK, THE HERITAGE FOUND., UNIONS CHARGE HIGHER DUES AND PAY THEIR OFFICERS LARGER SALARIES IN NON-RIGHT-TO-WORK STATES 4 (2015), http://www.heritage.org/jobs-and-labor/report/unions-charge-higher-dues-and-pay-their-officers-larger-salaries-non-right. Vanguard suggests that the average and median 401(k) deferral rate for employees in the U.S. was 6.8% and 6.0%, respectively. VANGUARD, HOW AMERICA SAVES 7 (2018), http://pressroom.vanguard.com/nonindexed/HAS18_062018.pdf. Even assuming half the deferral rate, for the median household—making $59,039 per year—that would translate into over $1,700 per year in 401(k) savings compared to estimated union dues of roughly $600 per year, nearly 3 times as much. JESSICA L. SEMEGA, KAYLA R. FONTENOT & MELISSA A. KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016 5 (2017), http://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf.

to involve voluntary consent of the stockholders.[169] Making this inconsistency more plain is the extent to which the Supreme Court discounted the provisions of McCain-Feingold that gave corporations the right to act as a collective action mechanism for the shared interests of their stockholders in political speech. McCain-Feingold did so by prohibiting corporations from making expenditures in favor of the election or defeat of political candidates, except through corporate-sponsored PACs.[170] But the *Citizens United* majority said that the PAC exception did not allow corporations the opportunity to speak politically for two reasons, neither of which makes sense. The first is cost. In this important area of First Amendment jurisprudence, the *Citizens United* majority was concerned that a PAC's administrative cost, such as keeping receipts for three years, was prohibitive.[171] The second is that the speech would be separate—it would come from the PAC, *not* the corporation: "A PAC is a separate

[169] Indeed, the *Janus* majority cited *Citizens United* only for the proposition that precedent can be overturned when the previous decision's "quality of reasoning" is lacking. *See Citizens United*, 138 S. Ct. at 2479.

[170] 52 U.S.C. § 30118(a) ("It is unlawful for . . . any corporation . . . or any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . .").

[171] *Citizens United*, 558 U.S. at 337–38 ("[E]very PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur[.]") (citations omitted).

association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak."[172]

But the Supreme Court's reasoning on this score displays an ignorance of corporate law and structure on a basic level. Most large business corporations rely on the conception of the corporation we have articulated for an important reason: they use the ability to create distinct legal entities to pursue different business lines and opportunities.[173] To say Johnson and Johnson or Exxon-Mobil is to name only the parent corporation of what is likely many separate corporations or entities. In order to avoid having their legal identity ignored, each of these subsidiaries must be accounted for individually and be adequately capitalized. That is a minor and accepted cost of doing business.[174] The Court overlooked these basic realities in

[172] *Id.* at 337 ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.") (citations omitted).

[173] Richard Squire, *Strategic Liability in the Corporate Group*,78 U. CHI. L. REV. 605, 606 n.1 (2011) ("In 2010, the one hundred US public companies with the highest annual revenues reported an average of 245 major subsidiaries, with 114 as the median. Only five reported fewer than five major subsidiaries."); *see also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 106 (1986) (observing that Cargill "a large privately owned corporation" has "more than 150 subsidiaries in at least 35 countries"). Indeed, this is not a twenty-first century phenomenon. Professor Eisenberg observed the trend towards "megasubsidiaries" in the early 1970s. *See* Melvin A. Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 HARV. L. REV. 1577 (1971) ("Due to a number of recent legal and economic developments, a significant portion of the country's business assets is now held, not only by corporations, but by massive subsidiary corporations—megasubsidiaries.").

[174] Society would appreciate the *Citizens United* conception of a corporation, if implemented elsewhere, as it would decrease the federal deficit. Because most corporations operate through subsidiaries, they decrease their U.S. tax obligations. Apple, for instance, "has accumulated more than $128 billion in profits offshore, and probably much more, that is untaxed by the United States and hardly touched by any other country." Jesse Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017),

treating the broad PAC provisions in McCain-Feingold as leaving corporations subject to a total speech ban. The Court's other rationale for that finding—that a corporate-funded and controlled PAC's speech would not be the parent's speech—is also implausible. Apple's wholly owned subsidiaries are regarded by the customer as Apple. No distinction is involved, and none was exacted of corporations by McCain-Feingold's requirement that corporations restrict themselves to speaking through a controlled PAC funded only by voluntary stockholder donations.

The reality is that shareholders in the modern publicly held corporation are nothing special. Shareholders are no more a part of an "association" than are owners of any other financial assets part of associations. Generally speaking, shareholders have no control—indeed they have no say whatsoever—in who buys and sells shares and thus enters into the assemblage of investors. In modern corporations, "shares trade on multiple exchanges, the ownership is constantly shifting, and most of the owners trade under 'street names' that make it very hard even for the IRS to know their true identities."[175] Justice Kennedy suggested that PAC compliance with

ttps://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html. At a 21% tax rate, Apple would owe the US Treasury over $26 billion if the *Citizen United* majority's concept of a corporation—absent subsidiary—was realized. Most of that $128 billion in offshore profits was made in the Isle of Jersey, which has a population of about 100,000. ISLE OF JERSEY, CENSUS (2011), https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Chapter1TotalPopulation%2020120808%20SU.pdf. Each resident of Jersey would have to purchase over 1,000 iPhones each for that much profit to be realized.

[175] Avi-Yonah, *supra* note 33, at 1046.

McCain-Feingold "might explain why fewer than 2,000 of the millions of corporations in this country have PACs."[176] But the reason corporations struggled to raise money under McCain-Feingold has nothing to do with the practical hurdles of setting up a PAC. Rather, corporations failed to raise money from their stockholders because corporate law scholars have been right for years: corporations are *not* associations of individuals, and have no realistic chance of getting stockholders to voluntarily give money to them for political speech.[177] The empirical reality the Supreme Court missed in *Citizens United* is that when Exxon-Mobil asked for money, stockholders did not say yes.[178]

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[176] *Citizens United*, 558 U.S. at 338.
[177] *Id*. at 338 (observing that few corporate PACs were formed under McCain-Feingold).
[178] As Professor Pildes has observed "[i]f an Exxon CEO decided to commit one week of profits to spending on elections, he would have over $800 million to spend (in the pre-*Citizens United* world in 2008, Exxon's PAC raised only $950,000 in voluntary contributions)." Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 SUP. CT. REV. 103, 113. Most of the funds likely came from Exxon-Mobil managers subject to implicit employment pressures. Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1489 n.371 ("[C]orporate PACs raise almost all of their money from corporate employees . . .").

VI. Corporations are State-Created Legal Fictions

In the previous sections of this Article, we showed that corporations are not "associations of shareholders" as a descriptive matter. Here we make two related points. First, the Court's statement in *Citizens United* that corporations are "associations of citizens" is not supported by citations.[179] It is a mere assertion without support or foundation. Second, and more importantly, we argue that the appropriate source for determining whether a corporation is an entity or an association of shareholders is state law. As the Supreme Court pointed out in *CTS Corp. v. Dynamics Corp. of America*, "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."[180] Writing for the majority, Justice Powell further observed that the entire U.S. "free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation."[181]

The point here is that, absent action by the U.S. Congress, the question of whether a corporation is an association of shareholders or an entity is a matter of state, not federal, law. As we have also shown, the Supreme Court itself has long accepted

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[179] *See Citizens United*, 558 U.S. at 356 (stating without citation that corporations are "associations of citizens").
[180] 107 S.Ct. 1637, 1649 (1987).
[181] *Id. See also Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1976); *Business Roundtable v. SEC*, 905 F. 2d. 406 (D.C. Cir 1990)).

this fundamental fact in its jurisprudence addressing a myriad of important topics, including constitutional law. And under state law, as we have shown in this Article, the corporation is an entity, not an association. The fact that corporations are entities and not associations of shareholders explains why shareholders enjoy limited liability. It explains why corporations can enter into contracts and sue and be sued. The entity theory also explains why corporations are not located in the states in which their shareholders are citizens, but rather in the states in which their headquarters are located for purposes of diversity jurisdiction. And the entity theory explains why corporations face criminal liability for their actions and are responsible for paying taxes.

Since at least 1841, corporations in the U.S. uniformly have been viewed as entities under state law in light of the fact that the existential purpose of a corporation was to allow for the creation of an entity that could transact business in the same way that natural person would do so.[182] Corporations are creatures of state law. Based on prior practice in the federal courts that accepted this reality, one would have to conclude that the unsupported assertion in *Citizens United* that the corporation is not an entity but an association of shareholders is an application of state law. But an application of a state law principle so accepted that there was no need to cite prior

[182] *The People v. Assessors of Watertown,* 1 Hill 616, 620-21 (N.Y.Sup. Ct. 1841).

authority embracing it. Yet, there is absolutely no support for this stark assertion in the law of any state, it is instead just a belief statement of five judges.

A. Hybrid Forms of Business Organization

Thus far our Article has focused on two forms of business organization, the general partnership and the corporation. Because the purpose of this Article is to explore the existential nature of the corporation and to demonstrate why the corporation is, in essence, a legal entity and not an association of individuals, we have found it useful to concentrate on these two modal forms of business organization. Once one introduces the existence of additional forms of business organization, our argument becomes stronger. Hybrid forms of business organization such as limited liability companies (LLCs), limited liability partnerships (LLPs), and limited partnerships (LPs) have some of the characteristics of an entity/corporation and some of the characteristics of an association of persons/general partnership. Thus, when one considers the full range of different types of business organizations, the corporation can be viewed as located at the extreme pole on a continuum that runs from clear and unambiguous entities to clear and unambiguous associations of persons, with LLCs, LLPs and LPs occupying the intermediate space on the continuum.

1. The Limited Partnership

The limited partnership form of business organization represents an early attempt to create a business form that would combine the pass-through tax attributes of a partnership with the limited liability protections of the corporation.[183] Like corporations, limited partnerships are creatures of state statutes in that, unlike partnerships, they are not formed merely by the actions of the owners "carrying on as co-owners of a business for profit," but rather by complying with the formation requirements of a relevant state statute.[184]

Limited partnerships are comprised of (at least) one general partner, which may be a corporation or other limited liability entity, and one or more limited partners.[185] The general partner has unlimited liability for the contract and tort liabilities of the

[183] "Limited partnerships, which were used in the early twentieth century to avoid personal liability of the partners, became the subject of the Uniform Limited Partnership Act in 1916." Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2260 (2015).

[184] MACEY, MOLL & HAMILTON, *supra* note 66, at 841; *see also* 6 *Del. C.* § 17-201(a) ("In order to form a limited partnership, 1 or more persons (but not less than all of the general partners) must execute a certificate of limited partnership. The certificate of limited partnership shall be filed in the Office of the Secretary of State . . ."); SAUNDERS, LAND, & VOSS, 4 FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 17-208.01 (6th ed) ("The fact that a certificate of limited partnership is on file with the Secretary of State is notice that the partnership is a limited partnership.").

[185] 6 *Del. C.* § 17-201(a) (requiring general partners be listed in the certificate of limited partnership); *see also* Buchwalter et. al., 68 CORPUS JURIS SECUNDUM PARTNERSHIP § 557 ("A limited partnership is a type of partnership composed of one or more general partners who manage the business and are personally liable for the partnership's debts, and one or more limited partners who contribute capital and share in the profits but who take no part in running the business and incur no liability with respect to partnership obligations beyond their contribution.").

limited partnership.[186] The liability of the limited partners is limited to the amount of their investments, so long as they do not participate in the control of the business to an extent that triggers liability under the applicable statute, a standard which is considered threateningly vague by many investors.[187]

Generally speaking, limited partners, like shareholders, have no say in the strategic direction or operation of the business.[188] The general partner of the limited partnership runs the business, although sometimes limited partners have voting rights that allow them to displace the general partner, a right that is exercised very seldom.

Although statutes generally do not address the question of whether limited partnerships are separate legal entities, limited partnerships possess a number of characteristics, particularly limited liability for the obligations of the business, which

[186] 6 *Del. C.* § 17-403(b) ("[A] general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law . . . to persons other than the partnership and the other partners."); *see also* Buchwalter et. al., 68 CORPUS JURIS SECUNDUM PARTNERSHIP § 557.

[187] 6 *Del. C.* § 17-303(a) ("A limited partner is not liable for the obligations of a limited partnership unless he or she is also a general partner or, in addition to the exercise of the rights and powers of a limited partner, he or she participates in the control of the business. However, if the limited partner does participate in the control of the business, he or she is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.").

[188] *Life Care Centers of Am., Inc. v. Charles Town Assocs. Ltd. P'ship*, 79 F.3d 496, 503 (6th Cir. 1996) ("The modus operandi of limited partnerships is an important reason why the 'aggregate' theory of partnerships is not always applicable in this context. Limited partnerships are business organizations in which the limited partners are precluded by law from participating in the operation of the partnership."); Buchwalter et. al., 68 CORPUS JURIS SECUNDUM PARTNERSHIP § 586 ("Limited partnerships are business organizations in which limited partners are precluded by law from participating in the operation of the partnership.").

suggest that they are separate legal entities.[189] In particular, limited partners can seek to bring derivative lawsuits by or in the right of the entity,[190] just as corporate shareholders can.[191] And the dissociation of a limited (or a general) partner from the limited partnership does not result in the dissolution of the limited partnership.[192] As such, courts have generally treated limited partnerships organized under the Revised Uniform Limited Partnership Act as legal entities distinct from their owners.[193] And the Uniform Limited Partnership Act treats the limited partnership as "an entity distinct from its partners."[194]

Delaware, the leading U.S. state for entity formation, adopts a mixed approach to limited partnerships. "[B]y statute, the parties to a Delaware limited partnership have the power and discretion to form and operate a limited partnership 'in an environment of private ordering' according to the provisions in the limited partnership

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[189] MACEY, MOLL & HAMILTON, *supra* note 66, at 851; *see also* SAUNDERS, LAND, & VOSS, 4 FOLK ON THE DELAWARE GENERAL CORPORATION LAW §17-201.03 ("A limited partnership is a distinct legal entity separate from its partners. A limited partnership is not a 'natural person,' and is a 'statutory creature not existing at common law.'") (citations omitted).

[190] 6 *Del. C.* § 17-1001 ("A limited partner or an assignee of a partnership interest may bring an action in the Court of Chancery in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.").

[191] MACEY, MOLL & HAMILTON, *supra* note 66, at 851.

[192] 6 *Del. C.* § 17-702(a)(2) ("An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights or powers of a partner.").

[193] MACEY, MOLL & HAMILTON, *supra* note 66, at 851; *Hart Holding Co v. Drexel Burnham Lambert Inc.*, Civ. A No. 11514, 1991 WL 236228, at *6 (Del. Ch. Nov. 7, 1991) ("Glencoe, as a limited partnership, is a distinct legal entity which is separate from its partners.") (Allen, C.).

[194] ULPA § 104(a).

agreement."[195] A Delaware Limited Partnership "is a creature of both statute and contract."[196] But although contractual flexibility provides substantial leeway to modify the relationship, certain statutory formalities, such as filing with the Secretary of State, must be adhered to for the "Limited Partnership" moniker to attach.[197] Most important, as under the Uniform Limited Partnership Act, a Delaware Limited Partnership is an entity in its own right, distinct from its limited partners.[198]

2. The Limited Liability Partnership

The limited liability partnership is a statutory creation based conceptually on the general partnership. But the enabling statutes that permit the creation of LLPs provide that the contract and tort liability of partners in LLPs is limited to the amount of their initial investments, as is the case for shareholders in corporations and for limited partners in limited partnerships.[199] Because partnership statutes typically provide that LLPs are partnerships, a state's general partnership law is generally

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[195] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002).

[196] *Twin Bridges Ltd. P'ship v. Draper*, No. Civ. A 2351-VCP, 2007 WL 2744609 at *9 (Del. Ch. Sept. 14, 2007).

[197] *Gotham Partners, L.P.*, 817 A.2d at 170 ("We have noted that DRULPA [Delaware Revised Uniform Limited Partnership Act] embodies "the policy of freedom of contract" and "maximum flexibility." DRULPA's "basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement" or "where the agreement is inconsistent with mandatory statutory provisions.").

[198] *Hart Holding*, 1991 WL 236228, at *6.

[199] *E.g.*, 6 *Del. C.* § 17-214(d) ("If a limited partnership is a limited liability limited partnership, . . . no limited partner of the limited partnership shall have any liability for the obligations of the limited partnership . . . .").

applicable to LLPs, absent provisions to the contrary in the foundational LLP agreement.[200]

The applicability of general partnership law to LLPs suggests that, generally speaking, LLPs are associations of their partners, not entities. Unlike corporations, the default rule for LLPs is that each partner has a right to participate in the management of the business.[201] Significantly, in LLPs, the default rule is that a unanimous vote of the partners is required for the admission of a new partner.[202]

3. The Limited Liability Company

The limited liability company is a non-corporate business structure whose equity investors, who are known as "members," have limited liability for the contractual and tort obligations of the business, like shareholders in corporations. But LLCs also have the pass-through tax status of partnerships, and virtually unfettered flexibility and discretion to organize their corporate governance and internal operations through intra-firm contracting.[203] As with LPs and LLPs, the primary reason for forming an LLC is to create a structure that offers investors the corporate law feature of limited liability and the partnership law feature of pass-through tax status. The two distinct advantages of the LLC structure are: (1) the fact that there is

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[200] RUPA §§ 101(5), 102(9).
[201] *Id.* §§ 401(f), 401(h); UPA § 18(e).
[202] UPA § 18(g); RUPA §§ 401(i), 401(b)(3).
[203] *See* 1 FLETCHER, *supra* note 57, § 20 (The LLC "combin[es] the organization flexibility and pass-through tax treatment of a partnership with the limited liability protection of a corporation").

more certainty about the limited liability feature in the LLC than there is in the limited partnership because involvement by LLC members in the operation of the LLC will not jeopardize the limited liability status of such active members in the way that such involvement jeopardizes the limited liability status of limited partners in limited partnerships; and (2) the tremendous flexibility in the organizational structure of LLCs. The LLC is a tremendously popular form of business organization, with new LLCs being formed in the U.S. at twice the rate at which new corporations are being formed.[204]

The corporate form remains the dominant form of business organization for publicly traded firms, although a small number of LLCs and LPs are publicly traded.[205] Venture capital firms eschew the LLC form of business organization, and it is generally not possible for an LLC to make an initial public offering of securities. Thus, despite the popularity of LLCs, the corporation remains the dominant form of business organization for large public enterprises, although this could change in the

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[204] Rodney Chrisman, *LLCs are the New King of the Hill*, 15 FORD. J. OF CORP. & FIN. L. 459, 459-462 (2010).

[205] Suren Gompstian, *The Governance of Publicly Traded LLCs*, THE CLS BLUE SKY BLOG (Jan. 5, 2016), http://clsbluesky.law.columbia.edu/2016/01/05/the-governance-of-publicly-traded-llcs (counting twenty-two publicly listed LLCs as of 2016); List of Current MLPs & MLP Funds, MLPA, https://www.mlpassociation.org/mlp-101/list-of-current-mlps (last updated Aug. 3, 2018) (listing 112 publicly traded limited partnerships as of 2018); Michael J. Mauboussin et al., *The Incredible Shrinking Universe of Stocks*, CREDIT SUISSE (Mar. 22, 2017), http://www.cmgwealth.com/wp-content/uploads/2017/03/document_1072753661.pdf (recording 3,671 listed companies in 2016).

future.[206] Because of the flexible nature of the LLC, the LLC in its "off the rack" format is a legal entity.

That said, because of the LLC's flexible nature, a given LLC may more closely resemble either a legal entity or an association, depending on how it is structured. In most states, an LLC may be structured as either "member-managed" or "manager-managed."[207] In a member-managed LLC, each individual member has the authority to bind the entity, whereas in a manager-managed LLC, only the managers have the authority to bind the entity.[208] In this respect, the member-managed LLC corresponds more to the partnership model, while the manager-managed LLC tends to approximate the corporate form. By default, Delaware law adopts the member-managed model, but it also allows the LLC agreement to provide for a manager-managed structure (or something in between).[209] The Court of Chancery has advised it will analogize to partnership law for standard member-managed LLCs, limited partnership law for LLCs with a single managing member and other passive, non-managing members, and corporate law for manager-managed LLCs with corporate features such as a board of directors.[210] It would therefore be easy to imagine that investors could form an LLC

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[206] Mary Siegel, *Publicly-Traded LLCs: The New Kid on the Exchange*, 68 S.M.U. L. REV. 885 (2015).
[207] 1 FLETCHER, *supra* note 57, § 20.
[208] *Id.*
[209] *See* 6 *Del. C.* § 18.402 (vesting "the management of a limited liability company . . . in its members" by default, but allowing for "a limited liability company agreement [to] provide[] for the management, in whole or in part, of a limited liability company by a manager").
[210] *See Obeid v. Hogan*, C.A. No. 11900-VCL, slip op. at 11–13 (Del. Ch. June 10, 2016).

that so closely resembles a partnership that it would be more accurate to characterize it as an association than as a separate and discrete entity. At the same time, it would also be easy to imagine an LLC that squarely fits the entity model. In either case, the LLC retains the central feature that distinguishes legal entities from associations: limited liability and a legal identity distinct from those who own its equity.[211] By way of example, members cannot sue in the name of the LLC but must proceed derivatively, as in corporate law.[212]

It should be noted, however, that, as discussed above,[213] state law often explicitly determines whether the LLC has entity status. In Delaware, for example, the relevant statute provides that a "limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation."[214] As such, it may be the case that, as in Delaware, state law has made a definitive legal determination about the existential status of a particular form of legal entity, in which case, of course, no further inquiry would be required.

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[211] 6 *Del. C.* § 18-106(b); see also *CompoSecure, L.L.C. v. CardUX, LLC*, 2018 WL 660178, at *26 (Del. Ch. Feb. 1, 2018) (Laster, V.C.) ("Section 18–106(b) of the Delaware Limited Liability Company Act (the 'LLC Act') recognizes that a duly formed LLC is a legally distinct entity.").
[212] 6 *Del. C.* § 18-1001 ("A member or an assignee of a limited liability company interest may bring an action in the Court of Chancery in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.").
[213] *See supra* TAN XX-XX.
[214] 6 *Del. C.* § 18-201.

B. <u>Non-Profit Corporations</u>

To this point, we have focused on business entities because they are the biggest aggregators of wealth and these are the entities likely to have been on Congress's mind when it adopted McCain-Feingold. But the corporations for which it is most justifiable, we suppose, to ignore basic principles of corporate law and treat as "associations of their stockholders" are non-profit corporations that have as their primary purpose advancing a particular cause. Corporations like this do exist, of course, and we do not deny that speaking out on behalf of their causes is central to their purpose.

But, that centrality does not change the legal facts. Even non-profit corporations are distinct from their stockholders, or more typically, their members.[215]

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[215] Laurie Bennett, *Who Knew That Cato Had Shareholders?*, FORBES (Mar. 2, 2012), https://www.forbes.com/sites/lauriebennett/2012/03/02/who-knew-that-cato-had-shareholders/#4f1b05918932 ("You don't see 501(c)(3)s with shareholders very often." (quoting Jeffrey S. Tenenbaum, chairman of the non-profit practice at Venable LLP) (discussing the Cato Institute, a non-profit which had shareholders until 2012); *e.g.*,15 Pa. Stat. and Cons. Stat. Ann. § 5103 (West) (defining members of non-profits to include "[a] shareholder of a corporation, if the corporation issues shares of stock"); *Pennsylvania Nonprofit Corporations*, PA. DEP'T OF STATE, https://www.dos.pa.gov/BusinessCharities/Business/Resources/Pages/Pennsylvania-Nonprofit-Corporations-.aspx ("Nonprofit corporations are those corporations whose members or shareholders may not receive any of the pecuniary [monetary] profits of the corporation."); MARILYN E. PHELAN, 1 NONPROFIT ORGANIZATIONS §§ 1:51, 3.1 (2d ed.) (noting that "[w]hile most states prohibit nonprofit corporations from issuing shares of stock, some states do permit nonprofit corporations to issue shares of stock," and that Pennsylvania corporations can be "both stock or nonstock corporations"). *But see* George W. Dent, Jr., *Corporate Governance without Shareholders: A Cautionary Lesson From Non-Profit Organizations*, 39 DEL. J. CORP. L. 93, 97-98 (2014) (although most non-profit corporations have boards of directors, "[u]nlike business corporation, however, the boards of [non-profit corporations] are not elected by shareholders because [non-profit organizations] have no shareholders").

It is precisely for the important benefits that come from being an entity that such corporations are formed.[216] In the leading incorporation state, Delaware, non-profit corporations cannot have shareholders.[217] And in keeping with the distinction between for-profit and non-profit organizations, the ABA endorses a Model Business Corporation Act for business organizations and a separate Model Nonprofit Corporation Act for non-profit organizations. Most states following the model acts, therefore, have distinct statutes for business corporations and non-profits.[218] To this

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[216] *E.g.*, PHELAN, 1 NONPROFIT ORGANIZATIONS, *supra* note 215, § 1:64 ("Most nonprofits are incorporated. The corporate form provides limited liability, centralized management, and more defined and flexible operational guidelines."); *id.* § 1:2 ("Benefits provided nonprofit organizations that are not available to profit organizations make operation as a nonprofit attractive. Most, though not all, nonprofit organizations are exempt from federal income taxation. Securities issued by some nonprofit organizations are not subject to the Securities Act of 1933. Nonprofit organizations cannot be subjected to involuntary bankruptcy. In the absence of an intent or purpose to affect the commercial aspects of a profession, the applicability of the Sherman Anti-Trust Act applicability to nonprofit organizations is limited. Nonprofit organizations having no shares of stock and that do not carry on business for their own profit or that of their members (within the meaning of the word profit as attributed to profit organizations), are not subject to regulation by the Federal Trade Commission as to charges of unfair competition.").

[217] *Id.* § 1:20 (noting that Delaware law does not authorize non-profit corporations to issue stock). Although the Revised Model Non-Profit Act does permit non-profits to issue shares, it is rather uncommon for non-profits to do so. *See generally* ALI–ABA, Model Nonprofit Corporation Act (2008); *see also Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206 (1982) ("Most states apparently permit nonprofit corporations to have "members' similar to shareholders in a business corporation, although state statutes generally do not seem to require this form of organization; in many states the Board of Directors of a nonprofit corporation may be an autonomous, self-perpetuating body.") (citations omitted); Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 575–78 (1981) (discussing the different states' approaches to non-profit formation).

[218] For example, California has a Corporations code with specific chapters for "General Corporation Law" and "Nonprofit Corporation Law." *Compare* Cal. Corp. Code Div. 1, *with* Cal. Corp. Code Div. 2. Likewise, New York has a "Business Corporation Law" code and a "Not-for-Profit Corporation Law" code. *Compare* N.Y. Bus. Corp. Law § 101 *et seq*. (McKinney), *with* N.Y. Not-for-Profit Corp. Law § 101 *et seq*. (McKinney).

point, Citizens United, the litigant, was a non-stock, non-profit membership corporation incorporated in Virginia with an expressive purpose.[219] Therefore, if Citizens United the corporation was an "association of citizens,"[220] it was not one involving an association of shareholders. But *Citizens United*, the judicial decision, was not about just non-profit corporations. If *Citizens United*, as a case, had applied only to non-profits, it would not have had much effect.

Now, we concede that as to non-profit corporations formed for a specific charitable or other non-profit purpose, it is more logical to assume that the members are united in their support of that purpose. The reason for that is obvious, which is that the members cannot expect any economic return and therefore can be presumed to have become a member solely because of their interest in advancing the entity's stated non-profit goals.[221] To that end, Professor Hansmann has observed that "the corporate law that has been developed for business corporations, and particularly

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[219] *Citizens United v. Fed. Election Comm'n*, Joint Appendix at 10A, 2009 WL 62995 (Jan. 8, 2009) (Amended Verified Complaint for Declaratory and Injunctive Relief (Dec. 21, 2007)). Virginia has a separate code for "Stock" and "Nonstock" corporations. *Compare* Va. Code Ann. § 13.1-601 *et seq.*, *with* Va. Code Ann. § 13.1-801 *et seq*. Virginia nonstock corporations, of which *Citizens Untied* was, are not allowed to issue dividends to their members and are effectively non-profit organizations. Va. Code Ann. § 13.1-814 (West) ("A corporation shall not issue shares of stock. No dividend shall be paid and no part of the income of a corporation shall be distributed to its members, directors or officers, except that a corporation may make distributions to another nonprofit corporation that is a member of such corporation or has the power to appoint one or more of its directors.").

[220] *Citizens United*, 558 U.S. at 349.

[221] *See generally* PHELAN, 1 NONPROFIT ORGANIZATIONS, *supra* note 215, § 1:1 ("A nonprofit organization, whether incorporated or operated as a trust or as an unincorporated association, is an organization in which no part of the income is distributable to its members, directors, or officers.").

that which concerns the fiduciary obligations of corporate management, often provides a poor model for nonprofit corporation law."[222]

Most essential to our argument in this article is the law's treatment of for-profit corporations, which have as their goal the attainment of profits for the benefit of their stockholders. In *Citizens United*, the Supreme Court accepted as to all corporations, including those most relevant to society in terms of their effect on the fairness of our polity's electoral process, a view that it has refused to adhere to in other contexts. As important, *Citizens United* failed to take into account basic differences between business corporations and non-profit corporations: differences that the Court has acknowledged and recognized in other cases.

For example, the Supreme Court has consistently denied for-profit corporations standing to sue to vindicate the rights of their stockholders.[223] But in the context of non-profit membership corporations, the Supreme Court has allowed them standing to sue on behalf of their members because their members are deemed

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[222] Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 845 (1980).

[223] *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) ("In the ordinary case, a party is denied standing to assert the rights of third persons.") (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); s*ee also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("In determining whether [a corporation] has standing . . . we conduct the same inquiry as in the case of an individual."); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that to establish concrete injury—standing analysis's first prong—"a mere 'interest in a problem' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself.").

to be united in their relevant values and to have joined the membership corporation to advance those values.[224]

As to the failure of *Citizens United* to hew to the same distinctions in addressing McCain-Feingold, it also is important to recognize how membership organizations typically fund their activities, including those involving speech. It is not by using funds contributed by their members in their capacity as members.

Rather, these corporations raise money by voluntary, tax-subsidized charitable contributions.[225] Members, typically involved as directors, are usually

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[224] *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342–45 (1977) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members.") (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). The Supreme Court has held that associational standing attaches to an organization "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. Admittedly, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014), the Supreme Court allowed the for-profit Hobby Lobby corporation to sue to vindicate the religious beliefs of the family that controlled a majority of the corporation's equity. Like *Citizens United*, *Hobby Lobby* can be seen as a case where, for similar ideological reasons, the majority took a view of corporations it fails to embrace in other areas of law. The Court failed to address constitutional standing in *Hobby Lobby*, but nonetheless held that a for-profit corporation is a "person" and entitled to statutory standing under the Religious Freedom Restoration Act of 1993 (RFRA). 134 S. Ct. 2751, 2768–69 (2014); *see also* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 141–44 (2014) (highlighting that *Hobby Lobby* "addressed the separate claims brought by individual owners themselves" and warning that "the notion that the owners could sue on behalf of legally separate corporations would raise still more problematic issues of third-party standing").

[225] *See generally* PHELAN, 1 NONPROFIT ORGANIZATIONS, *supra* note 215, § 1:2 ("[N]onprofit organizations have financing problems. Equity financing is not available, and debt financing can be difficult to obtain. Reliance upon donations can be illusory. The founders, members, directors, and officers of a nonprofit organization cannot share in any profits the organization may generate. As noted above, there can be no distribution of profits of nonprofit organizations. Founders, members, directors, and officers can only be paid a reasonable salary for services they perform for the organizations.").

expected to donate heavily to the charity and, more important, to help raise funds.[226] But, the key point is that these corporations do not in fact use corporate funds donated by their equity investors to fund their speech activities. Rather, these corporations must do exactly what was permitted by McCain-Feingold's PAC authorization: seek out voluntary donations based on donors' support for the causes and positions adhered to by the corporation.

Precisely because of these realities, non-profit corporations pose little danger of compelled speech using funds freighted by a legal and equitable obligation toward the corporations' equity holders. That is because, as was required of unions under *Abood* and its progeny,[227] and as was required by McCain-Feingold for both corporations and unions,[228] non-profit corporations must fund their speech by specifically raising funds voluntarily for that purpose from donors. As we have shown, no responsible commentator on American corporate law on the left or the

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[226] "68 percent of nonprofit organizations have a policy requiring board members to make a personal contribution on an annual basis. Boards average 74 percent participation in giving." THE BRIDGESPAN GROUP, BOARD MEMBERS AND PERSONAL CONTRIBUTIONS (2010), https://www.bridgespan.org/bridgespan/images/articles/board-members-and-personal-contributions/BoardMembersPersonalContributions.pdf?ext=.pdf; *see also* Hansmann, *The Role of Nonprofit Enterprise*, *supra* note 222, at 877 ("Because nonprofits are unable to sell equity shares, they must rely largely upon donations, retained earnings, and debt for capital financing. The funds available from these sources may, however, be poorly matched to the capital needs of the organization. Donations may reflect merely the whims of contributors."). Although there are some non-profits—termed "commercial nonprofits"—that "receive the bulk of their income from prices charged for their services," such as nursing homes and hospitals, the non-profits most likely to be a collective of individuals advocating for a cause are "donative nonprofits," "that receive most or all of their income in the form of grants or donations." *Id*. at 840–41.

[227] *See Abood*, 431 U.S. at 233–36.

[228] 52 U.S.C. § 30118(b)(2).

right believes that stockholders in American business corporations invest in their stock because they desire to have those corporations engage in political speech on their behalf. Any belief of that kind ignores all relevant empirical facts known about corporations and their stockholders.

Conclusion

In this Article we have championed three ideas. First and foremost we have argued that the core assertion on which the Supreme Court's opinion in *Citizens United* is based, which is that a corporation is an "associations of shareholders"[229] is wrong. The corporation is not an association of citizens or even shareholders, either under law, or in a theoretical sense. The whole point of the corporate form is to create a discrete legal entity separate and apart from its shareholders. Unless such a separate entity is created when a corporation is formed then the basic objective of the corporation, which is to create an economic framework for amassing capital to be deployed in economic activity, cannot be reached.

In arguing that corporations are economic entities with rights and obligations separate and apart from their shareholders we make two ancillary points. First, we show that, as a matter of logic and theory, the corporation cannot be conceptualized simultaneously as an entity and as an association of shareholders. These conceptions of the corporation are logical alternatives: they are substitutes not complements. The corporation is, from an analytical perspective, an alternative form of business organization to the partnership form. The partnership is an association of the partners who own the enterprise. The point of allowing the creation of corporations is to create

[229] *Citizens United*, 558 U.S. at 349.

a legal framework to permit the formation of business organizations that are entities rather than associations of shareholders.

Finally, moving from logic to authority we observe that, to the extent that the question of whether a business organization is an entity or an association of shareholders can be viewed as a matter of fact determined by the state law that creates the organization in addition to being viewed as an existential matter. Supreme Court precedent clearly establishes that state law, rather than federal law, is the appropriate source for determining whether a corporation is an entity or an association of shareholders. And state law is clear that corporations are entities separate and apart from their shareholders.

Thus, whatever one might say about *Citizens United* from a constitutional law perspective, the case is bad corporate law. The majority opinion mischaracterizes the corporation, describing it as an "association of shareholders" when it is, in reality, a separate and distinct legal entity. The flaws in the opinion are severe and manifest in light of the fact that the Court provides no basis for the assertion that the corporation is an association of shareholders and fails to recognize that corporations are creatures of state law, and therefore state law rules should guide our understanding about the essential nature of these entities.

Perhaps worst of all, the Court's decision struck down bipartisan legislation that allowed business corporations broad license to engage in political speech, but only required that they do so using funds specifically raised from voluntary donation by their constituents—including stockholders. By this means, Congress left business corporations with substantial expressive rights, but through means that took into account the actual facts about what business corporations are and what they are not. In the name of vindicating the expressive rights of American investors, the Court therefore compelled millions of ordinary Americans to endure the involuntary use of their equity capital for a purpose that they did not authorize and that has no rational connection to their decision to invest.