# Corporate Expression

VINCENT S.J. BUCCOLA

**ABSTRACT**—The U.S. Supreme Court's decision in *Citizens United v. FEC* set off a vigorous and continuing debate about the role of business firms in political life and, more specifically, about their expressive possibilities and limitations. This chapter, to be published in a forthcoming volume of Elgar's *Encyclopedia of Law and Economics*, sketches the structure of the American law of corporate expression and surveys the academic literature on political expression in particular. It observes that the evaluative literature reflects two familiar but fundamentally inconsistent approaches to the business firm—one implicitly taking the firm as a black box profit-maximizer and considering the effects of its activity on the broader polity, the other quite explicitly modeling conflict within the firm and considering the effect, especially on shareholders, of managerial discretion. The first approach is naïve; the second, myopic (from a welfarist perspective). This chapter thus argues, albeit gesturally, that the welfare implications of corporate political-expressive capacities remain elusive. One's best guess is that the effects of robust expressive capacities are directionally mixed with respect to any given firm, heterogeneous across firms, and, because incorporated and unincorporated organizational forms are reasonably close substitutes, small in the aggregate.

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## I. INTRODUCTION

The U.S. Supreme Court's decision in *Citizens United v. FEC* set off a vigorous and continuing debate about the role of business firms in political life and, more specifically, about their expressive possibilities and limitations.[1] This chapter sketches the structure of the American law of corporate expression and surveys the economically inflected literature on corporate political expression in particular. It observes that the evaluative literature reflects two familiar but fundamentally inconsistent approaches to the business firm—one implicitly taking the firm as a black box profit-maximizer and considering the effects of its activity on the broader polity, the other quite explicitly modeling conflict within the firm and considering the effect, especially on shareholders, of managerial discretion. The first approach is naïve; the second, myopic (from a welfarist perspective). This chapter thus argues, albeit gesturally, that the welfare implications of corporate political-expressive capacities remain elusive. One's best guess is that the effects of robust expressive capacities are directionally mixed with respect to any given firm, heterogeneous across firms, and, because incorporated and unincorporated organizational forms are reasonably close substitutes, small in the aggregate.

Analyses of the law of corporate political expression typically address one of two doctrinally distinctive sets of questions. One set of questions concerns the capacities firms have (or should have) to produce discursive expression in the face of government opposition. The essential question is—can or should a government have more leeway to restrict the expressive activities of business firms than of individuals? This approach takes an "external" view of the firm, so to speak, because it treats the firm as a unity to which legal rules attach. The other set of questions concerns the way in which firms produce expressive activity, and in particular the way laws shapes or channels that production, whatever the governmental limits on expressive activity may be. The essential question is—who among a firm's constituents can or should be able to speak for the firm? This approach takes an "internal" view, because it models the firm as a disunity of individuals whose collective action—necessarily a fiction—is the product of a legally defined aggregation rule.

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

Most of what follows takes these two approaches at face value. After briefly describing the law of commercial speech regulation in Part II, this chapter turns to corporate political speech. Part III surveys the law and academic literature (very little of it economically inflected) corresponding to the "external" view. Part IV considers the law and academic literature (much more of it economically inflected) corresponding to the "internal" view.

But although it is possible, and for some purposes useful, to take the external and internal views separately, the rules corresponding to each interact at the level of incentive formation. For example, the difference (if any) between a government's authority to regulate corporate and individual speech can be expected to affect both the extent to which entrepreneurs integrate economic activity in incorporated forms and the terms on which integration is achieved (Buccola 2016). At the same time, the rules that structure firms' production of political expression can be expected to affect the type and quantity of expression and, therefore, the significance of stronger or weaker corporate immunities to regulation. Moreover, the social significance of shareholder returns that are attributable to political influence is deeply contested. Part V thus suggests that optimality judgments are exceedingly hard to reach on any kind of empirical basis. Here as with so many questions of corporate law and governance, intuitions about the size of agency costs, the efficacy of contract and markets, and the responsiveness of economic organization to regulation seem destined to drive opinion about wise policy.

## II. COMMERCIAL SPEECH

People carrying on a business, like anyone else, may wish publicly to make claims of fact or to express opinions or convey intentions on a wide variety of subjects. Indeed, expressive action broadly understood is indispensable to every business's viability. Advertisements for marketing; representations for obtaining licenses; financial statements for raising capital: these and many more kinds of communication are mandatory for almost every enterprise. But those carrying on a business may also wish to express opinions not pertaining exclusively or even predominantly to the immediate needs of the enterprise, opinions that relate more generally to the cultural or political situation in which the business is embedded.

American law treats these subjects of speech—commercial and political—differently. Broadly speaking, federal and state governments have wider latitude to restrict or otherwise channel speech made in furtherance of a business venture than speech concerning matters of general concern. The First Amendment has been interpreted to sharply constrain government authority to limit political speech; to give government somewhat more freedom to regulate arguably misleading or otherwise objectionable speech made in commerce; and to say nothing at all about government's ability to regulate non-speech business activity that may nevertheless have expressive qualities. The distinctions apply as readily to natural persons engaged in trade—through proprietorship or partnership, for instance—as to corporations. Since this volume concerns primarily the law and economics of business corporations as such, issues concerning the commercial/political speech distinction lay largely outside the scope.[2] Nevertheless, a brief statement of the issues is warranted because much of the expression business corporations are apt to produce, and so much of the regulation of corporate expression, has nothing to do with politics.

As easy as it is to state the distinction between commercial and political expression, the lines between them are hard to mark out. The doctrinal categories imply a separation, non-existent in fact, between the market for ideas, from which the law must abjure, and the market for goods and services, where lawmakers have a freer hand.[3] And the

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[2] For those who want a deeper, historically-inflected account of the commercial/political and speech/non-speech distinctions, Shanor (2016, 2018) is a good place to start.

[3] The elaboration of these categories is relatively recent. It was only in 1976 that the Supreme Court first identified "commercial speech" as a distinctive kind of expression calling for distinctive regulatory limits. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 435 U.S. 748 (1976). This is not to say, however, that people making what would now be called "commercial speech" had no right to do so before the 1970s. The common-law prohibitions of fraud and defamation have always attached to utterances made in the course of a person's trade just as to those made in non-commercial settings. But the extent of government's authority to restrict commercially motivated speech that might mislead but is not fraudulent or defamatory, or that might be unsavory but is not obscene, went untested until the twentieth century. It was only when Progressive and New Deal regulatory efforts began to target commercially motivated speech *as such* that the issue could even theoretically be joined. The Sherman Antitrust Act (1890), section 1 of which outlawed "conspirac[ies] … in restraint of trade," might be seen as a leading edge. But practically the question of

distinction between expressive conduct, to which First Amendment rights attach, and non-expressive conduct, to which they do not, is famously murky. Line drawing is a problem throughout law, but here the problem is not one of vagueness, as in the specification of "reasonableness." Rather, the concepts on which the law of speech regulation is built are essentially contested and therefore unstable.

Nor could it be otherwise. As Shanor (2016) discusses out, linguistic expression mediates almost all human interaction, including commercial transactions. And transacting itself often has expressive content, especially where particular goods, services, and brands carry political significance. Commercial advertising, the domain in which the "commercial speech" concept was born and in which much litigation has played out,[4] illustrates the fundamental difficulty. On one hand, little is as obviously a part of commerce as a public offering of goods or services for sale. On the other hand, advertising works by imaginatively associating the advertised product with a more or less fully articulated notion of the good life. And little is as obviously political as an assertion of the nature of the Good.[5]

In any case, the commercial/political distinction is crucial to understanding a wide variety of features of American law. Take, for example, the constitutionality of the securities laws. The Securities Act of 1933 doesn't just prohibit and penalize statements that would constitute fraud at common law (which are outside the First Amendment's coverage by any account). It requires a person who wants to issue securities to make a variety of non-misleading, public statements about her business.[6] This impinges on expressive interests to some extent. But the law doesn't therefore run afoul of the First Amendment

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commercial speech rights could and did arise only as the regulatory state's reach grew.

4 E.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

5 For what it's worth, a large and growing literature has remarked on the judiciary's apparent, increasingly expansive sense of the kinds of business activities that may warrant protection as "speech" (e.g., Kendrick 2015; Post and Shanor 2015; Weiland 2017; Shanor 2018). How far this will go is an open question.

6 Most commercial-speech regulation restricts what businesses can say, usually on grounds of immorality or consumer confusion. Post (2015) discusses compelled speech in commercial settings.

because government has latitude to curtail misleading speech that is made in, or even defines, a commercial sphere.[7]

The degree to which governments can restrict commercially motivated speech has massive consequences for American political economy. It does not, however, bear directly on the distinctive features of corporate organization. For present purposes, then, I want to set commercial speech aside and turn to concededly political speech.

## III. POLITICAL SPEECH: WHAT CAPACITIES?

### *A. Legal Framework*

What capacities do (or should) business firms have to produce political expression—that is, advocacy—over a government's objection? As a practical matter, the descriptive answer is straightforward. Most corporations have the same capacities to spend funds on political expression that individuals have, which is to say that constraints on corporate political speech are for the most part capital rather than legal constraints.

But to state the matter this way masks complexity and openness in the law's second-order structure. In particular, two doctrinal inquiries jointly determine the first-order rules of a given corporation's expressive capacities. First, what kinds of expression do its organizational documents empower it to produce? Second, to what extent are its expressive powers, whatever they may be, immune to subsequent government interference?

The distinction between corporate powers and rights, although it may sound scholastic, is central to American law. Federalism makes this so, since the government that establishes a corporation's powers, the chartering state, is not always the government that seeks to limit or punish the use of those powers.

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7 Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980), articulated a "four-part test" to determine the validity of commercial-speech regulation:

> At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

In the nineteenth century, even after the advent of general incorporation laws, the states routinely chartered corporations with narrowly circumscribed powers (e.g. Avi-Yonah 2010; Blair & Pollman 2015; Strine & Walter 2015, 2016; Macey & Strine 2018). Today, as a matter of practice, all states empower their corporations liberally by default. The Model Business Corporations Act, for example, declares that unless a corporation's articles say otherwise, the firm has "the same powers as an individual to do all things necessary or convenient to carry out its business and affairs…."[8] Thus, liberality extends to expressive powers. By default, corporations today have effectively the same expressive powers as individuals have.[9]

The century-old fact of liberal corporate empowerment has obscured the logical priority of articles of incorporation (which establish corporate powers) over constitutional law (which establishes rights against government interference with the exercise of constituted powers). Most contemporary debate ignores empowerment altogether and focuses instead on the scope of corporate constitutional rights. The remainder of this chapter will track that debate. In assessing the significance of rights, however, it is important to remember that a corporation's chartering state and—more importantly as a practical matter—its promoters or controllers can if they wish forswear one or more expressive powers (Buccola 2017). This oft-overlooked observation has important implications for empirical conjectures discussed below. In particular, the ability of those who control a corporation's charter to restrict future expressive activity if they believe it will help them attract capital or labor on favorable terms implies a limit on the size of the agency costs associated with expressive capacities.

In any case, the extent to which business corporations' political-expressive powers warrant protection from government interference is much contested. The issue famously came to a head in *Citizens United v. FEC*, where the Supreme Court held that federal election law cannot limit corporations' use of treasury funds to advocate for a candidate in an electoral race (see Winkler 2018, pp. 324–76).[10] In the 1970s, the Court had held that federal law cannot limit *individuals'*

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[8] Model Business Corporations Act, § 3.02.

[9] There are de minimis exceptions. Delaware, for example, creates corporations unable to confer academic or honorary degrees. Del. Code. Ann. tit. 8, § 125.

[10] 558 U.S. 310 (2010).

spending on expressive activities in favor of a candidate.[11] *Citizens United* effectively declared that the rule for corporations would be the same. The decision altered the existing first-order landscape only modestly (Levitt 2010). Corporations had already enjoyed the right to, for example, spend treasury funds to advocate for or against referenda[12] or to opine on electoral matters without naming particular candidates.[13] But the logic and rhetoric of *Citizens United* were sweeping, and the case quickly came to serve as a totem for a more general legal principle: Whatever rights individuals in the United States have to produce political speech without government interference, corporations also have. Put differently, current doctrine holds that the socio-legal nature of an organization subjected to speech regulation is irrelevant to the regulation's validity.

*B. Critique*

Corporate theorists overwhelmingly reject *Citizens United*, at least insofar as it stands for a broad legal principle. Their criticism has largely rested on legal rather than explicitly economic grounds, the gist in one way or another being that the decision's rationale misapprehends the legal theory of the corporation. But, as we shall see, the most sophisticated critiques turn on (usually implicit) economic premises, for better or worse.

The rudiments of the basic critique are captured in the popular dictum that "corporations aren't people" and the injunction that the courts shouldn't treat them as though they are. The educated version of the idea takes issue with the Supreme Court's rhetorical appeal to the interests and rights of shareholders as bases for ascribing expressive rights to corporations. The reason for incorporating an enterprise, historically and still today, is to sever the common law's identification of the individuals who manage and have equity in an enterprise with the enterprise itself (e.g. Tucker 2011; Macey & Strine 2018; Macey 2019). The abstract, inhuman quality of the corporation is therefore no unfortunate accident to be swept under the rug. It is rather the corporation's central design feature. And so, at least in one sense, to ascribe

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11 Buckley v. Valeo, 424 U.S. 1 (1976).

12 First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

13 The scope of the statutory ban on "electioneering" is discussed in McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

to corporations the all-too-human constitutional rights of their shareholders is to deny the corporate form's central logic.

There are at least three problems with the basic critique. First, it proves too much. The First Amendment, we may stipulate, was designed to protect the political-expressive interests of individual humans. We may also stipulate that the point of the corporate form is mainly to dissociate individual humans from an enterprise's activity. So, the argument goes, it is wrong to extend speech rights to corporations *in virtue of* individual humans. But all provisions of the Bill of Rights are designed to secure the interests of individual humans. The form of the basic critique thus leads to the conclusion that no constitutional rights attach to corporations in virtue of the individuals associated with them—where else would such rights come from?—and consequently that governments have discretion to, for example, take their property without due process or just compensation (e.g. Greenfeld 2015). That is an unacceptable conclusion, both normatively and descriptively, so at minimum the basic critique needs to be refined.

Second, the critique's formal nature leads to functionally odd—and to most people unacceptable—conclusions. According to the critique, government authority to restrict corporate political expression is grounded not in any particular corporation's commercial character, but in the fact, common to all corporations commercial and otherwise, that it is a product of legislative will. The critique thus undermines the expressive rights of advocacy non-profit and other "public-spirited" corporations as well as of Exxon Mobil. The Supreme Court famously recognized First Amendment rights inhering in advocacy corporations in two cases involving the NAACP's civil rights advocacy in the 1950s and 1960s.[14] Corporations are useful means through which individuals can coordinate political expression with like-minded fellow-citizens. But the logic of the basic critique of *Citizens United* implies that government can throttle political expression whenever an artificial entity is used to pool funds and underwrite the expression's dissemination. At the same time, because the basic critique's logic depends on the corporation's formal qualities, it does not extend to unincorporated businesses. That is, the critique does not supply a rationale for government to curtail the political speech of commercially motivated people who pool finances without using a corporation (see

14 NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). *See also, e.g.,*

e.g. Orts & Sepinwall 2015). Put briefly, a government's authority to limit corporate political expression is only loosely related to its ability to exclude commercial interests from the public sphere.

Third, the formal and historical logic of at least some accounts (e.g. Strine & Walter 2015) is faulty. Corporations come into being only at the sufferance and by the design of *a* government, and historically, as I have said, state governments constrained all manner of corporate powers. This does not imply, however, that the *federal* government ever could, or now should be able to, restrict the use of chartered powers just because the target of regulation was or is a corporation. In *Citizens United*, for example, the petitioner was a Virginia corporation, while the regulation it challenged was a federal statute. The corporation was an artificial legal construct, to be sure, but it was a construct of the Commonwealth. Artificiality alone says nothing about how extensive the federal (or sister-state) authority to restrict the use of state-authorized expressive powers ought to be.

Subtler critiques of corporate expressive rights address some of these shortcomings. These critiques have two features in common: an acknowledgment that at least some constitutional rights are indispensable and a recognition that corporate rights are grounded one way or another in the interests of individuals. There is a variety of approaches. Blair and Pollman (2015) argue that the justifiable corporate rights, at least for business corporations, are those that facilitate capital lock-in. Without, for example, a corporate right to due process or to compensation for a government taking, the corporate form would be an unattractive mode of organization in most cases. Implicitly their approach presupposes that capital lock-in is not only a useful feature of the corporate form (Hansmann & Kraakman 2000; Blair 2003), but the animating principle of which courts ought to take judicial notice. Others (e.g. Pollman 2011, 2016; Greenfield 2015; Strine & Walter 2016) suggest that expressive rights might be recognized differentially across different kinds of corporations, depending on tax status (e.g. non-profit or for-profit),[15] size (e.g. public or private), mission, or the like.

[15] This uneasy distinction would recall the landscape on "electioneering" before *Citizens United*. The Supreme Court had previously held anti-electioneering rules unconstitutional as applied to non-profit advocacy corporations. FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

## C. *Assessment*

The subtler critiques of *Citizens United* have the advantage of being consistent with settled expectations about property rights and the rights of advocacy organizations to engage in core political speech. But they are not entirely satisfying. For one thing, they share with the basic critique the implication that unincorporated business firms have greater rights than incorporated but otherwise identical firms—odd for a functional account although not disqualifying.

More generally, the subtler critiques sacrifice formal certainty for what they gain in pragmatic plausibility and fit with settled law. Insofar as these critiques disclaim an authoritative deductive logic for ascribing corporate rights, they call on an indeterminate functional analysis. They ask, in effect, that courts reason pragmatically from a sense of corporate purpose—purpose either tailored to individual firms or of the corporate form in general. But identifying a corporate *telos* is no easy task. Surely the words printed in organizational documents are not the place to look. And it would be hopelessly reductive to declare that *the purpose* of all so-called "for-profit" business corporations is pecuniary. Corporate purposes are inherently plural.[16] As an historical matter, the corporate form came to prominence due to its capacity to rationalize production in capital-intensive industries. But as Heaton (2018) points out, the same legal features that make the corporation useful for producing material products at scale also make it useful for producing political expression at scale. There is no *a priori* functional reason to segregate these capacities or to privilege one over the other. If there is a functional reason to do so, it must be on account of the rule's actual or anticipated effects.

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[16] This observation, the foundation of "nexus of contract" and proprietary conceptions of the corporation, casts doubt on Strine and Walter's (2016) identification of a tension between corporate rights of conscience and what they call "conservative" corporate theory. The theorists most closely associated with the shareholder wealth-maximization norm are keen to point out that it's a *default* instruction to managers, not an essential feature of the corporation. Easterbrook & Fischel (1991, pp. 35–36), for example, are clear about the corporate form's flexibility: "An approach that emphasizes the contractual nature of a corporation removes from the field of interesting questions one that has plagued many writers: what is the goal of the corporation? It is it profit, and for whom? Social welfare more broadly defined? … Our response to such question is: who cares?").

The most plausible critiques of corporate expressive rights thus appear at least implicitly to depend for their force on an economic analysis. This is not to say they depend on rank welfarism. One needn't demand or impose any particular social-welfare function. It is, however, to say that the best critiques call for comparative institutional analysis. How does the equilibrium in a world with broad corporate expressive rights compare to the equilibrium in a world without them? This is the key question and one that the critical literature has for the most part overlooked.[17]

Buccola (2016) draws attention to the comparative statics and in doing so sounds an objection to the critical majority. He observes that, to the extent political-expressive and other constitutional rights are valuable to business enterprises, profit-maximizing firms will on the margin substitute away from incorporated modes of organization in a world where those rights are denied to corporations. More specifically, if entrepreneurs choose their organizational form to minimize total costs of production (e.g. Hansmann 1996), they will choose unincorporated forms when the value of the rights denied to corporations (but granted to natural persons) exceed the value of the productive efficiencies and any tax benefits associated with the corporate form. With respect to firms for whom the right to produce political expression is valuable (or for whom the benefits of incorporation are limited), a rule forbidding corporate political speech will not exclude disfavored speech at all; it will simply sacrifice productive efficiencies.

The size of the effect is unknown. A rule forbidding corporate political speech would curtail the political expression of profit-maximizing firms for whom the value of speech is small or the benefits of incorporation great. If demand for the corporate form is sufficiently inelastic, or if the political expression of those firms who do not highly value expressive rights is sufficiently repulsive, rules restricting corporate expression could be worthwhile. To my knowledge, though, no one has sought to estimate the elasticity to expressive rights of demand for the corporate form.[18] And note that, if expressive rights were

[17] A notable exception is Coates (2015, pp. 265–75), who speculates explicitly that the equilibrium consequence of broad corporate expressive rights is a corrupt political regime akin to oligarchic Russia.

[18] After *Citizens United*, some hypothesized that firms might disvalue the corporate right to spend on electioneering (Epstein 2011; Tucker 2011). The corollary of a corporation's right to spend funds supporting political candidates is, after all, a

to prove valuable enough, an enterprising jurisdiction could be expected to create partnership law that mimics corporate attributes closely without interposing an entity between the equity investors and the government.

In any case, the world critics of corporate expressive rights have in mind is presumably not one in which the commercial interests with the most to gain from influencing political life continue unchecked, while those with a more modest interest are shut out of public affairs. Greater attention to the comparative statics would help at least to clarify the significance of corporate expressive rights.

## IV. POLITICAL SPEECH: WHO DECIDES?

Law structures the use of corporate expressive capacities in addition to supplying those capacities in the first instance. This is necessarily true, since corporations do not act autonomously but are instead *deemed to act* constructively—that is, by reference to legal rules for aggregating individuals' actions or preferences (Brudney 1981). An important set of questions, then, asks how law influences (or ought to influence) the production of corporate political expression, given whatever capacities for expression corporations may have. These questions are about the allocation of authority—*who decides* whether to spend corporate funds on political expression, how much, under what conditions, toward what end, and by which means.

### A. Legal Framework

For most business corporations, the first-order law allocating authority is remarkably simple. Incumbent managers have what Bebchuk and Jackson (2010, p. 83) describe as "plenary authority." Managers can decide in the first instance and without board or shareholder approval whether to use corporate funds on political expression and, if so, how to do so. They are free to spend the amount of corporate funds they wish on the kind of political expression they wish, and are

politician's power to encourage it to do so. The effect of the right could in principle be to reduce profitability. In an event study of the *Citizens United* decision, Stratmann & Verret (2015) find abnormal positive returns for public companies, with the strongest effect coming in regulated industries. The finding casts doubt on expropriation stories, but they can't be ruled out, either with respect to electioneering rights or expressive rights of other kinds.

under no special obligation to call attention to the cost of political spending or even affirmatively to disclose its existence—subject, as always, of course, to the board's acquiescence.

Managers are, in theory, liable in equity to account for the use of their discretion; and directors are, in theory, liable for their acquiescence. Some scholars have argued that courts should scrutinize political expenditures more thoroughly than they do general business or even charitable expenditures that lack politically expressive content (Kwak 2013; Leahy 2014, 2015, 2017). But what criteria judges might consider are unfortunately obscure. Shareholders' pecuniary advantage is a familiar and plausible criterion (see Kesten 2016), but judges are poorly positioned to estimate the likely pecuniary effects of any particular expressive act. Understandably, then, courts are reluctant to intervene (Bebchuk & Jackson 2010). Spending on political expression is treated as ordinary-course spending, and the deferential "business judgment" standard of review effectively insulates managers' decisions to use treasury funds on political messaging.

Once again, however, the simplicity of the first-order law in most corporations masks complexity and openness in the second-order law. Public as well as private actors have a number of levers with which they can alter the first-order rules, and the levers' "stickiness" defines a limit to the magnitude of any dysfunction associated with the status quo (Coase 1960).

As noted above, the states can probably prohibit the corporations they charter from spending on political expression altogether. It is even clearer that chartering states can check the sole discretion over political expenditures that most managers enjoy today (Brudney 1981; Bebchuk & Jackson 2010). State law has always declared not only the powers domestic corporations can exercise, but also the terms of exercise. And these terms can vary by subject-matter and over time. For example, the traditional rule on mergers provided that unanimous shareholder consent was prerequisite to closing a transaction. As the number of shareholders in the largest firms increased and holdout problems became insuperable, the states changed their respective rules of decision. Now a bare majority's approval can effect a merger. The particular rule is unimportant. What is important is the premise that chartering states can define (and alter) the procedures through which corporate powers may be exercised.

The states could restrict managerial discretion if they wished to do so. A state might, for example, require that the directors of its corporations approve political expenditures, that the shareholders do so, that both do, and at whatever majority or supermajority thresholds the legislature chooses. Managers in such a regime who deploy funds for political expression without the necessary approval or ratification would act *ultra vires* and could be made to answer personally for the funds spent. But because firms choose their place of incorporation, any one state's move along these lines is destined to practical irrelevance. The decision in most jurisdictions, including the most important, Delaware, has been to leave the matter up to private ordering.

What, then, of private ordering? In general, a corporation's promoters decide in the first instance how decisions to use corporate funds for political expression will be made. If they want to restrict discretion, or even to disclaim the corporate power to produce political expression altogether, they can do so in their articles. The default rule is managerial discretion, but it is only a default. If a corporation's promoters are silent on the matter, as they invariably are, the board subsequently can restrict managerial discretion informally, by bylaw, or, with enough shareholder support, by amending the articles. It is against this flexible second-order law that the near-uniformity of first-order practice ought to be judged.

### B. *Critique*

The status quo has attracted significant criticism from legal academics. Most criticism assumes the shareholder-centric, agency-cost framework so common in the law-and-finance literature. The concern with respect to political-expressive rights is that managers may deploy corporate funds in furtherance of candidates and causes with which they privately sympathize but which do not promise a return to shareholders. If law or informal governance norms cannot resolve conflicts of interest, the corporation's capacity to spend on political messaging becomes one more way for managers to indulge the private benefits of control.

This is not a new concern. The agency costs of corporate political spending were a driver of the first campaign-finance laws (Winkler 2004). Brudney (1981) was, however, the first modern corporate scholar to argue that divergence between managers' and shareholders' political interests—both pecuniary and expressive—can be non-

trivial. Long before corporate political expressive rights became culturally salient, he advocated on this ground for rules giving shareholders veto rights over corporate political expression. Among active scholars, Bebchuk and Jackson have been the most persuasive and persistent critics of the status quo (see Bebchuk & Jackson 2010, 2013; Bebchuk et al. 2018). They (2010) paint a picture of manager-shareholder conflict similar to Brudney's and argue that the conflict justifies SEC rulemaking to interpose independent directors between public-company managers and the corporate treasury or, in any event, to compel disclosure (2010, 2013, 2018).[19]

### C. *Assessment*

To the extent one is concerned about shareholders, the wisdom of government intervention depends on, among other things, whether any shareholder advantages associated with managerial discretion (and secrecy) are offset by the diversion of corporate funds that discretion and secrecy make possible.

In a world of faithful managers who use their authority to enhance corporate profits (or improve shareholder well-being otherwise defined), discretion is presumptively valuable for shareholders. In this world, a manager spends on political messaging until she expects the marginal dollar so invested to yield less than a dollar in additional profit (or non-pecuniary benefits to shareholders). Political expression is just one among many costs of doing business. The manager's task is to optimize across all the relevant budget items, and removing one budget item from the field simply reduces her options. Likewise requiring the faithful manager to disclose her cost structure simply gives valuable information to competitors and others. But if, on the other hand, managers seek to maximize the sum of their own pecuniary and non-pecuniary private benefits of control, and if their private interests diverge sharply enough from those of the shareholders, then, absent discipline of one kind or another, the discretion to spend corporate funds on pet political causes—and to do so secretly—may impose a net cost on shareholders.

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[19] The SEC has not taken up the call, but we have seen some disclosure of political expenditures in settlements in SEC Rule 14a-8 litigation (see Haan 2016). Verret (2013) makes the most straightforward argument against SEC-mandated disclosure.

In our world there are no perfectly faithful managers, and the private interests of managers and shareholders surely diverge—to a large degree in some cases and to at least a small degree in every case. The standard thrusts and parries of the agency-cost literature are thus in play. A rule of managerial discretion and secrecy will lead to some diversion of corporate funds. But that is hardly decisive, because the optimal size of agency costs is non-zero (Jensen & Meckling 1976).

The relevant question is instead whether shareholders—of a given firm or in general—can predictably be made better-off by curtailing managerial discretion. There is no *a priori* answer. There are only *a priori* guesses, and these are bound to track general intuitions about the tendency of corporate governance practices to converge on efficient norms. As I have said, the second-order law of intra-corporate authority is flexible enough to accommodate almost any conceivable approach. Yet practice has converged on a rule of unfettered managerial discretion. Those who think governance tends to allocate control efficiently will be skeptical of proposals to intervene with respect to political expenditures specifically. Those on the other hand who think governance norms tend to be sticky and that corporate managers are prone to take advantage of that fact will be less skeptical.

Answers are ultimately empirical, and some researchers have sought to quantify the relationship between corporate political expression and financial performance. Research designs in this area face significant limitations, however. Apart from incomplete data, the field is beset with endogeneity. Aggarwal, Meschke, and Wang (2012) is suggestive of the magnitude of endogeneity problems. They compare the performance of companies that give treasury funds to get-out-the-vote drives and single-issue advocacy campaigns—about 11 percent of their sample—to companies that do not. The "expressive" companies are found to underperform. The effect size is what is most striking. A donation of $10,000 is associated with a $1-million reduction in earnings. This means that the fact of political-expressive spending can account for no more than 1 percent of the measured effect. Put differently, the study's findings, if they can be generalized, imply that the correlation between corporate political spending and profitability is driven almost entirely—and maybe entirely full stop—by unobserved factors.

In any case, a number of papers have sought to tease out what relations can be found. One approach is to acknowledge endogeneity

and simply measure correlations. Cooper, Gulen, and Ovtchinnikov (2010), for example, study all publicly traded firms with political action committees from 1979–2004. They find a positive correlation between the number of candidates a company's PAC supports and the company's future abnormal returns. The effect is stronger for contributions to powerful and home-state politicians. The authors do not, however, seek to control for firm-specific characteristics that might determine profitability, incentives to contribute, or both.

Coates (2012) accounts for industrial variation in a study of the relationship between political activity, governance, and firm value (Tobin's Q) among firms in the S&P 500. He does not directly get at political-expressive capacities as such, but the political activity measure seems to be a reasonable proxy. He finds heterogeneity across industries. Almost all firms that compete in heavily-regulated industries or industries in which government is a major customer are also politically active. Although the data are not definitive, Coates (2012) surmises that shareholders in these industries benefit from political engagement, conditional at least on the political engagement of competitors. In other industries, however, political activity is positively correlated with standard measures of agency costs and negatively correlated with firm value. Chen, Parsley & Yang (2015), by contrast, find that lobbying expenditures are positively related to accounting and market measures of financial performance.

Event-study designs have also been used to estimate the perceived (dis)value to shareholders of managerial discretion. In particular, because the decision in *Citizens United* was arguably an exogenous shock to the extent of that discretion, some have sought to measure the decision's impact directly. Werner (2011), in a study of Fortune 500 companies, finds no statistically significant effect on stock prices attributable to salient events in the disposition of *Citizens United*. The non-effect holds for politically sensitive as well as insensitive firms. Stratmann and Verret (2015), by contrast, in a study of all public companies, find that the stock of more politically active firms experienced positive abnormal returns after the decision's announcement. Consistent with Coates (2012), they find also that the stock of firms in heavily regulated industries, where political influence is presumably most important, experienced the largest effects.

The findings are inconclusive, but it is hard to credit a view of the world in which the shock to corporate expressive capacities wrought

by *Citizens United* had a substantial effect on stock prices. The decision strengthened corporate speech rights, and so managerial discretion, only marginally (see Levitt 2010). This observation is most obviously consistent with Werner (2011). But if investors interpreted *Citizens United* not mostly as a decision about corporate expressive rights, but rather as a signal of the Justices' proclivities in future cases, then it may be consistent with Stratmann and Verret (2015), too. Either way, the first-order effects of the decision cannot plausibly have been large.

Further empirical study is unlikely to settle questions about the effect of political-expressive capacities on shareholders. The competing intuitions on the matter parallel the intuitions underlying a much older and still unresolved dilemma of authority in corporate law—namely, the authority to direct corporate funds to charitable ends. On one hand, corporate charity can benefit shareholders. Direct corporate giving can secure goodwill for an enterprise more efficiently than donations from individual shareholders can, and without conjuring a free-rider problem (Butler & McChesney 1999). In an agency-cost framework, the faithful manager gives until the value of the marginal dollar given (in pecuniary and non-pecuniary senses) is equal to the value of a dollar of retained earnings or dividends. On the other hand, the unfaithful manager can use her authority to direct corporate funds to causes with which she is personally sympathetic rather than to those most likely to elicit goodwill (Butler & McChesney 1999; Brudney & Ferrell 2002). Both the first- and second-order rules relating to corporate charity are similar to those governing political expression. And the same kind of empirical design problems continue to plague the literature on corporate charity. Most recently, in a sample of Fortune 500 companies, Masulis and Reza (2015) find evidence consistent with an agency-cost story, including that charitable giving increases as CEO stock ownership decreases; while in a sample of large international firms, Liang and Renneboog (2017) find that entrenched managers are no more likely to make charitable donations and that corporate charity is positively associated with measures of firm value and profitability.

What, then, are we to make of the status quo? There is nothing obviously special, from an agency-cost perspective, about *politics* as a site for quiet managerial discretion. The putative costs and benefits are plain to see, and the levers by which investors can constrain managerial discretion on a domain-specific basis are equally clear.

## V. CONCLUSION

The two streams of academic literature on corporate expression largely meander past one another. Those who criticize the law of political-expressive capacities on instrumental grounds, as the most sophisticated critics do, tend to argue as though corporations are profit maximizers. Their concern follows from a (usually implicit) model to that effect: in short, corporate political expression will tend to corrupt the political system because rent seeking predictably maximizes shareholder returns, and (implicitly) corporate activity pursues that aim. But those who criticize the status quo allocation of expressive authority within the firm argue quite explicitly that the black box profit-maximizing model is inadequate, that on the contrary managers spend corporate funds to advance political objectives they privately value rather than those calculated to benefit shareholders. Both visions can't be right, at least not on average.

Complicating welfare analysis further are two even more fundamental uncertainties—namely, whether shareholder interests are in conflict with the general welfare and, if so, the extent to which they are advanced by seeking to influence electoral results. A matrix of possibilities suggests at least four ways of thinking about what is at stake in attributing political-expressive capacities to business corporations (even assuming, contra Buccola (2016), that organizational forms are fixed). In large measure, these perspectives track longstanding divisions among students of corporate law and governance.

| | **Black Box Firm** | **Agency Cost Firm** |
|---|---|---|
| **Shareholders in Harmony with General Welfare** | Expressive rights allow proper weight to be assigned to shareholder interests [*Coasean Optimists*] | Expressive rights allow managers to advance idiosyncratic causes on shareholder dime [*Bebchuk & Jackson*] |
| **Shareholders in Conflict with General Welfare** | Expressive rights allow shareholder interests to corrupt political process [*Progressive Pessimists*] | Expressive rights allow managers to advance noble aims (correcting conflict) [*CSR Optimists*] |

There is no particular reason to think one story fits all firms. Variation across industries, capital structures, and personalities, among other things, means that the significance of political-expressive capacities is also apt to vary. But we understand variation only poorly. More

generally, we are not close to establishing empirical regularities with a degree of certainty that could budge observers from their priors. For now and for the foreseeable future, intuitions about the size of agency costs and the relation between shareholder and public interest are bound to influence views strongly.

One hopes nevertheless that a deeper understanding of the connection between the two perspectives on political-expressive capacities—the "external" and the "internal"—will help to clarify analysis. Each perspective standing alone lacks essential economic content, since a firm is an equilibrium defined jointly by (internal) governance and (external) constraint (cf. Buccola 2018). The welfare implications of a rule change on one margin depend not only on adjustments at that margin but on the other as well.

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