A New Discourse Theory of the Firm After *Citizens United*

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INTRODUCTION

Could a new "discourse theory" of the firm provide a better way than existing corporate law principles to understand the evolving nature of the firm and the role shareholders should play in corporate governance? Two recent developments provide a special urgency for considering the question. First, the Supreme Court's decision in *Citizens United v. FEC*,[1] which grants to corporations essentially the same political speech rights as individuals, will affect democracy at its core by allowing corporations to dominate the political agenda and public opinion. Second, the Securities and Exchange Commission's ("SEC") promulgation of Rule 14a-11, which grants shareholders the right to nominate directors using the corporation's own proxy, could effectively serve as a check on creeping corporate influence in all realms of society.[2] Those two developments combine to signal a potentially tec-

1 Citizens United v. FEC, 130 S. Ct. 876 (2010).

2 Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–87 (Sept. 16, 2010) (to be codified at 17 C.F.R. pt. 240).

tonic shift in the nature of the corporation and to beckon for a more descriptively accurate theory of the corporation capable of accommodating such a change.

In *Citizens United*, the Supreme Court attempted to clarify the incredibly murky waters of its corporate speech jurisprudence. The case related to Citizens United's dissemination of the documentary film *Hillary: The Movie*, which aimed to dissuade voters from voting for then-Senator Hillary Clinton in the 2008 presidential primaries.[3] Despite the availability of *Hillary* in theaters and on DVD, Citizens United sought to increase coverage by offering the movie to digital cable subscribers through the end of the 2008 Democratic Party primary elections.[4] Because section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "McCain-Feingold")[5] bans corporate expenditures for speech that expressly advocates the election or defeat of a candidate for office within thirty days of a primary or sixty days of a general election, Citizens United preemptively challenged the constitutionality of the BCRA.[6] In striking down section 203 of the BCRA, the Court ruled that corporations largely possess the same political speech rights as individuals and rejected prior precedent in which the Court expressed concern for the deleterious effects of excessive corporate influence over the electoral process.[7]

With respect to Rule 14a-11, because shareholders previously did not enjoy the right to nominate directors using the corporate proxy, the new rule represents a significant expansion of shareholder rights. Simply proposing to enhance the rights of shareholders in directing corporate affairs produced heated public debate. Proponents and detractors submitted hundreds of letters to the SEC, voicing concerns of all sorts.[8] Despite promises to implement Rule 14a-11 in late 2009, the SEC decided to delay a final vote on the new rule amidst the public controversy and requested additional commentary before revisiting adoption of the rule in 2010.[9] In July 2010, however, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection

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3 *Citizens United*, 130 S. Ct. at 887.

4 *Id.*

5 Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b (2006).

6 *Citizens United*, 130 S. Ct. at 887–88.

7 *Id.* at 912–13, 917.

8 *See* Katayun I. Jaffari & Justin B. Ettelson, *The SEC Takes Another Pass at Shareholder Access*, LEGAL INTELLIGENCER, Oct. 27, 2009, at 5.

9 Press Release, U.S. Sec. & Exch. Comm'n, SEC Re-Opens Public Comment Period for Shareholder Director Nomination Proposal (Dec. 14, 2009), *available at* http://www.sec.gov/news/press/2009/2009-265.htm.

Act ("Dodd Act"),[10] which authorizes, but does not require, the SEC to promulgate rules giving shareholders access to the corporate proxy for director nominations.[11] On August 25, 2010, the SEC promulgated the final Rule 14a-11 in a form very similar to the proposed rule.[12]

In light of the likely effect of *Citizens United* in increasing corporate dominance in society, this Article uses the question whether shareholders should enjoy enhanced rights to nominate directors as a springboard for advocating a new discourse theory of the firm. Borrowing in large part from the works of Jürgen Habermas, the Article suggests that with the growing influence of corporations in all aspects of economic, social, and political life, shareholders require a greater voice in the deliberative process that leads to the selection of directors. The basic aim of the theory is to demonstrate how rules of deliberation and decisionmaking can enhance the effectiveness of the organizational structures that affect our lives. According to the theory, effective deliberation about the goals and practices of any organization requires crafting rules and incentives that promote autonomous expression of ideas, fair and equal participation in the deliberative process, respectful consideration of expressed viewpoints, and the ability to alter previously accepted positions through continued discourse.

But why is a new discourse theory necessary to answer effectively questions about the nature of the firm and the expansion of shareholder rights? Quite simply, the corporation has evolved from a simple investment vehicle for generating wealth. Accordingly, the underlying theories governing corporate behavior should evolve as well. The decisions affecting some of the most important aspects of our individual and communal lives now get made inside the boardroom rather than in the public eye. And, in the wake of *Citizens United*, corporate actors may likely dominate the political agenda and public opinion on any matters that remain open for discussion in the

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

11 *See id.* § 971, 124 Stat. at 1915.

12 *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts New Measures to Facilitate Director Nominations by Shareholders (Aug. 25, 2010), *available at* http://www.sec.gov/news/press/2010/2010-155.htm. Just prior to publication of this Article, however, the SEC stayed enforcement of Rule 14a-11 pending the resolution of a suit filed by the Business Roundtable and U.S. Chamber of Commerce. *See* Facilitating Shareholder Director Nominations, Securities Act Release No. 9149, Exchange Act Release No. 63,031, Investment Company Act Release No. 29,456, 75 Fed. Reg. 65,641 (Oct. 20, 2010). The petition for review suggests the new rule violates corporations' First Amendment rights, among other claims. *See* Petition for Review, Bus. Roundtable v. SEC, No. 10-1305 (D.C. Cir. Sept. 29, 2010), 2010 WL 3770710.

public realm. In some real sense, the ability to direct corporate decisions represents the ability to control political life. As a result, the mechanisms for legitimate corporate decisionmaking should become a paramount concern.

At least in American society, the legitimacy of governmental choices relies on democratic processes to garner the assent of the governed. Though obviously not traditional polities, corporations now make decisions on a host of matters previously relegated to government or other public institutions, and they do so arguably on behalf of shareholders. Despite increasing shareholder calls for a greater voice in corporate policymaking, shareholders possess a largely passive role under current law. But to the extent corporations increasingly encroach into territory once solely occupied by government, and to the extent corporations increasingly dominate the political sphere itself, a new blend of political and business theory seems necessary to ensure the basic legitimacy of decisionmaking within the corporate setting. Existing corporate law standards that largely ignore shareholder input seem far out of touch with the expansive role modern corporations play in society and thus seem ill-suited to ensure a sense of legitimacy in corporate decisionmaking. In contrast, a new discourse theory of the firm represents such a blend that could enhance the integrity and legitimacy of corporate decisionmaking while taking into account the evolving role of the modern corporation.

In essence, the business of corporations is no longer simply business. For instance, corporations are increasingly attentive to consumer and investor preferences regarding corporate social responsibility ("CSR").[13] That attention suggests to some that shareholders already possess sufficient influence over corporate practices and policies. But the move into the realm of CSR by corporations—whether to enhance profits or to embrace a genuine stakeholder sensibility—represents a significant shift in the evolution of the corporation itself. The very fact that corporations engage on the battlefield for satisfying consumer and shareholder preferences regarding CSR signals that corporations now make social and political concerns part of their basic business plans. And with the recent Supreme Court decision in *Citizens United*, the reach of corporate influence will cascade into more and more aspects of society.

As corporations expand their reach into new social and political spheres, shareholders have campaigned more vigorously to expand

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13 *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 625–26 (2006).

their influence over corporate decisions.[14] Calls for enhanced shareholder engagement should resonate more strongly following the Supreme Court's decision in *Citizens United*. A strong case already exists for democratizing corporate governance to the extent corporations increasingly dominate various aspects of economic, social, and political life. As decisions traditionally left to government and standard political processes now get made—or controlled—by corporations, giving shareholders some of the traditional rights of citizens within a polity does not seem all that radical. In many respects, the corporation has become the new public forum in which political decisions get made. Following the decision in *Citizens United*, however, the floodgates of corporate influence will open almost completely. If that tide of corporate influence renders traditional political processes incapable of attending adequately to the public interest, then internal corporate governance structures might require revisiting to ensure some mechanism for giving some form of public voice adequate attention.

What plagues the current debate regarding the proper role shareholders should play in governing the corporation, however, resembles a problem of two ships passing in the night. Proponents and opponents alike focus on the role of shareholders in determining the corporate project, the scope of interests that need consideration when making business decisions, the effect of discourse on effective management, and the legitimacy of management decisions in light of the nature of the corporation. But what seems a potential drawback to one camp represents an advantage to the other side. This incongruity results not just from different preferences about outcomes, but also from the lack of a consistent framework for analyzing the issues at stake. The project here is to provide such a framework. The analysis does not intend to posit a radically new way of looking at the corporation, although the framework may indeed seem radical to some. Instead, the project intends to provide an analytical construct that sensibly attends to the concerns raised by the variety of perspectives in the debate.

So how would embracing a new discourse theory of the firm help resolve the debate about whether shareholders should gain the right to nominate directors using the corporate proxy? Within a discourse theory of the firm, assessing the legitimacy of organizational rules or corporate actions depends on an examination of the deliberative pro-

14 *See* Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 55 (2008).

cess that gave rise to the rules or practices at stake. According to the theory, effective deliberation about the goals and practices of any organization requires crafting rules and incentives to promote autonomous expression of ideas, fair and equal participation in the deliberative process, respectful consideration of expressed viewpoints, and the ability to alter previously accepted positions through continued discourse. With respect to the specific question whether shareholders should gain access to the corporate proxy for nominating directors, discourse theory would require determining if enhanced shareholder voting rights would promote a more robust deliberative process for corporate decisionmaking. For it is only embracing a sufficiently robust deliberative process that secures legitimacy for corporate decisions and practices.

Adopting a new discourse theory of the firm would provide a more comprehensive and descriptively accurate account of the relationship between corporate managers and shareholders. In contrast to current corporate theories, a discourse theory would provide a normatively superior framework for guiding the evolution of shareholder and corporate actors going forward. Not only does a new discourse theory of the firm accurately attend to the evolving nature of the corporation, but it provides rather clear guidance on whether the SEC should have promoted enhanced shareholder suffrage through director-nomination rights under Rule 14a-11. Within a new discourse theory of the firm, providing shareholders the right to nominate directors represents a clear first step in enhancing a continual engagement between corporate managers and the shareholders they serve. In the end, by embracing the right of shareholders to nominate directors, discourse theory would promote an efficient level of shareholder engagement with the firm.

But why would discourse theory as applied to shareholder nomination rights necessarily promote efficiency? An efficient rule regarding shareholder nomination of directors would reflect what corporate managers, shareholders, consumers, and other stakeholders would hypothetically negotiate in a world of perfect information and without the burdens of any transaction costs in bargaining. The precise outcome of that hypothetical negotiation would necessarily change as the preferences of any parties evolve. A rigid set of standards, however, cannot attend to changing preferences. To the extent preferences regarding shareholder nomination rights change over time, steadfast reliance on static standards would undermine efficiency despite providing predictability. In contrast to the current regulatory regime,

which largely silences shareholder views, a discourse-theory framework continually engages shareholder interests as they evolve and better enables corporate managers to align corporate practices with market preferences.

In the end, using discourse theory to reconsider the basic rights and responsibilities of shareholders and corporate managers does not really intend to produce something remarkably new. Instead, the analytical tool simply helps makes sense of an evolution of a relationship well underway. To that end, discourse theory at bottom provides descriptive accuracy that adherence to a static, and largely outmoded, notion of the corporation cannot provide. And if a discourse analytical framework more accurately attends to the dynamic relationship between shareholders and the corporation, the approach should also provide some helpful normative guidance on the question whether shareholders should possess the right to nominate directors using the corporate proxy.

The Article details the increasing dominance of corporations in all aspects of economic, political, and social life as spurred along by the increasing role of CSR, shareholder activism, and the corporate political speech rights conferred by *Citizens United*. To accomplish the project, Part I describes the evolving nature of the corporation and shareholders in the wake of *Citizens United*. Part II discusses the basic tenets of discourse theory and explains how those principles might apply within a new discourse theory of the firm. Part III then examines how a new discourse theory of the firm would answer the question whether shareholders should gain the right to nominate directors using the corporate proxy. In particular, Part III suggests that, within a new discourse theory of the firm, giving shareholders the right to nominate directors using the corporate proxy would not only produce better corporate governance, but also an efficient rule regarding shareholder voting. The Article concludes that, to the extent enhanced discourse promotes efficiency as well as better governance both inside and outside the corporation, a new discourse theory of the firm seems better suited than existing corporate law theories to answer difficult questions regarding the rights and responsibilities of corporations and the evolving constituencies they serve.

A final note regarding the limits of this project remains essential. The goal here is simply to *introduce* a new discourse theory of the firm in the wake of *Citizens United* by using the question of shareholder access to the corporate proxy as a springboard for analysis. Fully articulating a comprehensive discourse theory of the firm lies far outside

the intended scope of this Article. Although that task lies ahead, it remains for another day. At present, valuable insights can still come from identifying the need for a new discourse theory of corporate organization and examining how application of even the most basic tenets of discourse theory would help solve pressing corporate law problems.

I. CORPORATIONS AND SHAREHOLDERS IN THE WAKE OF *CITIZENS UNITED*

The increasing influence of the modern corporation and the growing desire of shareholders to influence corporate practices provide a special impetus for embracing a new discourse theory of the firm. As corporations gain political power and encroach more deeply into territory once solely occupied by government, the private boardroom rather than the public forum represents the relevant battlefield for determining the most important aspects of our lives. Despite increasing shareholder demands for greater participation in shaping corporate policy, shareholders possess a largely passive role under current law. As the nature of the firm evolves from a simple investment vehicle to an increasingly dominant force in society, the rules governing that institutional construct should arguably evolve as well. Recognizing how the modern corporation plays an increasingly important role in all aspects of economic, social, and political life represents the essential starting point for embracing a new discourse theory of the firm.

A. The Rising Tide of Corporate Influence

Even as far back as the 1930s, Adolf Berle and Gardiner Means famously predicted in *The Modern Corporation and Private Property*[15] that the corporation would evolve to become the dominant form of social organization, competing on equal terms with government.[16]

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15 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); *see also* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 738 (2001) (describing *The Modern Corporation and Private Property* as one of the most cited and important corporate works); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1685 (1988) (describing how *Time* magazine labeled the book "the economic Bible of the Roosevelt administration"). *But see* Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 209 (2005) (suggesting that some noted economists around the time of publication largely ignored the work); *see also* Hovenkamp, *supra*, at 1684 (explaining that Ronald Coase, future Nobel laureate, "never cited Berle's and Means' work and virtually ignored the 'legal' literature on the structure of the business firm").

16 BERLE & MEANS, *supra* note 15, at 357; *see also* Tsuk, *supra* note 15, at 179–80.

The basic separation of ownership and control inherent in the corporate form enabled corporations to secure widespread public investment.[17] As corporations amassed enormous capital and increased in size, the political influence of corporations grew, as well.[18] But beyond playing a central role in political life, corporations have developed complex internal bureaucratic structures that significantly affect—and in many ways substantially control—the daily lives of employees, customers, creditors, and members of the communities the corporations inhabit.[19] Some suggest those corporate bureaucracies rival the power and influence of governmental structures,[20] with large multinational corporations resembling mini nation-states that conduct their own economic, social, and even foreign policies.[21] Although demonstrating the growing societal influence of corporations does not present a terribly difficult task, explicating the spheres in which corporations increasingly dominate provides a necessary foundation for considering a new theory of the firm going forward.

1. Economic

From a purely economic perspective, the commanding power of corporations remains undeniable. In the United States, total market capitalization[22] of public companies exceeded $14 trillion in 2007.[23]

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17 *See* Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 241, 248 (2008); *see also* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

18 *See* Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2354–55, 2361–64 (2007); *see also* Arthur S. Miller, *Corporations and Our Two Constitutions*, *in* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 241, 242 (Warren J. Samuels & Arthur S. Miller eds., 1987) (stating that corporations' "power and influence, both externally in the national political order and internally in the so-called corporate community, make them a true form of governance").

19 *See* Tsuk, *supra* note 15, at 179–80 ("The rapid economic, social, and technological changes of the 20th century have led to the emergence of large corporate bureaucracies. As national governments amass political power, multinational corporations dominate the global economy, over which . . . centralized national governments have less and less control." (internal quotation marks omitted)).

20 *Id.* at 192 ("Corporate structure resembled government structure. Corporate financial capacities resembled sovereign economic powers. Like government authorities, corporate managers exercised power by means of a rationalized system of control and administration. Like the sovereign state, large corporations formulated laws and policies affecting individuals and groups. Like states, corporations were social, economic, and political entities.").

21 Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549, 560–62 (2002) (suggesting that corporations effectively represent nation-states that conduct their own economic, political, and foreign initiatives); *see also* Tsuk, *supra* note 15, at 192.

22 Market capitalization represents the number of outstanding shares of public company stock multiplied by the current price per share. *See* A CONCISE DICTIONARY OF BUSINESS 231 (1990).

On an international scale, multinational corporations have grown even more swiftly,[24] with market capitalization of public companies worldwide exceeding $50 trillion.[25] Some multinational corporations (including many U.S. corporations) even contribute significantly to offset losses in state aid to countries where the corporations operate.[26] In comparison to the economic power of independent countries, fifty-one U.S. corporations rank among the hundred largest global economies, with sovereign nation-states occupying the remaining forty-nine positions.[27] The comparison between states and corporations should not seem terribly odd considering many firms resemble sovereign nations by employing significant rulemaking, adjudicative, and even security functions.[28] Without doubt, as corporations develop globally, the economic power of corporations expands correspondingly.[29]

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23 *See Wilshire 500 Total Market Index*, WILSHIRE ASSOCS., http://www.wilshire.com/Indexes/Broad/Wilshire5000/ (follow "5-Yr Graph" hyperlink) (last visited Aug. 17, 2010).

24 *See, e.g.*, Denis G. Arnold, *Libertarian Theories of the Corporation and Global Capitalism*, 48 J. BUS. ETHICS 155, 155 (2003) ("Multinational corporations (MNCs) are extraordinary [sic] powerful actors on the global stage, and their influence in [sic] increasing. . . . Between 1985 and 1990, FDI [foreign direct investment] increased at an annual rate of 30%; and between 1992 and the late 1990s annual flows of FDI nearly doubled to $350 billion. This increase in FDI is one indicator of the steadily growing economic and political influence of MNCs . . . ." (citing ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY 169 (2000))).

25 *See Global Stock Values Top $50 Trln: Industry Data*, REUTERS, Mar. 21, 2007, *available at* http://www.reuters.com/article/idUSL2144839620070321.

26 *See* Margarita Tsoutsoura, Corporate Social Responsibility and Financial Performance 4 (Mar. 2004) (unpublished working paper), *available at* http://www.escholarship.org/uc/item/111799p2 (discussing the debate about whether corporations should attempt to solve issues traditionally addressed by governments, such as human rights and community investing). For a competing viewpoint that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it . . . engages in open and free competition, without deception or fraud," see MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2002).

27 Tsoutsoura, *supra* note 26, at 5; *see also* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 57 (2002) (stating that only seven countries had revenues greater than General Motors in 2000 and that fifteen corporations ranked among the largest independent economies in the world).

28 *See* Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 132 (2008) ("[T]he distinction between corporations and the state is blurring, not only internationally, but also domestically, as corporations act in ways that make them similar to nation-states. The nation-state is not dead, but it is evolving. A pivotal factor in this evolution is the power of the world's largest corporations. Like the vassal whose power overshadows the king's, these companies act similarly to traditional nation-states in some ways. They have tremendous economic power, establish security forces, engage in diplomatic, adjudicatory and 'legislative' activities, and influence monetary policy."); *see also* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1308–09 (2003) (discussing how multinational corporations have increasingly encroached on the authority of states).

29 As an example of the massive amount of assets amassed by corporations, the *World*

2. *Social*

Beyond economic might, corporations play a crucial role in developing social norms, even if only to enhance corporate profits. Engaging the CSR movement represents one increasingly important way for corporations to influence social mores. Corporations arguably engage in socially responsible practices simply to satisfy investor and consumer preferences.[30] To the extent consumers and investors reward companies that follow certain environmental, social, or ethical practices (e.g., a willingness to pay a premium for compliant companies' stock or products), corporations possess a real economic incentive to comply.[31] The dialogue between consumers, investors, and businesses regarding noneconomic practices does not really represent a new practice. To the contrary, attempts to encourage CSR have roots many centuries old.[32] The modern socially responsible investing ("SRI") movement, however, arose in the aftermath of the social and political foment of the 1960s.[33] Since that time, and with increasing frequency, consumers and investors have screened corporate activities for positive compliance with desired practices, such as engaging in fair trade policies with suppliers, or for avoidance of disfavored activities, such as deforestation.[34] According to one recent consumer survey,

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Investment Report in 1998 estimated that 53,000 multinational corporations and 450,000 global affiliates had total assets in excess of $13 trillion, in U.S. currency. UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 1998: TRENDS AND DETERMINANTS, at xvii (1998), *available at* http://www.unctad.org/en/docs/wir1998_en.pdf. Additionally, in 2007, an estimated 79,000 multinational corporations generated $31 trillion in sales. UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2008: TRANSNATIONAL CORPORATIONS AND THE INFRASTRUCTURE CHALLENGE, at xvi (2008), *available at* http://www.unctad.org/en/docs/wir2008_en.pdf; *see also* Theodore J. Lowi, *Our Millennium: Political Science Confronts the Global Corporate Economy*, 22 INT'L POL. SCI. REV. 131, 133 (2001) ("Annual turnover in global capital exchanges rose from an estimated $188 billion in 1986 to $1.2 trillion in 1995, and is still rising. Cross-border capital transactions in the G7 countries rose tenfold in that period . . . ." (citations omitted)).

30 *See* Siebecker, *supra* note 13, at 623–24.

31 For a full discussion of the rise of socially responsible investing and shareholder advocacy, along with a description of corporate responses to those activities, see *id.* at 623–26.

32 SOC. INV. FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 3 (2006), *available at* http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf.

33 *Id.* at 3–4.

34 *See id.* at 2–3; *see also* Tom J. Brown & Peter A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, 61 J. MARKETING 68, 68–69 (1997) (positing that CSR associations influence the way consumers evaluate a company's products); Sankar Sen & C.B. Bhattacharya, *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, 38 J. MARKET RES. 225, 238–39 (2001) (discussing how a corporation's CSR initiatives affect consumer behavior); *Brand New Day*, ECONOMIST, June 19, 1993, at 70, 71 (describing the upcoming "era of corporate image, in which consumers

more than two-thirds of American consumers report "knowing that a company meets global standards for being socially responsible would be either extremely or very influential if they wanted to buy a particular product or service from that company."[35]

As a result of increased consumer and investor demand for socially responsible business practices, corporations willingly engage constituencies to gain access to cheaper capital and greater profits. A 2008 survey of international business leaders conducted by IBM indicates that 68% of those surveyed focus on CSR activities to generate new revenue and that 54% believe current CSR activities give their company an advantage over competitors.[36] To the extent corporations accurately report those benefits, real incentives exist for corporations to embrace socially responsible business practices. As SRI continues to flourish, corporations respond in kind to public concerns about socially responsible business practices. In 2008, 86% of companies in the S&P 100 Index included information about social and environmental business practices on their websites.[37] Moreover, 49% of those same companies issued special "[CSR] reports" upon which investors and consumers in the SRI community rely.[38] Because companies may face market backlash when negative reports surface regarding unsavory social, labor, or environmental practices,[39] many corporations now work together with SRI funds and shareholder advocacy groups

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will increasingly make purchases on the basis of a firm's whole role in society: how it treats employees, shareholders and local neighbourhoods").

35 FLEISHMAN-HILLARD & NAT'L CONSUMERS LEAGUE, RETHINKING CORPORATE SOCIAL RESPONSIBILITY: EXECUTIVE SUMMARY 8 (2007), *available at* http://www.efbayarea.org/documents/resources/general-resources/CSR-Executive-Summary-07.pdf.

36 GEORGE POHLE & JEFF HITTNER, IBM GLOBAL BUS. SERVS., ATTAINING SUSTAINABLE GROWTH THROUGH CORPORATE SOCIAL RESPONSIBILITY 3 (2008), *available at* http://www-935.ibm.com/services/us/gbs/bus/pdf/gbe03019-usen-02.pdf.

37 Press Release, Soc. Inv. Forum, Sustainability Reporting by S&P 100 Companies Made Major Advances from 2005–2007 (July 17, 2008), *available at* http://www.socialinvest.org/news/releases/pressrelease.cfm?id=112.

38 *Id.*; *see also* Michelle Bernhart & Alyson Slater, *How Sustainable Is Your Business?*, COMM. WORLD, Nov.–Dec. 2007, at 18, 18.

39 For example, Domini Investments, a bellwether SRI fund, dropped Wal-Mart from its socially responsible index fund, the Domini 400, based on reports about poor labor and human rights conditions involving its overseas suppliers. *See* Ellen Braunstein, *From Sweatshops to Shopping Malls*, RETAIL TRAFFIC (Sept. 1, 2001, 12:00 PM), http://retailtrafficmag.com/mag/retail_hot_topic_sweatshops/ (explaining that Domini based its decision on a "report from the National Labor Committee that Wal-Mart goods were made by nearly enslaved workers under armed guard in Honduras and China" and that "Wal-Mart's 'Kathie Lee' goods were made by 13-year-olds in Honduras, forced to work 13 hours a day, the report states").

to build into their business plans specific policies responsive to the SRI community.[40]

Regardless whether corporations actually embrace a cooperative posture in striving to achieve the goals of the SRI community, it seems all too clear that corporations increasingly heed the market's demand for disclosures regarding business practices and operations relevant to SRI.[41] As a recent PriceWaterhouseCoopers study indicated, many large U.S. companies consider their stances on labor, environmental, and social practices to be "the next competitive battlefield."[42] Engaging on the battlefield requires corporations to speak on a variety of social, political, ethical, and environmental matters. The drive to speak about CSR practices in order to capture a competitive advantage in the marketplace has sparked massive media campaigns. Multinational corporations like BP, General Electric, and Wal-Mart—to name only a few—have invested huge sums to communicate an image of CSR to consumers and investors.[43] The allure of CSR, then, results in greater public calls for corporate disclosures and a concomitant drive by corporations to project an image of social responsibility that secures the greatest market advantage.

As corporations more deeply embed themselves in the communities they inhabit or affect, the conception of a corporation as a purely economic actor seems misplaced. This deep social engagement based on economic might renders corporations "increasingly powerful social mechanisms for community-level change."[44] With the identity of the corporation organically shifting to accommodate its enhanced role in shaping markets and communities, "[c]orporate internal governance issues, once considered strictly economic and confined to internal cor-

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40 *See* Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 528–29 (2005); Matthew Hirschland, *Whose Responsibility? CSR, Business and Public Policy: Why Going It Alone Is Not an Option*, LEADING PERSP., Winter 2006, at 1, 1, *available at* http://www.bsr.org/reports/leading-perspectives/2006/2006_Winter.pdf; *see also* POHLE & HITTNER, *supra* note 36, at 3; Stacey Smith, *Navigating the Stakeholder Relations Continuum*, LEADING PERSP., Fall 2004, at 6, 6, *available at* http://www.bsr.org/reports/leading-perspectives/2004/Fall.pdf.

41 For a discussion of the link between social investment and corporate accountability, see Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1293–96 (1999).

42 Clinton Wilder, *The Next Competitive Battlefield: The Sustainability Movement's 'Triple Bottom Line' Requires IT Execs to Deliver Better Data*, OPTIMIZE, Aug. 2002, at 76, 76.

43 Moira Herbst, *Energy Efficiency: A Passing Fad?*, BLOOMBERG BUSINESSWEEK (Mar. 11, 2008, 12:01 AM), http://www.businessweek.com/bwdaily/dnflash/content/mar2008/db20080310_387188.htm.

44 Trevor Goddard, *Corporate Citizenship: Creating Social Capacity in Developing Countries*, 15 DEV. PRAC. 433, 433 (2005).

porate stakeholders, have been broadened to include social and political issues and the concerns of outside stakeholders beyond the regulatory authority of the chartering state."[45] Noting the increasing attention corporations pay to societal concerns does not serve as a rebuke to the basic premise that corporations exist to make profits for shareholders.[46] But striving for financial gain causes corporations to take a more active role in securing a commercially friendly social framework that makes profits more likely.[47] In that sense, modern corporations possess a mutually reinforcing profit motive and social focus.[48]

The societal development at stake concerns not just the aggregate effects of economic growth on community wealth, but also the social mores developed through corporate culture. Despite common criticisms of unbridled corporate globalization,[49] some suggest that "[b]uilding and sustaining a corporation within a community requires mutual trust and a shared sense of purpose. The degree of community social interaction makes it easier to cooperate for a common good, or to meet individual ends through combined means."[50] Moreover, the bureaucratic structures within the corporate setting affect individual values.[51] As a result,

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45 Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801, 1807 (2008).

46 *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 280 (1992).

47 *See* POHLE & HITTNER, *supra* note 36, at 1 ("A growing body of evidence asserts that corporations can do well by doing good. Well-known companies have already proven that they can differentiate their brands and reputations, as well as their products and services, if they take responsibility for the well-being of the societies and environments in which they operate. These companies are practicing [CSR] in a manner that generates significant returns to their businesses."); *see also* Allen, *supra* note 46, at 280 ("Thus while these entities [corporations] are surely economic and financial instruments, they are, as well, institutions of social and political significance. The story of the contending conceptions of the corporation reflects that fact. Indeed, it may not be an exaggeration to imagine that this story resonates with an elemental tension that our society has endured since the days of the industrial revolution."); Lawrence E. Mitchell, *Preface* to PROGRESSIVE CORPORATE LAW, at xiii (Lawrence E. Mitchell ed., 1995) ("[N]o institution other than the state so dominates our public discourse and our private lives.").

48 *See* POHLE & HITTNER, *supra* note 36, at 1.

49 *See, e.g.*, Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-First Century*, 122 HARV. L. REV. 907 (2009) (book review).

50 Goddard, *supra* note 44, at 435 (noting that a corporation's interaction with the community "is especially important in income-poor environments").

51 *See* Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 COLUM. J.L. & SOC. PROBS. 347, 361–62 (2007) (describing how workplace hierarchies influence individual understandings of the existing social and political order).

> [w]hen the workplace also functions as a cultural or social force, or when a corporation exerts measurable social power, the implications of workplace hierarchy and exclusion can take on greater meaning. Because law and culture are reciprocally constituting and mutually supporting, a corporation's social power may be strong enough to influence mainstream political and social thinking.[52]

Though perhaps driven by desire for profit, corporations can enhance their bottom line by promoting social cohesion and communal trust.[53]

3. Political

Beyond the economic and social impact of corporations on society, corporations exert enormous influence in the political realm.[54] On a basic level, corporations influence the political agenda by shaping public preferences. As previously noted, the internal practices and culture within a corporation can affect the attitudes and preferences of those who work within the firm or who interact with the corporation.[55] Although perhaps amorphous, those values can certainly animate political choices.[56] From an external perspective, corporate

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52 *Id.* at 362 (internal quotation marks and footnotes omitted).

53 Goddard, *supra* note 44, at 435 ("Relations between corporations and communities may enhance competitive advantage, as corporations recognise that community participation in their core business is not only empowering but that trust grows with greater accountability. Such partnerships result in deeper relationships and develop social capital that is 'invested' in the community and can be drawn upon in the future." (citation omitted)); *id.* at 436 ("Corporations that can learn from long-term projects stand to gain the most from being seriously committed to enhancing a community's social capital."); *see also* Tsoutsoura, *supra* note 26, at 6 (noting that, not only do corporations stand to profit financially, but also that "socially responsible companies have enhanced brand image and reputation" and have "less risk of negative social events which damage their reputation and cost millions of dollars in information and advertising campaigns").

54 For a discussion of corporate speech rights, see generally Siebecker, *supra* note 13; Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247 (2008). For a discussion of the power of corporations in influencing political discourse and outcomes, see generally SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT (1996); CHARLES DERBER, CORPORATION NATION: HOW CORPORATIONS ARE TAKING OVER OUR LIVES AND WHAT WE CAN DO ABOUT IT (1998); ROBERT L. KERR, THE CORPORATE FREE SPEECH MOVEMENT: COGNITIVE FEUDALISM AND THE ENDANGERED MARKETPLACE OF IDEAS (2008); TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY (2003); Kuhner, *supra* note 18; Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 393; David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process*, 61 BROOK. L. REV. 1347 (1995).

55 *See supra* notes 51–52 and accompanying text.

56 Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 808–13 (2007).

advertising aims directly at creating and controlling public preferences.[57] Conversely, refusing to advertise on particular programs or networks that take positions contrary to corporate preferences can have an equal impact on public perceptions.[58] Although advertising choices may not seem overtly political, consumer preferences often tie neatly into political causes, especially when related to economic concerns.[59]

In a less subtle fashion, corporations often fund advocacy groups, trade organizations, or think tanks that work to curry public support using a variety of techniques, from direct-mail campaigns to expert commentary on popular television programs.[60] Perhaps most significant, many corporations directly own "newspapers, magazines, radio stations, and television networks through which they may exert varying degrees of influence."[61] Some even suggest that just five large corporations—Time Warner, Disney, Bertlesmann, News Corporation, and Viacom—effectively control the mass media industry by owning a vast number of important television stations, radio stations, movie studios, Internet providers, newspapers, magazines, and publishing houses.[62]

On a more strategic level, corporations exert political power through lobbying, direct advocacy, political advertising, and financial contributions to particular candidates or causes.[63] Moreover, in light of the enormous economic might and scale of multinational corporations, some argue that the largest corporations conduct independent foreign policy to protect corporate assets and secure markets.[64] Be-

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57 Arnold, *supra* note 24, at 168.

58 *Id.*

59 *See id.*

60 *Id.*

61 *Id.*; *see also* NEIL J. MITCHELL, THE CONSPICUOUS CORPORATION: BUSINESS, PUBLIC POLICY, AND REPRESENTATIVE DEMOCRACY 53 (1997) (stating that all major television networks "are linked, through ownership, to other business interests: General Electric and NBC, Walt Disney and Capital Cities/ABC Inc, and CBS and Westinghouse").

62 BEN H. BAGDIKIAN, THE NEW MEDIA MONOPOLY 3 (2004).

63 *See* Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 AM. POL. SCI. REV. 891 (2000) (examining a range of corporate political activities); *see also* Arnold, *supra* note 24, at 167.

64 Orts, *supra* note 21, at 561–62 ("[T]he nature of modern war highlights the fact that business corporations are not only abstract economic entities but social institutions. As organized institutions composed of human beings, they have moral and political as well as economic responsibilities. Like states, business corporations must therefore develop their own foreign and domestic policies, either implicitly and unconsciously or, much better, explicitly and with awareness. This does not mean that large, global corporations should appoint new vice presidents of

cause corporations possess massive wealth disproportionate to individuals, public discourse and the political agenda seem vulnerable to domination by corporations.[65] Whether appearing at congressional hearings or contributing to political action committees ("PACs"), corporations play a large role in setting political agendas that promote industry interests.[66] Despite the evolving nature and purpose of the corporation as more socially situated than purely profit maximizing,[67] many corporations simply seek to utilize the political process to enhance profitability.[68] Regardless of the motives for political participa-

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war or defense, but it does require corporate leaders to take the larger global issues of war and peace seriously from a moral as well as an economic perspective. In a 'postnational' world, business corporations can no longer simply rely on nation-states to take care of problems of international security, if, indeed, they ever could delegate this responsibility entirely.").

65 Long before the decision in *Citizens United*, the Supreme Court noted its longstanding concern about the potentially dangerous role corporations play in the political process. *See* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("We have described that rationale in recent opinions as the need to restrict 'the influence of political war chests funneled through the corporate form,' to 'eliminate the effect of aggregated wealth on federal elections,' to curb the political influence of 'those who exercise control over large aggregations of capital,' and to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.' This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that 'the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .' Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." (citations and footnote omitted)). Of course, in *Citizens United*, the Supreme Court overruled *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), rejecting the logic that corporate wealth distorts the political process. *See infra* notes 155–65 and accompanying text.

66 *See* Henry E. Brady et al., Political Activity by American Corporations 6–7 (Apr. 8, 2007) (unpublished manuscript), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/1/9/6/3/8/pages196387/p196387-1.php ("Appearances at Congressional hearings are typically focused on business-wide or industry-wide concerns—it would typically be unseemly at most hearings to make a pitch for the narrow interests of the corporation alone. PAC contributions are presumably primarily about affecting public policy towards business in general or the industry, but they may also have a particularized component as members of Congress representing one's offices or plants are supported. Although lobbyists and government relations offices concern themselves with general policies, they may be also somewhat more focused on particular concerns such as getting government contracts or solving particular regulatory problems.").

67 *See, e.g.*, Ian B. Lee, *Citizenship and the Corporation*, 34 LAW & SOC. INQUIRY 129 (2009) (articulating a new citizenship framework for the corporation).

68 Brady et al., *supra* note 66, at 17 ("Any theory of corporate political activity must begin with a basic question: *What do corporations want*? At the most fundamental level, we follow the basic theory of the firm and assume that all firms want to maximize their revenues and minimize their costs. In many cases, firms are perfectly capable of achieving these goals in the marketplace, without any assistance or intervention from government. In such cases, firms would have no incentive to mobilize politically. But firms frequently do turn to government for assistance

tion, corporations clearly occupy a central role in the political process. The centrality of that role will surely increase in the wake of *Citizens United*, with corporations enjoying largely unbridled influence in the political realm.[69]

B. The Changing Currents of Shareholder Engagement

Understanding the changing role of shareholders within the modern corporation is the next essential step in recognizing a need for a new discourse theory of the corporation. As the size, influence, and import of modern corporations steadily grew over the last century, the role shareholders played within the corporation evolved as well. Once almost entirely passive, shareholders now clamor to influence corporate practices. Despite extant law that limits shareholder interference with management's ability to steer the corporation, shareholders display an increasing desire to engage management on a variety of social, ethical, environmental, and corporate governance issues. What used to be a realm largely relegated to private contractual ordering[70] now represents a public forum of sorts. Of course, corporations do not represent polities. Given the special profit-making nature of the corporation, parroting all the principles governing political life in the corporate world would seem neither attainable nor necessarily desirable.[71] But in light of the increasingly deep reach by corporations into all aspects of economic, social, and political life, the old justifications for severely limiting shareholder involvement become rather strained.[72]

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both with maximizing revenues and minimizing costs. In many cases, firms are directly responding to particular government actions such as new regulations that they believe impact on their revenues and costs."); *see also* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235 (1998) ("[W]hatever the government does will inescapably have an immeasurable impact on the health and welfare of the private corporate world and vice versa.").

69 *See infra* Part I.C.

70 *See* Coase, *supra* note 17, at 390–91.

71 *See* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 634–35 (1997) ("The question of corporations' social responsibilities has been debated throughout this century. Yet the centralized administration of corporate affairs has hindered a more democratic approach to the issue, particularly one that would take account of the views of corporate shareholders—the parties who fund such expenditures. While a perfectly democratic system is unattainable in light of the collective-action problems affecting the shareholder franchise in the public corporation, the lack of an *ideal* system of shareholder participation has too readily functioned as a justification for maintaining the status quo.").

72 *See id.*

What follows represents some brief highlights regarding the evolution of shareholder status in the modern corporation; it does not attempt to present a full accounting of the rich history of shareholder rights over the last century.[73] Still, even a brief summary of some important historical developments in shareholder status provides sufficient evidence that shareholder rights necessarily evolve as the corporation adapts to changing circumstances. Gaining a better sense of the evolving role of shareholders, then, provides a necessary foundation for understanding why a robust dialogue between shareholders and those who govern the corporation on their behalf seems essential to maintaining the basic legitimacy of corporate decisionmaking.

1. Early Shareholder Passivity

Shareholders played an extremely passive role at the early stages of the modern American corporation. Around the time Berle and Means published *The Modern Corporation and Private Property* in 1932,[74] the United States experienced great economic and political volatility associated with rapid industrialization.[75] With the expansion of industry, entrepreneurs and investors looked to business forms that offered a balance of limited liability with the opportunity to secure capital investment.[76] The corporate form, which afforded limited liability and free transferability of shares, became highly popular.[77] At that time, a relatively small number of corporations secured a large percentage of available capital, and stock ownership remained concentrated among founding shareholders.[78]

As the size and number of corporations rapidly grew to tremendous proportions, the number of shareholders vastly increased.[79] With the inability of founding shareholders to maintain controlling inter-

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73 For a fuller description of the history of shareholder rights, see generally Williams & Conley, *supra* note 40.

74 BERLE & MEANS, *supra* note 15.

75 Tsuk, *supra* note 15, at 179.

76 *See* Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 252 (2008).

77 *See id.*; *see also* Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 534–35 (2007) (relating former Columbia University President Nicholas Murray Butler's remarks: "In my judgment the limited liability corporation is the greatest single discovery of modern times . . . even the steam engine and electricity are far less important than the limited liability corporation and they would be reduced to comparative impotence without it.").

78 Mark S. Mizruchi, *Berle and Means Revisited: The Governance and Power of Large U.S. Corporations*, 33 THEORY & SOC'Y 579, 581 (2004).

79 Colombo, *supra* note 76, at 253.

ests, shareholders became dispersed and lacked the ability to coordinate effectively.[80] As an undifferentiated mass, shareholders essentially ceded control of the corporation to professional managers who made decisions on shareholders' behalf.[81] Although shareholders certainly played a role in electing boards of directors who were ultimately accountable to shareholders, in Berle's and Means's view, shareholders remained essentially powerless.[82] The view that shareholders lacked the interest or capability to direct the affairs of the corporation resonated for decades until the advent of large institutions that aggregated and filtered previously diffuse shareholder interests.

2. The Rise of Institutional Investors

When Berle and Means wrote *The Modern Corporation and Private Property*, most shareholders were individuals.[83] Today, institutional investors, typically pension funds and mutual funds, own the majority of outstanding stock in American corporations.[84] With the ability to vote large blocks of shares or to sell vast amounts of stock that could adversely affect share price,[85] institutional investors can take a much more active role in corporate governance than widely dispersed individual shareholders. Although many institutional investors remain essentially passive, the concentration of stock ownership potentially disrupts the traditional power relationship between share-

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80 *Id.*; *see also* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1275 (2008) (discussing how the roots of shareholder powerlessness rested on two factors: shareholders were rationally apathetic regarding corporate affairs, and proxy rules effectively prohibited shareholders from soliciting proxy votes in director voting). *But see* Mizruchi, *supra* note 78, at 581 (suggesting the change was more of a usurpation than an equitable trade, as the interests of the managers were not necessarily in line with those of the shareholders, and managers were able to further their own privileges in the form of higher salaries or perks).

81 Colombo, *supra* note 76, at 253.

82 *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 121 (2008).

83 Anabtawi & Stout, *supra* note 80, at 1275. In 1934, a House Report estimated that over ten million individuals owned stocks or bonds, and that "over one fifth of all the corporate stock outstanding in the country [was] held by individuals with net incomes of less than $5,000 [about $80,000 today] a year." H.R. REP. NO. 73-1383, at 3 (1934).

84 Anabtawi & Stout, *supra* note 80, at 1275 (stating that in 1950, institutional investors accounted for 80% of outstanding corporate shares, and today, institutional investors account for more than 66% of such shares); *see also* Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 329 (1987).

85 *See* Anabtawi & Stout, *supra* note 80, at 1275.

holders and corporate managers.[86] Moreover, institutional investors' "greater access to firm information, coupled with their concentrated voting power," enables them to monitor more actively and accurately the board's performance and to encourage restructuring of the board when corporate performance lags.[87] As a result, institutional investors possess an enhanced ability to hold corporate management accountable for failing to promote shareholder welfare, regardless of the perspective of shareholder welfare employed by the institutional investor.[88]

The SEC's 1992 proxy rule amendments provide another important step in the evolution of shareholder engagement.[89] The 1992 amendments exempted most shareholder communications from the definition of proxy solicitation, a prior limitation on investor-to-investor communication.[90] Institutional investors and other shareholders could now combine their holdings into a coordinated voting bloc without suffering liability under the securities laws.[91] Moreover, shareholders could now more easily communicate regarding issues of

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86 *Id.* at 1276 (suggesting that, although many pension funds and mutual funds are relatively passive and hold very diversified portfolios, some prominent institutional investors "have emerged as activist investors willing to mount public relations campaigns, initiate litigation, and launch proxy battles to pressure corporate officers and directors into following their preferred business strategy"); Bratton & Wachter, *supra* note 82, at 145.

87 Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 50 (2002).

88 Anabtawi & Stout, *supra* note 80, at 1276 (noting that, although most institutional investors play passive roles, they have a greater ability to impact the corporate governance arena than individual investors).

89 *See id.* The SEC's proxy rules are codified at 17 C.F.R. § 240.14a-3(a) (2010).

90 Anabtawi & Stout, *supra* note 80, at 1276–77. Proxy solicitations of shareholders trigger burdensome federal obligations, discouraging many investors from communicating with each other in such a way as to trigger these federal obligations. *Id.* at 1276. Prior to 1992, the rules broadly defined a solicitation as any communication to shareholders "under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 686 (2007). Thus, shareholders were unlikely to communicate with each other if that communication was "reasonably calculated" to influence another shareholder's vote. Anabtawi & Stout, *supra* note 80, at 1276. The 1992 amendments allowed two exceptions to the broad definition of solicitation, making clear that many public statements, such as speeches, press releases, and advertisements, were not proxy solicitations. *Id.* at 1277; Briggs, *supra*, at 687. The first exception is the ten-or-fewer rule, which allows a shareholder to solicit freely up to ten other shareholders without a filing to the SEC. *Id.* This exception is very useful in the early stages of an insurgency campaign. *Id.* The second exception is the free speech rule, which permits a shareholder to solicit an unlimited number of shareholders without a filing to the SEC, provided that written materials are not part of such a solicitation. *Id.* at 687–88. This exception allows an insurgent to mount an inexpensive campaign for or against any proposal up for vote. *Id.* at 688.

91 Anabtawi & Stout, *supra* note 80, at 1277.

corporate governance and policy.[92] As a result, large shareholders could more effectively exercise—or threaten to exercise—their voting power, and the ability of institutional investors to exert influence over the corporation increased dramatically.[93]

3. Director and Shareholder Primacy

With such an increase in shareholder communication and campaigning, a reinvigorated debate erupted among academics and market professionals regarding the role shareholders should play in corporate governance.[94] The general question centered on whether the corporation is an entity designed to maximize shareholder wealth or an entity intended to take into account the concerns of other stakeholders, such as employees, creditors, customers, or members of the community in which the corporation operates.[95] With respect to the view that regarded shareholder wealth maximization as the central purpose of the corporation, two dominant perspectives emerged: the "shareholder primacy" and "director primacy" models.[96]

Shareholder primacy focuses on shareholder wealth maximization and requires corporate managers to act exclusively in the economic interests of shareholders.[97] Officers and directors remain inherently distrusted, however, because "managers are not owners and accordingly have skewed incentives respecting the maximization of the value of the firm."[98] Due to that inability to trust management, shareholder primacy advocates insist that shareholders must possess the "power to

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92 *Id.*

93 *See id.* at 1276.

94 *See, e.g.*, Bratton & Wachter, *supra* note 82, at 145.

95 Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 549 (2003); Bratton & Wachter, *supra* note 82, at 145–46.

96 William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. Pa. L. Rev. 653, 655–56 (2010) ("The question holds out a choice between a shareholder-driven, agency model of the corporation, guided by informational signals from the financial markets, and the prevailing legal model, which vests business decisionmaking in managers who possess an informational advantage regarding business conditions. The shareholder side contends that the prevailing model fails to provide a platform conducive to aggressive entrepreneurship and instead invites management self-dealing and conservative decisionmaking biased toward institutional stability. It looks to a shareholder community populated with actors in financial markets for corrective inputs. Unlike the managers, who are conflicted and risk averse, the shareholders come to the table with a pure financial incentive to maximize value.").

97 *See, e.g.*, Bainbridge, *supra* note 95, at 549; Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 440–41 (2001); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. Davis L. Rev. 705, 712–13 (2002).

98 Bratton & Wachter, *supra* note 82, at 148.

intercede directly and frequently in corporate decisionmaking, whether by unilateral shareholder power to amend corporate charters, shareholder referenda to approve business decisions, or regular board election contests."[99] Within a shareholder primacy model, shareholders remain the ultimate owners of the corporation who require effective mechanisms for monitoring and altering the actions of professional managers entrusted to run the corporation.[100]

In contrast, the director primacy model defends managerial discretion in order to maximize shareholder wealth.[101] Rather than promote mechanisms for shareholder engagement, the director primacy model suggests insulating managers from shareholder interests and initiatives to facilitate effective management of the corporation on the shareholders' behalf.[102] Within the director primacy model, actual expressions of shareholder concerns simply distract managers.[103] Because directors personify the corporate entity—a result of an implicit nexus of private contracts that comprise the firm—directors remain best suited to run the business without shareholder intervention.[104]

The debate over shareholder versus director primacy remains unresolved and certainly remains much more complex than this brief summary conveys.[105] A discussion of the competing models of corporate organization simply attempts to demonstrate that determining the

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99 John F. Olson, *Professor Bebchuk's Brave New World: A Reply to "The Myth of the Shareholder Franchise,"* 93 VA. L. REV. 773, 774 (2007) (discussing with some skepticism the views of shareholder primacy advocate Professor Lucian Bebchuk); *see also* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 892–908 (2005) (arguing that shareholders should be able to allocate power to themselves by adopting charter provisions authorizing shareholders to make major business decisions); Williams, *supra* note 97, at 712–13 (describing the views of shareholder primacy advocates, who posit that shareholders should control the corporation and that other corporate constituents should be protected through contracts rather than direct participation in corporate governance).

100 *See* Williams, *supra* note 97, at 712–13.

101 Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735 (2006) ("Indeed, the extent to which corporate law is stacked against shareholder 'intervention power' goes beyond just the housekeeping rules; much of business law acts to limit shareholder involvement in corporate governance. Taken together, these rules form a regime I call 'director primacy.' Hence, I do not quibble with Bebchuk's exposition of shareholder weakness; to the contrary, I welcome it as further evidence that my director primacy model accurately describes how corporations work." (footnotes omitted)).

102 Bainbridge, *supra* note 95, at 572–73.

103 *See id.*; Bratton & Wachter, *supra* note 82, at 146.

104 *See* Bainbridge, *supra* note 95, at 560.

105 For a fuller description of the various positions in the director-versus-shareholder-primacy debate, see generally *id.* (defending director primacy); Bebchuk, *supra* note 99 (defending shareholder primacy); Bratton & Wachter, *supra* note 82 (detailing the historical evolution of shareholder primacy).

appropriate role of shareholder engagement remains highly contested. That scholars sustain a credible debate over time indicates that the dynamic nature of shareholder status necessarily changes as corporations and society evolve.

4. CSR, Stakeholder Theory, and Shareholder Activism

The CSR movement, the growing popularity of the stakeholder theory of corporate organization, and shareholder activism provide further proof of the evolving nature of shareholder status. As the CSR movement burgeons,[106] shareholder activism grows as well. Some suggest the rapid development in CSR stems from a new stakeholder theory of the firm.[107] In contrast to the shareholder primacy or director primacy models, stakeholder theory rests on the premise that all of a corporation's various constituencies, or stakeholders, contribute to the corporation's success or failure.[108] Therefore, maximization of shareholder wealth does not represent the essential focus under a stakeholder theory model. Instead, corporate managers should take into account the interests of all stakeholder groups when charting corporate actions.[109]

The validity of a stakeholder model of the firm gained traction with the advent of corporate constituency statutes passed by a majority of states decades ago.[110] Although adopted in large part to provide a legitimate means for corporate boards to fend off hostile takeovers,[111] the statutes provide specific authority for directors to take

106 *See supra* notes 30–53 and accompanying text.

107 *See* John Nirenberg, *Profit by Doing the Right Thing*, NATION (Thail.), Dec. 9, 2002 ("The big message of the [Business for Social Responsibility in the U.S.] conference was that being responsive to stakeholders—not just shareholders—actually results in higher profits when it is part of an overall CSR strategy."). For a background of the stakeholder theory of corporate governance, see generally Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008). Moreover, a January 2005 issue of *The Economist* even featured a series of articles discussing stakeholder theory's resurgence over shareholder primacy. *See Capitalism and Ethics: The Good Company*, ECONOMIST, Jan. 22, 2005, at 11; *The Ethics of Business*, ECONOMIST, Jan. 22, 2005, insert at 20; *The Good Company*, ECONOMIST, Jan. 22, 2005, insert at 3; *Profit and the Public Good*, ECONOMIST, Jan. 22, 2005, insert at 15; *The World According to CSR*, ECONOMIST, Jan. 22, 2005, insert at 10.

108 Colombo, *supra* note 76, at 256.

109 *Id.*

110 *See id.* at 256 n.55 (noting that, by 2003, forty-one states had adopted constituency statutes, with Delaware, the most influential state in corporate law, as a notable holdout).

111 *See, e.g.*, Williams, *supra* note 97, at 716. The hostile takeover boom of the 1980s "reignited the shareholder-stakeholder debate" because, in a corporate takeover, "shareholders of the target company received a substantial premium in exchange for their shares, while other constituencies of the target company . . . often fared quite poorly." Colombo, *supra* note 76, at 255. Directors were powerless to take into account the interests of nonshareholder stakeholders

nonshareholder interests into account when making corporate decisions.[112] In any event, more than two-thirds of existing constituency statutes allow directors to consider nonshareholder interests on ordinary business matters.[113] Thus, by their very nature, constituency statutes undermine shareholder primacy while advancing a sort of CSR that attends to greater nonshareholder interests.[114] But a stakeholder theory need not necessarily animate CSR. Instead, if extant shareholders simply possess preferences for the corporation to act responsibly towards other stakeholders, a model that requires taking those shareholder interests into account would secondarily promote stakeholder interests as well.[115]

Regardless of the reasons motivating the development of CSR, corporations seem to embrace CSR with increasing regularity due to increased pressure from shareholders.[116] Even business schools nationwide teach stakeholder rhetoric and practices.[117] CSR discourse permeates corporate communications.[118] Modern corporations appear

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and constituencies during these takeovers due to the predominant shareholder primacy norm of the time. *Id.* at 256. If taking into account such stakeholder interests would inhibit shareholder wealth maximization, the directors were required to ignore those interests. *See id.*

112 *See* Colombo, *supra* note 76, at 256 ("For all their faults, limitations, and shortcomings, the promulgation of constituency statutes represents, undoubtedly, a significant advance for the stakeholder model of the corporation, and has inspired a new generation of stakeholder-oriented scholarship.").

113 Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 686 (2006).

114 *See id.*

115 *See* Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 122–28, 162–69 (2009).

116 *See id.* at 127.

117 Fairfax, *supra* note 113, at 695 (contending that such a conclusion can be drawn from business school curricula and related activities). For instance, "[b]etween 2001 and 2004, MBA programs placed significant emphasis on social and environmental responsibility in corporate affairs." *Id.* Furthermore, a 2005 survey revealed that, in 2003, "45% of business schools required students to take one or more courses in ethics, corporate social responsibility or other related topics, whereas in 2001 only 34% of business schools had this requirement." *Id.*

118 *E.g.*, Fairfax, *supra* note 56, at 773–74. A 2007 study by Professor Fairfax revealed that

> the vast majority of [Fortune 100 companies] espouse stakeholder rhetoric in some official corporate arena. . . . Eighty-eight percent of these companies include stakeholder rhetoric within their annual report, with 28% adopting such rhetoric on the very first page of the report, and 68% addressing stakeholder concerns within the first five pages.

Id. at 780. At least two corporations "focus their rhetoric exclusively on shareholders." *Id.* at 782; *see also* John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 4–5 (2005) ("Between 1999 and 2002, the percentage of *Fortune* Global Top 250 companies that produced a separate social, environmental, or sustainability report increased from 35 to 45, and these figures compare to only 10% of the Global 500 in 1993. In 2002, 29% of these reports were indepen-

to present an image to the public as good citizens to counter the many negative corporate images (such as the BP oil spill) that often dominate the news.[119] With an increasing number of large institutional investors and money managers focusing on socially responsible business practices,[120] the influence of SRI necessarily increases as well.[121] In June 2008, the United Nations reported that owners and managers of worldwide assets valued at more than $14 trillion had signed the United Nations Principles for Responsible Investment, an international compact whereby signatories pledged to screen investments based on certain environmental, social, and governance issues.[122] Within the United States, approximately "one out of every nine dollars under professional management . . . today is involved in socially responsible investing" for a total aggregate value in excess of $2.7 trillion.[123] That $2.7 trillion value reflects an increase of 324% from 1995 and represents 15% greater growth than assets under professional management not screened based on social criteria from 2005 to 2007.[124] Moreover, between 2005 and 2007, there has been a 28% increase in institutional investor assets screened on social and environmental criteria and a 32% increase in funds dedicated to community investing projects.[125]

Complementing the rapidly growing aggregate value of assets screened on CSR criteria, shareholder advocates seem to enjoy in-

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dently verified, most often by accounting firms, versus 19% in 1999. These statistics reflect worldwide trends that began in the early 1990s. Moreover, these aggregate percentages may understate the significance of the reporting phenomenon, given much higher rates in some of the countries with the largest economies. Thus, 72% of the top 100 companies publish social reports in Japan, 49% of the top 100 publish in the UK, 36% publish in the United States, and between 30% and 40% publish in Northern Europe." (footnotes omitted)).

119 *See* Fairfax, *supra* note 113, at 677.

120 Siebecker, *supra* note 115, at 123.

121 *See* Press Release, Soc. Inv. Forum, Report Finds Total SRI Grew 260 Percent Since 1995, SRI Mutual Funds Grew 15-Fold; Nearly 1 in 10 Dollars Now in SRI Screening, Shareholder Advocacy, Community Investing (Jan. 24, 2006), *available at* http://www.socialinvest.org/news/releases/pressrelease.cfm?id=61 ("Over the past decade, SRI has become a major force in the U.S. financial marketplace." (quoting Tim Smith, president of the Social Investment Forum)).

122 Press Release, United Nations Principles for Responsible Inv. Initiative, Principles for Responsible Investment: Signatories Double in One Year; Institutional Investors "Taking Implementation to the Next Level" (June 17, 2008), *available at* http://www.unglobalcompact.org/newsandevents/news_archives/2008_06_17a.html.

123 SOC. INV. FORUM, 2007 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES: EXECUTIVE SUMMARY, at ii (2007) (on file with *The George Washington Law Review*).

124 *Id.*

125 *Id.* at iii–iv.

creasing success in pursuing SRI.[126] To be sure, shareholders remain essentially powerless in some important areas of corporate governance.[127] Nevertheless, in recent years, the number of shareholder proposals on proxy ballots related to CSR concerns has grown markedly.[128] Moreover, between 2005 and 2007, overall voting support on shareholder-sponsored environmental and social initiatives increased by 57%.[129] With respect to large institutional investors that filed resolutions on social or environmental issues, assets under their control reached $739 billion.[130] Although some question the efficacy of direct shareholder involvement in managing company affairs,[131] others assert that shareholder advocates continue to play "a major role in improving corporate behavior through resolutions, letter writing, and negotiations with management on issues ranging from environmental risk and workplace standards to diversity, human rights violations, and a myriad of corporate governance concerns."[132] At the very least, shareholder advocacy through the proxy process provides a need for corporations to address publicly a variety of social, ethical, political, and environmental matters relevant to the SRI community.[133]

Despite the obvious limitations current law imposes on shareholders' ability to affect corporate governance, shareholders increas-

126 *See* Siebecker, *supra* note 13, at 623–26; Siebecker, *supra* note 115, at 123–26.

127 *See, e.g.*, Bebchuk, *supra* note 99, at 844–47 (describing, for example, that charter amendments must have board approval before shareholders vote, that only the board may initiate changes to the state of incorporation, and that only the board may initiate a shareholder vote for a merger, consolidation, sale of assets, or dissolution).

128 Fairfax, *supra* note 14, at 88–89; *see also* Erik Assadourian, *The State of Corporate Responsibility and the Environment*, 18 GEO. INT'L ENVTL. L. REV. 571, 582 (2006). In 2004, "investors filed 327 resolutions regarding social or environmental issues with U.S. companies," an increase of twenty-two percent over the number of resolutions filed in 2003. *Id.* at 582. In May 2005, hundreds of large investors, collectively controlling $3.2 trillion in assets, gathered at the United Nations to "discuss how to press companies to address climate change and its associated financial risks." *Id.* Investor actions seem to be making an impact on the corporate world. *See* Conley & Williams, *supra* note 118, at 4–5.

129 SOC. INV. FORUM, *supra* note 123, at iv.

130 *Id.*

131 *See* Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 741 n.27 (2007) ("[N]ot only have most studies found *no* correlation between increased shareholder activism and long-term share value, many have found that 'the long-run average stock return [of companies targeted by activists] is negative and in some cases statistically significant.'" (alteration in original)). *But see* Fairfax, *supra* note 14, at 89 ("This evidence reveals that shareholders' increased activism and power have not had a negative impact on stakeholder issues. Instead, such concerns appear to have benefited from increased shareholder activism.").

132 SOC. INV. FORUM, *supra* note 32, at 21.

133 *Id.* at 21–25.

ingly campaign to expand their influence.[134] That corporations remain increasingly attentive to consumer and investor preferences regarding socially responsible behavior suggests to some that shareholders already possess sufficient influence over corporate practices and policies.[135] But the move into the realm of CSR by corporations—whether to enhance profits or to embrace a genuine stakeholder sensibility—represents a significant shift in the evolution of the corporation itself. The very fact that corporations engage on the battlefield for satisfying consumer and shareholder preferences regarding CSR signals that corporations now make social and political concerns part of their basic business plans. In essence, the business of corporations is no longer simply business. And with the recent Supreme Court decision in *Citizens United*, the reach of corporate influence will cascade into more and more aspects of society.

C. The Cascading Effects of Citizens United

The case for expanding shareholder engagement seems much stronger following the Supreme Court's decision in *Citizens United*. With corporations occupying increasingly dominant positions in various aspects of economic, social, and political life, a strong case already exists for democratizing corporate governance. Because many decisions previously relegated to government and the standard political processes now get made—or controlled—by corporations, affording shareholders some of the basic rights of citizens within a polity does not seem terribly radical. In many respects, the corporation has become the dominant institution in which political decisions get made. The floodgates of corporate influence will open almost completely, however, in the wake of *Citizens United*. If that tidal wave of corporate influence sufficiently undermines the ability of traditional political processes to represent the public interest, internal corporate governance structures might need reshaping to make the corporation itself a new public forum in which diverse viewpoints receive adequate attention.

1. Navigating the Decision

In *Citizens United*, the Supreme Court attempted to clarify the incredibly murky waters of its corporate speech jurisprudence[136] by ruling that corporations largely possess the same political speech

134 *See* Fairfax, *supra* note 14, at 55.

135 *See* SOC. INV. FORUM, *supra* note 32, at 21.

136 For a detailed analysis of the incoherence of the Supreme Court's existing corporate

rights as individuals.[137] In particular, the Court struck down section 203 of the BCRA,[138] which bans corporate expenditures for "electioneering communications" or speech that expressly advocates the election or defeat of a candidate for office within thirty days of a primary or sixty days of a general election.[139] In the process, the Court overruled *Austin v. Michigan State Chamber of Commerce*,[140] in which the Court previously expressed concern for the deleterious effects of excessive corporate influence over the electoral process.[141]

Citizens United arose from a declaratory judgment and injunction sought against the Federal Election Commission.[142] Citizens United produced a ninety-minute documentary film, entitled *Hillary: The Movie*, in an attempt to dissuade voters from voting for then-Senator Hillary Clinton in the 2008 presidential primaries.[143] Despite the availability of *Hillary* in theaters and on DVD, Citizens United sought to increase coverage by offering the movie to digital cable subscribers through the date of the 2008 Democratic Party primary elections.[144]

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speech jurisprudence, see Siebecker, *supra* note 13, at 628–45; Siebecker, *supra* note 54, at 250–57.

137 Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

138 *Id.* at 911.

139 *See* Bipartisan Campaign Reform Act of 2002 § 203, 2 U.S.C. § 441b(b) (2006) (banning any "electioneering communication"), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010); *id.* §§ 201(f)(3)(A), 434(f)(3)(A) (defining an "electioneering communication" as any broadcast, cable, or satellite communication that (1) "refers to a clearly identified candidate for Federal office," (2) is made within thirty days of a primary election or sixty days of a general election, and (3) is publicly distributed), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

140 Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

141 *Citizens United*, 130 S. Ct. at 913. In *Austin*, the Court asserted that corporations are

> "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth "does not undermine its justification for regulating corporations."

Austin, 494 U.S. at 665 (citation omitted). In analyzing the application of the First Amendment to the Fourteenth Amendment claims preserved, the Court stated, "[T]he State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Id.* at 666; *see also* Siebecker, *supra* note 13, at 639.

142 *Citizens United*, 130 S. Ct. at 888.

143 *Id.* at 887.

144 *Id.* at 887–88.

Because *Hillary* criticized Senator Clinton in particular[145] and would appear within thirty days of the Democratic primary election,[146] Citizens United feared civil and criminal penalties under the BCRA.[147] As a result, Citizens United brought the declaratory judgment and injunction action challenging the BCRA as applied to *Hillary*.[148]

After deciding to address the facial constitutionality of the BCRA rather than simply as applied to *Hillary*,[149] the Court recapitulated—although obviously somewhat revamped—the basic principles undergirding its corporate political speech jurisprudence. At the outset, citing *First National Bank of Boston v. Bellotti*,[150] the Court reinforced its longstanding position that the Government cannot regulate or restrict speech based on the identity of the speaker.[151] With respect to political speech in particular, voters must remain free to obtain information from myriad sources in order to inform their political views and determine how to cast their votes.[152] In addition, the Court af-

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145 *Id.* at 887 ("*Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton."). The District Court scathingly described the film as being "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Citizens United v. FEC, 530 F. Supp. 2d 274, 279 (D.D.C. 2008). One newspaper article even described *Hillary* as featuring a "who's-who cast of right-wing commentators . . . tak[ing] viewers on a savaging journey through Clinton's scandals. The sole compliment about the then-senator comes from conservative firebrand Ann Coulter: 'Looks good in a pantsuit.'" Philip Rucker, *The Film that Cracked the Case*, WASH. POST, Jan. 22, 2010, at C8.

146 Section 441b bars corporations from directly financing the campaigns of political candidates or contributing funds to independent parties that advocate for or against a candidate in a federal election. 2 U.S.C. § 441b (2006); *Citizens United*, 130 S. Ct. at 887.

147 *Citizens United*, 130 S. Ct. at 888.

148 *Id.*

149 *Id.* at 892 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject. . . . As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.").

150 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

151 *Citizens United*, 130 S. Ct. at 898–99. The Court was apt to note that, despite these limitations on restriction, "there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Id.* at 899.

152 *See id.* at 899 ("Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.").

firmed that First Amendment protections necessarily extend to corporations.[153] Quoting *Bellotti*, the Court emphasized that political speech "does not lose First Amendment protection 'simply because its source is a corporation.'"[154]

In opposition to those basic principles, the decision in *Austin* represented an aberration in which the Court "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in history."[155] According to the Court, *Austin* inappropriately recognized a compelling "antidistortion interest" in "preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[156] In the Court's view, *Austin* allowed restrictions on corporate political speech based on the misguided view that corporations enjoy special advantages due to limited liability, perpetual life, and the accumulation of assets.[157] Because many wealthy individuals trace their wealth back to corporations, a jurisprudence based on the distorting effects of corporate wealth would produce dangerous and unacceptable consequences.[158]

Not only would *Austin* logically permit the Government to restrict the speech of media corporations, but it would also allow the Government to "ban the political speech of millions of associations of citizens" who operate small corporations without much aggregated wealth.[159] By restricting corporate speech, the Government "prevents

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153 *See id.* at 899–900 (enumerating the Supreme Court cases that recognize First Amendment protection of corporate speech).

154 *Id.* at 900 (quoting *Bellotti*, 435 U.S. at 784). *Bellotti* struck down state law prohibitions on corporate independent expenditures related to referenda issues and clearly reaffirmed that the government cannot restrict political speech based on the speaker's corporate identity. *See id.* at 902.

155 Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 695 (1990) (Kennedy, J., dissenting), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010). Before *Austin*, the Court "had not allowed the exclusion of a class of speakers from the general public dialogue." *Citizens United*, 130 S. Ct. at 899.

156 *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660).

157 *Id.* at 905.

158 *Id.*

159 *Id.* at 907. Taking the media as an example, the Court rejected the idea that "the First Amendment, as originally understood, would permit the suppression of political speech by media corporations," which are owned by media corporations and "have become the most important means of mass communication in modern times." *Id.* at 906. The Court further stated that

> [t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies.

their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile" to the association's interests.[160] Because corporations may possess special expertise that renders them "best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials,"[161] restricting corporate political speech would undermine the quality of public discourse and interfere with the "'open marketplace'" of ideas.[162]

Wholly rejecting *Austin*'s antidistortion rationale, the Court emphasized that, regardless of the wealth of the speaker, political speech remains "'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation'" rather than an individual.[163] The Court overruled *Austin* because it improperly contravened a long line of cases strictly prohibiting "categorical distinctions based on the corporate identity of the speaker."[164] With *Austin* invalidated, the Court held the restrictions on direct corporate expenditures for express political advocacy under the BCRA unconstitutional.[165]

2. Downstream Implications

The potential wide-sweeping implications of the ruling in *Citizens United* seem to suggest a new stage in the evolution of the corporation and a concomitant need for reshaping the principles animating corporate law. But what are those implications that would cause such a retooling of corporate jurisprudence?

a. Political Floodgates

The most obvious implication is the dominance of corporations in the political realm. Many commentators and "[g]ood-government groups have already condemned the decision in *Citizens United* as being likely to open a new era of corporate control of American politics."[166] Whether the decision will in fact produce such a large impact

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Id.

160 *Id.* at 907.

161 *Id.* at 912.

162 *Id.* at 906 (quoting N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

163 *Id.* at 883 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)).

164 *Id.* at 913.

165 *Id.* at 917.

166 Michael C. Dorf, *The Supreme Court Rejects a Limit on Corporate-Funded Campaign Speech*, FindLaw (Jan. 25, 2010), http://writ.news.findlaw.com/dorf/20100125.html.

remains an open question,[167] but some groups have already indicated they will take advantage of new speech freedoms. As an example, the U.S. Chamber of Commerce has already pledged to "organize the largest, most aggressive election campaign in its history."[168]

Moreover, President Obama bemoaned the decision, predicting "a new stampede of special interest money in our politics" that would allow large corporations to "marshal their power every day in Washington to drown out the voices of everyday Americans."[169] The President further commented in the 2010 State of the Union address that the ruling would "open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."[170]

Similarly, Fred Wertheimer, a longtime advocate of McCain-Feingold and a drafter of campaign reform legislation, called the decision "the most radical and destructive campaign finance decision in Supreme Court history."[171] Not surprisingly, Senator Feingold admonished that *Citizens United* "opened the floodgates to corporate money in federal campaigns in ways we haven't seen for nearly a century."[172]

One commentator even went so far as to state that *Citizens United* is "generally expected to boost Republicans more than Democrats, because corporations and corporate-backed outside groups tend to align with conservatives and also often have access to more money

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167 *Id.* ("Whether the decision will have a large impact remains to be seen. Even prior to the Court's ruling, campaign finance regulation was so shot through with loopholes that individuals and corporations seeking to buy influence in Washington had little difficulty doing so."); *see also* Jan Witold Baran, *Stampede Toward Democracy*, N.Y. TIMES, Jan. 26, 2010, at A23 (suggesting that much of the regulatory framework restricting corporate speech will remain untouched by *Citizens United*).

168 Kenneth P. Vogel, *Court Decision Opens Floodgates for Corporate Cash*, POLITICO (Jan. 21, 2010, 10:25 AM), http://www.politico.com/news/stories/0110/31786.html. In a scathing review of the Obama Administration's business agenda, U.S. Chamber of Commerce President Tom Donahue stated that the Chamber "will highlight lawmakers and candidates who support a pro-jobs agenda and hold accountable those who don't" by dramatically expanding its $100 million lobbying campaign for free enterprise. Lisa Lerer, *Chamber Chief Attacks Obama Agenda*, POLITICO (Jan. 12, 2010, 10:10 AM), http://www.politico.com/news/stories/0110/31397.html. Not surprisingly, the U.S. Chamber of Commerce joined the National Rifle Association and the AFL-CIO in submitting amicus briefs supporting Citizens United in challenging the law. Vogel, *supra*.

169 Vogel, *supra* note 168.

170 Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151_pf.html.

171 Nina Totenberg, *Campaign Finance Ruling: Hard to Reverse*, NAT'L PUB. RADIO (Jan. 22, 2010), http://www.npr.org/templates/story/story.php?storyId=122843894.

172 Russell Feingold, *The Supremes Have Opened the Floodgates*, COUNTERPUNCH (Jan. 22–24, 2010), http://www.counterpunch.org/feingold01222010.html.

than unions or liberal outside groups."[173] A *Washington Post*–ABC News poll of Americans similarly reflects the sentiment of many commentators.[174] Eight in ten poll respondents opposed the Court's decision, with sixty-five percent strongly opposing it.[175]

b. Corporate Alchemy

The ability of corporations to use the First Amendment as a means to escape liability in a variety of regulatory settings represents another important potential implication of *Citizens United*. The problem arises due to the growing incompatibility between the commercial speech doctrine and the Supreme Court's approach to corporate political speech.[176] Although the Supreme Court permits governmental regulation of commercial speech to ensure the market receives accurate information about products and companies,[177] the Court in the wake of *Citizens United* strictly scrutinizes governmental regulation of corporate political speech. The core of the problem lies in the Supreme Court's failure to define adequately what constitutes commercial speech, political speech, or the boundary between them. If corporate speech includes a mix of commercial and political speech, knowing which branch of corporate speech jurisprudence to apply becomes difficult, if not impossible, to discern.

As corporations exploit that glaring definitional defect, the entire analytical framework becomes unstable. For example, in *Nike, Inc. v. Kasky*,[178] a case fully argued before the Supreme Court prior to being remanded for additional factfinding, Nike claimed that its allegedly false and misleading statements made to the press about its overseas labor practices were immune from liability under a California consumer fraud statute because the statements about company practices

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173 Vogel, *supra* note 168.

174 *See* Eggen, *supra* note 170.

175 *Id.* Not everyone, however, opposes the decision. Cleta Mitchell, a top election lawyer, stated that *Citizens United* "ripped the duct tape off the mouths of the American people" and was great for the American people and free speech. Vogel, *supra* note 168.

176 *See* Siebecker, *supra* note 13, at 621–28; Siebecker, *supra* note 54, at 250–57.

177 Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 802 (1998) ("[U]nlike the complex dignitary justifications underlying First Amendment protection of political speech, First Amendment protection of commercial speech exists for only one reason—to assure a flow of accurate information to consumers necessary to the functioning of efficient markets."); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.").

178 Nike, Inc. v. Kasky, 539 U.S. 654 (2003) (per curiam).

were part of an ongoing political debate over international labor standards.[179] In order to elevate the level of protection afforded its public comments, Nike essentially asked that the Supreme Court collapse the distinct analytical frameworks for corporate speech and commercial speech to provide full First Amendment protection whenever a corporate statement touches a matter of public concern.[180] With increasing regularity, corporations like Nike are engaging in the artful alchemy of mixing just enough political commentary with commercial messages to create an amalgam deserving the most stringent constitutional protection as political speech.[181] To the extent corporations enjoy success in manipulating the defects in existing corporate speech jurisprudence, adherence to that flawed framework threatens the viability of some of the most socially important regulatory regimes that target corporate communication (e.g., the securities regulation regime, federal communications law, federal food and drug regulation, state and federal an-

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179 *See id.* at 656–57 (Stevens, J., concurring); David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1050 (2004).

180 *See* Siebecker, *supra* note 13, at 627.

181 *See, e.g.*, Sosa v. DIRECTV, Inc., 437 F.3d 923, 929–32 (9th Cir. 2006) (allowing a satellite television company to escape RICO liability after the company successfully claimed that thousands of demand letters it sent to individuals who allegedly accessed the satellite signal without authorization constituted protected speech under the First Amendment); CPC Int'l, Inc. v. Skippy, Inc., 214 F.3d 456, 461–63 (4th Cir. 2000) (agreeing with a corporation's claim that the corporation's web postings describing a protracted trademark and copyright dispute could not be subject to an injunction as false and misleading speech because they were a form of political speech deserving First Amendment protection); Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 586 (2d Cir. 2000) (rejecting a corporation's claim that Internet domain names constituted political speech immune from antitrust regulation, but noting that "domain names may be employed for a variety of communicative purposes with both functional and expressive elements, ranging from . . . commercial speech and even core political speech squarely implicating First Amendment concerns" and "[the court does not] preclude the possibility that certain domain names . . . could indeed amount to protected speech"); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1110–11 (C.D. Cal. 2004) (finding that the defendant successfully claimed immunity under a deceptive trade practices statute because statements it made about the plaintiff's software on its website and in code embedded in its Ad-Aware detection software were not commercial speech); Bernardo v. Planned Parenthood Fed'n of Am., 9 Cal. Rptr. 3d 197, 212, 215–21 (Cal. Ct. App. 2004) (granting a charitable organization's motion to dismiss under anti-SLAPP ("strategic lawsuit against public participation") statute after accepting the charitable organization's claim that its publications containing allegedly false statements about the safety of abortions were noncommercial speech); DuPont Merck Pharm. Co. v. Superior Court, 92 Cal. Rptr. 2d 755, 758–59 (Cal. Ct. App. 2000) (accepting a corporation's claim that its allegedly false statements in lobbying and public relations represented political speech); *see also* Tamara R. Piety, *Grounding* Nike*: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 188–99 (2005) (describing a variety of contexts in which corporations could claim political speech rights to evade regulation or liability).

tifraud laws, employment law, and workplace safety regulations, to name just a few).[182]

In *Citizens United*, the Court briefly hinted—as it has hinted opaquely in the past[183]—that some regulatory regimes lie outside the protective umbrella of the First Amendment.[184] As stated in *Citizens United*,

> [t]he Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite.[185]

But this acknowledgement by the Court that some institutional settings might remain outside the reach of the First Amendment creates more concern than solace. Quite simply, the Court offers no justifications for an institutional sensitivity that would prohibit corporations from using the First Amendment to protect themselves in a variety of settings where corporate communication represents the basis of liability.

In essence, corporations will be able to use *Citizens United* both as a sword and a shield. They will be able to pierce deeply into the political realm and potentially dominate political discourse. In addition, with enhanced political speech rights, corporations will be able to use *Citizens United* to shield themselves from liability by commingling corporate communications with some minimal political content. As I have advocated in other articles, adopting a new institutional approach to corporate speech would provide a coherent and rigorous framework to justify limitations on corporate speech in certain important institutional settings.[186] Until the Supreme Court not only demar-

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182 *See* Siebecker, *supra* note 13, at 656–71 (discussing how granting full First Amendment protection to politically tinged commercial speech would unravel some of the most important provisions of the securities laws); Jacob Bunge, *Goldstein Presses Free Speech Argument; Others Uncertain*, HEDGEWORLD DAILY NEWS, Feb. 22, 2007, *available at* 2007 WLNR 3505612 (describing a hedge fund manager's claim that certain investor solicitation rules under the securities laws unconstitutionally implicate political speech rights).

183 *See* Siebecker, *supra* note 13, at 642–45 (discussing ambiguous statements by the Court regarding the reach of the First Amendment into the securities regulation regime).

184 *See Citizens United*, 130 S. Ct. at 899.

185 *Id.* (citations omitted) (citing a few institutional settings in which speech restrictions disadvantaging certain persons were permitted).

186 *See generally* Siebecker, *supra* note 13 (suggesting that an institutional approach to corporate speech is needed to prevent a collision between the Court's commercial speech and politi-

cates the distinction between commercial and corporate political speech, but also provides coherent principles for cabining corporate political speech rights in certain institutional settings, incorporating discourse principles within a new theory of the firm itself might stem the tide of unbridled corporate excess.

II. A New Discourse Theory of the Corporation

The debate about whether the SEC properly granted shareholders the right to nominate directors on the corporate proxy resembles somewhat of a problem of two ships passing in the night. Proponents and opponents alike focus on the role of shareholders in determining the corporate project, the scope of interests that need consideration when making business decisions, the effect of discourse on effective management, and the legitimacy of management decisions in light of the nature of the corporation. But what seems a potential drawback to one camp represents an advantage to the other side. This incongruity results not just from different preferences about outcomes, as if the camps disagreed about simple matters of taste, such as whether vanilla tastes better than chocolate. Instead, despite the similarity in basic concerns, the incongruity of the outcomes more likely stems from the lack of a consistent framework for analyzing the issues at stake.

The project here is to provide such a framework. The analysis does not intend to posit a radically new way of looking at the corporation, although the framework indeed may seem radical to some. Instead, the project intends to provide an analytical construct that sensibly attends to the concerns raised by the variety of perspectives present in the debate. It is, however, the very awareness that vagaries in the debate need proper attention that leads to a particular mode of analyzing the issues raised.

By focusing on the role that discourse should play in organizing the corporate form and the relationship between the corporation and those affected by its actions, a more descriptively accurate account of the modern corporation emerges than what traditional notions of the firm portray. What follows is a brief attempt to introduce a new "discourse theory" of the firm, inspired by the theories of political philosopher Jürgen Habermas.[187] Such a new discourse theory could help

cal speech doctrines); Siebecker, *supra* note 54 (articulating a multidisciplinary institutional framework for analyzing corporate speech).

187 For a secondary source analysis of Habermas's work, see generally Andrew Edgar, The Philosophy of Habermas (2005); James Gordon Finlayson, Habermas: A Very

answer more coherently the extent to which corporations should permit shareholders and stakeholders to play a greater role in determining the course of corporate conduct. In general, the classical notion of the firm fails to account for the evolving identity and practices of the modern corporation and, as a result, seems increasingly ill-suited to answer new questions about corporate structure that arise in an ever-changing world. In contrast, a discourse theory that attends to the continually dynamic relationship among the firm, shareholders, and society provides a normatively superior framework for answering novel questions that inevitably arise as the corporation itself continues to evolve.

A. Basic Tenets of Discourse Theory

Over the last several decades, Habermas's pragmatic theory of justice centered on rational discourse emerged.[188] The theory examines the justifications for social organizations and the legitimacy of government by looking at the rules of discourse that occur within those contexts.[189] The basic aim of the theory is to demonstrate how rules of deliberation and decisionmaking can enhance the effectiveness of organizational structures that affect our lives.[190] According to the theory, effective deliberation about the goals and practices of any organization requires crafting rules and incentives that promote autonomous expression of ideas, fair and equal participation in the deliberative process, respectful consideration of expressed viewpoints, and the ability to alter previously accepted positions through contin-

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SHORT INTRODUCTION (2005); HABERMAS AND PRAGMATISM (Mitchell Aboulafia et al. eds., 2002); LESLIE A. HOWE, ON HABERMAS (2000); 1 JÜRGEN HABERMAS (David M. Rasmussen & James Swindal eds., 2002); THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS (1978); WILLIAM OUTHWAITE, HABERMAS: A CRITICAL INTRODUCTION (1994); TOM ROCKMORE, HABERMAS ON HISTORICAL MATERIALISM (1989).

188 *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., The MIT Press 1996) (1992) [hereinafter HABERMAS, BETWEEN FACTS]; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) (1983) [hereinafter HABERMAS, MORAL CONSCIOUSNESS]; JÜRGEN HABERMAS, ON THE PRAGMATICS OF COMMUNICATION (Maeve Cooke ed., 1998) [hereinafter HABERMAS, PRAGMATICS]; 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1984) (1981) [hereinafter 1 HABERMAS, COMMUNICATIVE ACTION]; 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Press 1987) (1981) [hereinafter 2 HABERMAS, COMMUNICATIVE ACTION].

189 *See* FINLAYSON, *supra* note 187, at 43–44.

190 *See* R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1957–58 (1996); *see also* OUTHWAITE, *supra* note 187, at 109, 120.

ued discourse.[191] Although fully describing the vast body of work on discourse theory lies outside the scope of this Article, surveying some core components necessary to develop a new discourse theory of the firm remains essential.

1. Communicative Action Versus Strategic Behavior

Discourse theory represents a process-orientated approach to engaging in argument that centers on a distinction between communicative action and strategic action.[192] Strategic action arises when

> the actors are interested solely in the *success*, i.e., the *consequences* or *outcomes* of their actions [and] they will try to reach their objectives by influencing their opponent's definition of the situation, and thus his decisions or motives, through external means by using weapons or goods, threats or enticements.[193]

In contrast, communicative action represents a condition where actors aim at reaching some mutual goal.[194]

Engaging in discourse aimed at a common goal (which could be deliberation about the identity of any such goal) represents a commitment that entails a set of normative and procedural constraints on the discourse.[195] The normative rules for communicative action that necessarily develop entail a commitment by actors to participate as equals in ascertaining the rightness of any proposed action.[196] Moreover,

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191 Rainey & Rehg, *supra* note 190, at 1957–59; *see also id.* at 1965–66 ("[P]ublic discussion can improve the rationality of political deliberation only insofar as it remains sufficiently free of serious distortions and barriers in communication. At the very least, this means that in critical moments it must be possible for the public sphere to mobilize itself and place issues on the agenda, even when powerful vested interests would prefer to maintain the status quo.").

192 Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1168–69 (1995) (reviewing HABERMAS, BETWEEN FACTS, *supra* note 188).

193 HABERMAS, MORAL CONSCIOUSNESS, *supra* note 188, at 133.

194 1 HABERMAS, COMMUNICATIVE ACTION, *supra* note 188, at 307–08; *see also* Rosenfeld, *supra* note 192, at 1168–69 ("In communicative action, on the other hand, actors are oriented toward reaching a common understanding rather than achieving personal success. The model for communicative action is that of an idealized community of scientists gathered together to ascertain the truth of a scientific hypothesis." (footnote omitted)).

195 Rosenfeld, *supra* note 192, at 1169 ("In such a community, discussion would be circumscribed by a set of normative constraints, such as the need to afford each participant an equal opportunity to present arguments and the commitment to be persuaded only by the force of the argument that better comports with scientific norms of rationality. Similarly, in discussions concerning legal or moral norms, communicative action envisions a dialogue between actors who are oriented toward reaching an understanding concerning the *rightness* of the norms under consideration.").

196 *Id.*; *see also* 1 HABERMAS, COMMUNICATIVE ACTION, *supra* note 188, at 307–08.

participants in the discourse tacitly agree to being persuaded only by the rational force of arguments presented.[197] From a normative standpoint, then, it is the moral commitment to communicative action rather than to purely strategic selfish behavior that gives the initial momentum to discourse theory.[198] For discourse theory to have that initial drive, no agreement need be made about the outcome of the discourse.[199] Instead, the theory assumes that the very decision to engage on matters of import imposes upon the participants a moral obligation to respect the discourse that ensues.[200]

Communicative action does not represent only political discourse that occurs in governmental settings or formal debates about the common good. Communicative action certainly occurs in the public sphere in formal decisionmaking bodies, such as Congress, the judiciary, and state governments.[201] But that substantive discourse also occurs in "weak publics," or institutions that affect and shape public opinion.[202] Those "weak publics" include a variety of nongovernmental institutions, such as associations, interest groups, local organizations, or, arguably, corporations.[203] So, the communicative action that

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197 Rosenfeld, *supra* note 192, at 1169 ("Habermas argues that the very agreement to engage in communicative action implies a voluntary submission to certain normative constraints embedded in the discursive practice itself. Thus, given an equal opportunity to present arguments and a genuine commitment to being persuaded only by the force of the better argument in a rational discussion, actors engaged in communicative action would only accept as legitimate those action norms upon which all those possibly affected would agree *together* to embrace on the basis of good reasons.").

198 *See id.* at 1168.

199 *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 188, at 134 (discussing how actors only "commit[ ] themselves to pursuing their goals" after agreeing on prospective outcomes and normative definitions upon which the discourse will be based).

200 *See* HABERMAS, PRAGMATICS, *supra* note 188, at 326 ("I will speak of communicative action *in a strong sense* as soon as reaching understanding extends to the normative reasons for the selection of the goals themselves. In the latter case, the participants refer to intersubjectively shared value orientations that—going beyond their personal preferences—*bind* their wills.").

201 Rainey & Rehg, *supra* note 190, at 1963; *see also* Rosenfeld, *supra* note 192, at 1169.

202 HABERMAS, BETWEEN FACTS, *supra* note 188, at 307–08; *see also* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109, 115 (Craig Calhoun ed., 1992) (positing that communicative discourse takes place in common arenas outside the mainstream liberal public sphere).

203 Rainey & Rehg, *supra* note 190, at 1963–64 ("'[W]eak publics' [are] composed of the diverse arenas more or less limited to the formation of public opinion, that is, without decisionmaking powers. Such publics are made up of the various kinds of voluntary associations and social movements—such as the Civil Rights movement, environmental groups, Mothers Against Drunk Driving, The Christian Coalition, and so forth—which help form public opinion and, in addition, provide their members with arenas for the formation and enactment of social identities." (internal quotation marks omitted)).

tacitly binds participants to certain rules for engaging in discourse occurs throughout a variety of societal institutions.

2. The Discourse Principle

The discourse principle represents an essential guiding hallmark for proper discourse. In essence, the discourse principle requires the settling of contested claims through communicative action under procedures that render the outcome legitimate.[204] The principle requires mutual recognition of the participants' rights to take part in the debate and respectful consideration of viewpoints raised.[205] Individuals must be permitted to question propositions, to introduce new ideas into the discourse, and to change their opinions over time.[206] Moreover, speakers must remain free from coercion, whether internal to the debate or external to the discussion.[207]

Certainly, the discourse principle represents an ideal that does not necessarily reflect the reality of discourse that occurs in most institutional settings.[208] Nonetheless, the rule reflects what should be universally acceptable commitments from those who engage in dialogue to solve shared problems.[209] For only through the minimum requirements of what the discourse principle mandates can participants ensure their voices will be heard and considered.[210] Although the discourse principal is perhaps an ideal yardstick against which actual modes of deliberation can be measured, it represents an essential procedural mechanism to justify organizational action.

3. Legitimacy and Universal Acceptance

Closely related to the discourse principle is the need for legitimacy. For Habermas, the legitimacy of laws and rules depends on the ability of those affected to view themselves as authors of the rules

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204 Rosenfeld, *supra* note 192, at 1169.

205 HABERMAS, BETWEEN FACTS, *supra* note 188, at 108–09; FINLAYSON, *supra* note 187, at 43–44; Rainey & Rehg, *supra* note 190, at 1958; Rosenfeld, *supra* note 192, at 1169.

206 HABERMAS, MORAL CONSCIOUSNESS, *supra* note 188, at 89; FINLAYSON, *supra* note 187, at 43.

207 *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 188, at 89 ("(3.1) Every subject with the competence to speak and act is allowed to take part in a discourse. (3.2) a. Everyone is allowed to question any assertion whatever. b. Everyone is allowed to introduce any assertion whatever into the discourse. c. Everyone is allowed to express his attitudes, desires, and needs. (3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2)." (footnote omitted)).

208 *See* Rosenfeld, *supra* note 192, at 1170–71.

209 Rainey & Rehg, *supra* note 190, at 1957.

210 *See* FINLAYSON, *supra* note 187, at 115–16.

promulgated.[211] In order for individuals to view themselves in that light, the practical discourse producing laws or rules must follow certain procedures.[212] In essence, the procedural requirements follow what the discourse principle mandates regarding full, free, and equal participation in the deliberative process among affected individuals.[213]

What also makes the outcome of any particular discourse legitimate is the common acceptance of the *procedures* for discourse.[214] Participants in any debate might not universally assent to the *outcome* reached in a deliberation entered into to resolve some contested course of action.[215] Legitimacy is not dependent upon unanimity on the substantive outcome. But common acceptance of the procedural mechanisms that produce an outcome remains essential.[216] Only through the ability of participants to view themselves as authors of the law will they feel justly bound to obey.[217]

4. Benefits to Discourse

Habermas and other philosophical allies suggest manifold benefits to discursive politics, both practical and theoretical. Although surveying each might provide unnecessary distraction, mentioning two seem particularly important to the corporate setting to which this theory could be applied.

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211 *See* HABERMAS, BETWEEN FACTS, *supra* note 188, at 454 ("The addressees of law would not be able to understand themselves as its authors if the legislator were to discover human rights as pregiven moral facts that merely need to be enacted as positive law.").

212 *See* A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 798–805 (2003) (comparing the procedures required by Habermas's discourse theory with the procedures used to make formal Internet standards).

213 See Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 805 (1996) ("[T]he legitimacy of law is to be gauged from the standpoint of a collectivity of strangers who mutually recognize one another as equals and jointly engage in communicative action to establish a legal order to which they could all accord their unconstrained acquiescence. By means of communicative action, a reconstructive process is established through which the relevant group of strangers need only accept as legitimate those laws which they would all agree both to enact as autonomous legislators and to follow as law abiding subjects.").

214 Rainey & Rehg, *supra* note 190, at 1957.

215 *See* FINLAYSON, *supra* note 187, at 112 (articulating Habermas's view that, given the diverse perspectives in a society, "[t]he most that can be expected is that policies, decisions and laws can find some resonance with the ethical self-understanding of each of its various communities").

216 *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 188, at 134.

217 William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 992 (1998).

First, discourse theory better protects individual rights.[218] By encouraging and maintaining institutions in which individuals can participate in shaping the common social goals, individuals gain a sense of authority over their own fate.[219] What results is a vibrant society that continually reflects on the role of government, the rights and responsibilities that individuals enjoy, and the relationship between government and affected citizens.[220] That continual reflection allows individuals to become active participants in defining the law that governs.[221]

The second important benefit is the sense of fairness that the process of reasoned deliberation produces.[222] Discourse theory requires providing an even playing field upon which discourse occurs.[223] To the extent deliberation in the public sphere suffers from inequities of bargaining power, disparities in material resources that affect communicative impact, or differences in other endowments, discourse theory requires a certain rebalancing of resources.[224] Even if the inequalities cannot be eviscerated, discourse theory suggests dispersing the inequalities across the parties in the deliberation to ensure those disparities have minimal impact.[225] Attention to equalization within the discursive debate ensures a sense of fairness that facilitates acceptance, if not satisfaction, with the outcome of the deliberation.[226]

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218 *See* FINLAYSON, *supra* note 187, at 112–13 (discussing Habermas's theory that a "system of rights enshrined in law" directs what inputs from civil society should be absorbed by the government to produce acceptable law); Forbath, *supra* note 217, at 992 (describing how Habermas's "system of rights" ensures civic autonomy and legitimate lawmaking).

219 *See* Forbath, *supra* note 217, at 992.

220 *Id.*

221 *See id.* at 992 ("A constitutionally self-limiting state, a scheme of rights that ensures a politically autonomous citizenry and a network of vibrant, legally vouchsafed public spheres—together, these may enable the lifeworld and its communicative or intersubjective rationality to flourish and thereby secure the emancipatory hopes Weber abandoned and Marx mistakenly lodged in the economy.").

222 *See id.* at 991 (describing how discourse theory scrutinizes the bargaining process, requiring it to be "regulated from the standpoint of fairness").

223 HABERMAS, BETWEEN FACTS, *supra* note 188, at 165–67.

224 *See id.* at 166–67 ("[N]on-neutralizable bargaining power should at least be disciplined by its equal distribution among the parties . . . [securing] all the interested parties with an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing."); *see also* Forbath, *supra* note 217, at 991.

225 *See* HABERMAS, BETWEEN FACTS, *supra* note 188, at 166–67.

226 *See* Forbath, *supra* note 217, at 991 (articulating Habermas's view that lawmaking cannot be legitimate if the bargaining process is not equalized).

B. *Discourse Theory and the Corporation*

Understanding some important tenets of Habermas's discourse theory helps ground an extension of discourse theory to the corporate realm. Applying, and to some extent modifying, those essential discursive tools allows for a retooling of the relationship between the shareholder and the corporation. Such a reconsideration of the basic rights and responsibilities of shareholders and corporate managers does not really intend to produce something remarkably new. Instead, the analytical tool simply helps make sense of an evolution of a relationship well underway. To that end, discourse theory at bottom provides descriptive accuracy that adherence to a static, and largely outmoded, notion of the corporation cannot provide. And if a discourse analytical framework more accurately attends to the dynamic relationship between shareholders and the corporation, the approach should also provide some helpful guidance on the question whether shareholders should possess the right to nominate directors using the corporate proxy.

Although scholars have considered the role rhetoric plays in corporate life[227] and have extended discourse theory principles to corporate law problems,[228] Habermas expressed some doubt about the role corporations actually play in promoting fair discourse.[229] The concern stems from the massive wealth disparity and control that tips in favor of corporations and causes a distortion in the communicative impact of participants in the deliberative process.[230] Despite that concern, many scholars recognize how discourse within a corporate setting can

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227 *See, e.g.*, Fairfax, *supra* note 14; Fairfax, *supra* note 113.

228 *See* Angus Corbett & Peta Spender, *Corporate Constitutionalism*, 31 SYDNEY L. REV. 147, 149–52 (2009) (articulating a framework for evaluating the legitimacy of corporate governance and borrowing, in part, from Habermas's description of deliberative politics).

229 HABERMAS, BETWEEN FACTS, *supra* note 188, at 350 ("The constitutional structure of the political system is preserved only if government officials hold out against corporate bargaining partners and maintain the asymmetrical position that results from their obligation to represent the whole of an absent citizenry . . . ."); *see also* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (Max Pensky ed. & trans., 2001) (1998); Rosemary J. Coombe & Jonathan Cohen, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029, 1046 (1999) ("Habermas, like many contemporary constitutional theorists, clearly recognizes the dangers of corporate control and concentration of ownership, and the effects of free market principles in limiting the cultural resources, information, and modes of argumentation available to us in a consumer society.").

230 *See* Akilah N. Folami, *From Habermas to "Get Rich or Die Tryin": Hip Hop, the Telecommunications Act of 1996, and the Black Public Sphere*, 12 MICH. J. RACE & L. 235, 264–65 (2007).

contribute meaningfully to the greater political dialogue.[231] The concern about gross disparities simply highlights the need to correct those impediments to meaningful discourse.[232] Fidelity to the aim of discourse theory requires an attempt at legitimizing the processes of corporate control and the effects that corporate decisions have on society.[233]

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231 *Id.* at 241 ("While Habermas was (and remains) skeptical as to the realization of his ideal public sphere given contemporary societal conditions (i.e., corporate and market controlled mass media, pluralism, rampant social inequalities and stratification), other scholars, in examining Habermas' historical account of the public sphere, have critiqued the inherent and ideological inconsistencies of his 'utopian' ideal. In their examinations of Habermas' public sphere, they have also built and expanded upon his original vision. They have found 'political discourse' in the most unlikely of places, including the market and mass media, and, moreover, have explored the ways in which the law has stifled, rather than facilitated, such discourse. Scholars such as David Skover, Rosemary Coombe, Kenneth Aoki and others have explored the ways in which the market, the mass media, and even commodified identities can be used as a source and basis of political resistance to the larger public discourse. In fact, they have argued that failing to acknowledge, as Habermas does, such sites as spaces of contestation simply misses the mark when analyzing how individuals of the current, post-modernist, 21st century, consumer-oriented, mass-mediated, society form views about themselves and others, which in turn shapes their political identities and expressions." (footnotes omitted)).

232 *See* Coombe & Cohen, *supra* note 229, at 1038–39 ("Most contemporary constitutional theorists now appear to agree that some form of regulation of mass media is necessary to achieve democratic political goals, given that mass communications controlled by private actors and governed by market forces simply do not permit the diversity of perspectives necessary for the flourishing of dialogic democracy. State regulation of speech is thus supported as necessary to promote free speech. . . . Access to media must be expanded if we are to secure conditions for effective communication to promote recognition of diverse interests in the political process and this may well involve regulation of the exercise of private property—limits to the rights of shopping mall owners to control access to their properties, and regulations limiting campaign expenditures, for the most oft-cited examples. By excluding realms of private law and market forces from the space he regards as political, the model of democracy Habermas provides would keep existing allocations of communicative power intact while entrenching corporate dominance over realms of public communication." (footnotes omitted)); *see also* Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism*, 35 INDUS. L.J. 367, 373 (2006) ("Nevertheless, it is possible to distinguish corporatism from deliberative democratic theory in at least three respects. Firstly, deliberative democracy, at least in the form proposed by Jürgen Habermas, indicates that policy-making should be responsive to groupings of all interests which spontaneously emerge within civil society, and like pluralism, calls into question the privileged representation of management and labour under corporatist structures.").

233 *See* Rosenfeld, *supra* note 192, at 1175 ("Actually, Habermas accepts the inevitability of the administrative state with its bureaucracy, large corporate organizations, and dominant mass media. What his alternative paradigm aims to accomplish is to explore how to restore personal autonomy and dignity without abandoning the quest for factual equality under the material conditions characteristic of the modern welfare state. Habermas's proposed alternative, the proceduralist paradigm of law animated by the discourse principle, is, above all, elegantly simple. Starting from a picture of equal 'consociates' under law as autonomous and as reciprocally recognizant of each other's dignity, Habermas postulates that these consociates would have to regard as legitimate any laws of which they were both the authors and the addressees. In other

The amenability of corporate law and organization to discourse theory rests on the recognition of discourse theory's application to nongovernmental structures.[234] Some suggest that corporate law is especially suitable because corporations possess disparate power in controlling public opinion and debate that renders them amenable to discourse principles.[235] Accordingly, corporate power should be democratized to permit greater access to the deliberative processes.[236] In that way, individuals could have a greater voice in determining not just the internal operations of the company, but, more importantly, the position the corporation takes on any issue of public import.

Conceived in this way, the application of discourse theory stems not from a concern about restructuring the nature of the firm. Quite frankly, the historical relationship between shareholders and management, and the evolution of that relationship, possesses little initial significance. Instead, the impact that corporate speech has on government and on discourse within the public sphere sparks the need for a corporate discourse theory.[237] In order to democratize the cor-

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words, if a law can be reconstructed through the discourse principle counterfactual as being genuinely self-imposed pursuant to a consensus among all those who come under its sweep, then any rational actor must acknowledge its normative validity. Consistent with this, Habermas's proceduralist paradigm does not predetermine the content of any legitimate law but merely lays down the procedural requirement that laws satisfy the discourse principle to establish their normative validity." (citation omitted)).

234 *See* Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1, 21 n.67 (2006) ("Most prominent in this respect is the theoretical architecture of deliberative democracy—complex post-national coordination of grass-roots deliberative levels, within an overarching constitutional design still populated by centralized authorities."); *see also* Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 483 & n.74 (2005) (applying Habermas's discourse theory, including the requirement of a normative commitment to procedural fairness, to assess the legitimacy of the private law system).

235 *See* Gabriel Motzkin, *Habermas's Ideal Paradigm of Law*, 17 CARDOZO L. REV. 1431, 1435 (1996) ("While institutionalizing the protection of the rights of the citizenry poses a difficult and never-ending problem, institutionalizing the active powers of the citizenry as lords and overseers of the political order is an even more difficult problem. Here the recourse to the apparently extra legal-public sphere serves Habermas well: a radicalization of his proposal would be one which would strip current semipublic bodies of their anonymity and informality and endow the semipublic bodies of a corporate citizenry with analogous powers. The recipe, then, is that of democratizing corporate power and its transformed application outside of the sphere to which it has been previously confined. Against the objection that such a democratization would wound the apparent inviolacy of individual rights, Habermas's analysis concludes that such an inviolacy of individual rights is only apparent and theoretical. Individual rights are already dead. The question is how to revitalize them.").

236 *Id.*

237 *See* Corbett & Spender, *supra* note 228, at 149–50 (describing corporate constitutionalism as "a normative framework through which we can assess the legitimacy of corporate decision-making"). The theory of corporate constitutionalism articulated by Corbett and Spender

poration and the processes by which corporate positions are determined, greater access to the deliberative process becomes necessary. Reconsidering the internal relationship between shareholders and management, or the external relationship between the corporation and affected stakeholders, becomes relevant as a sort of byproduct of the greater need to afford legitimacy to the political process generally.[238]

III. Efficient Shareholder Suffrage Under a Discourse Theory of the Firm

The Supreme Court's decision in *Citizens United*, along with the SEC's expansion of shareholder nomination rights, provides a special impetus for embracing a new discourse theory for the firm. For, if *Citizens United* marks a substantial step in the evolution of the corporation, taking proper account of that new stage in corporate existence seems essential in order to address sensibly what rights shareholders should possess within that setting.

A. The New Rule for Enhanced Shareholder Suffrage

Although the right of certain shareholders to nominate directors on the corporate proxy remains quite fresh under Rule 14a-11, the debate about shareholder control over the corporation remains decades old.[239] Attitudes about the basic nature of the corporation have evolved, with views of the corporation changing from entities dedicated to short-term shareholder wealth maximization to institutions that affect, if not control, some of the most basic aspects of social, political, and economic life. Depending on the basic nature of the corporation accepted at the outset, the role of shareholder voting changes

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relies on three principles: "1. Accountability—corporate decision-making processes should be characterized by a separation of decision-making powers[;] 2. Deliberation—corporate decisions should be subject to deliberation[; and] 3. Contestability—corporate decisions which do not track the interests of members should be readily contestable." *Id.* (citing Stephen Bottomley, The Constitutional Corporation 12 (2007)).

238 For a discussion of the need to apply discourse theory to corporate actions in order to sustain a proper balance over public communication, see Coombe & Cohen, *supra* note 229, at 1038–39.

239 *See* Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the Decoupling of Economic and Voting Rights?*, 55 Vill. L. Rev. 93, 105 (2010) ("As far back as 1977, the SEC had Corporate Governance Hearings and among many other questions requested comment on whether shareholders should have access to corporations' proxy soliciting materials for the purpose of nominating persons of their choice to serve on boards."). For an early examination of enhanced shareholder access to corporate proxies, see Robert N. Shwartz, Note, *A Proposal for the Designation of Shareholder Nominees for Director in the Corporate Proxy Statement*, 74 Colum. L. Rev. 1139 (1974).

as well. To the extent the corporation exists simply to create wealth in readily identifiable short-term monetary gains, shareholders play a largely passive role in order to ensure the corporation realizes its natural goal.[240] In contrast, if society construes the corporation as more than a profit-maximizing entity, the role of the shareholder becomes much more pronounced.[241] Questions about the goal of the corporate project, the means to achieving decided ends, and the impact of corporate policies and practices on communities other than shareholders and investors require some attention. Exactly what balance to maintain between profit maximization and responsiveness to societal demands about responsible corporate behavior remains an open inquiry. That the debate occupies a fever pitch remains undeniable, especially as corporate scandals loom large, bankruptcies or takeovers of financial institutions once deemed too important to fail cross the transom with regularity, and citizens increasingly report the effect of corporate influence on public policies. In describing the debate, however, many miss the essential task of identifying the basic nature of the corporation at stake. By recasting the debate in terms of a new discourse theory of the firm, common ground may appear on the horizon for what otherwise remains two ships passing in the night.

1. Description of the New Rule

On August 25, 2010, the SEC enhanced the ability of certain shareholders to nominate directors by adopting Rule 14a-11.[242] Pursuant to the new rule, shareholders owning a minimum threshold of stock over a certain time period can require the company to include the shareholder's nominee(s) for the board of directors in its proxy materials.[243] In particular, shareholders (or groups of shareholders) enjoy access to the corporate proxy for nominating directors if they own securities representing at least three percent of the voting power and have held those securities for at least three years.[244] Moreover, to take advantage of the nomination rights, shareholders must certify that they do not seek more than one quarter of the seats on the

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240 *See supra* notes 101–04 and accompanying text.

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

242 *See* Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 12.

243 Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–83 (Sept. 16, 2010) (to be codified at 17 C.F.R. pt. 240).

244 *Id.*

board[245] and do not intend to take over the company or seek a change of control.[246]

Rule 14a-11 provides a significant expansion of shareholder rights to control who manages the corporation on the shareholders' behalf and the business practices the corporation pursues. Within the existing regulatory framework, however, shareholders possess rather limited power to effect corporate change.[247] As the SEC acknowledged in the release for the proposed rule, "[m]any commenters have noted that current procedures available for director nominations afford little practical ability for shareholders to participate effectively in the nomination process and, through that process, exercise their rights and responsibilities as owners of their companies."[248]

To the extent shareholders deem replacing existing board members essential to improving business practices, three basic options exist. First, shareholders can mount a proxy contest that must comport with existing rules.[249] Because shareholders bear the cost of the proxy solicitation and risk liability for failing to comply with SEC rules and regulations governing solicitation, this route becomes impracticable to most shareholders.[250] Second, Exchange Act Rule 14a-8 enables shareholders to submit certain nonbinding proposals for consideration in the company proxy materials.[251] Although shareholder activists of

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245 *Id.* at 56,784–85.

246 *Id.* at 56,784.

247 *See* Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, but Not Too Late*, 43 AM. U. L. REV. 379, 383–401 (1994) (discussing the historical barriers to shareholder participation embedded in the securities laws).

248 Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,027 (proposed June 18, 2009) (to be codified at 17 C.F.R. pt. 240).

249 *Id.*; *see also* Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy*, 61 VAND. L. REV. 475, 478–87 (2008) (describing the methods shareholders use to gain access to the corporate proxy under prior law).

250 *See* Facilitating Shareholder Director Nominations, 74 Fed. Reg. at 29,028; Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688 (2007) (stating that waging a proxy contest could cost several hundred thousand dollars); *see also* Roger Lowenstein, *A Seat at the Table*, N.Y. TIMES MAG., June 7, 2009, at 11, 12 ("Shareholders already have the right to wage a proxy fight, but that means paying for their own ballot to be circulated. To do so is difficult and expensive, and management will use corporate funds (which belong to the shareholders!) to campaign against them. It's as if the political party out of power had to set up alternate polling places. This is why management candidates almost always win."); *New Proxy Access Could Cost Flexibility, DSBA Group Says*, DEL. L. WKLY., Aug. 5, 2009, at 2 ("When shareholders send out their own proxy materials, it can cost in the tens of millions of dollars.") [hereinafter *New Proxy Access*]; *S.E.C. Chief Wants Better Shareholder Voting*, N.Y. TIMES (Nov. 5, 2009), http://www.nytimes.com/2009/11/05/business/05sec.html?_r=&pagewanted=print ("Shareholders are able to nominate directors but can only do so through a proxy fight, which many contend is expensive and burdensome.").

251 17 C.F.R. § 240.14a-8 (2010).

all stripes increasingly make use of this method to encourage changes in corporate policies, Rule 14a-8 specifically excludes proposals relating to the election of directors.[252] As a third option, shareholders may withhold their votes for management-nominated directors or engage in a "vote no" campaign.[253] Because the existing proxy rules prohibit soliciting other shareholders in "vote no" campaigns and many corporations provide for simple plurality election regardless whether a candidate receives a majority vote, this route for exercising shareholder control seems rather impotent.[254]

Although not a method of exercising control while remaining a shareholder, the "Wall Street Rule" reflects a market-based method to influence corporate managers.[255] According to the rule, shareholders who believe directors and officers mismanage a company should simply sell their shares rather than wage a fight to force shifts in corporate policies.[256] Although it might be rational for shareholders to sell stock in a poorly managed corporation rather than to expend resources to effect change, the Wall Street Rule does not provide a sufficiently sensible guiding light for those shareholders who seek to implement long-term strategies or who view corporations as something other than fungible probability packages of risk and reward.[257]

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252 *Id.* § 14a-8(i)(8); *see also* Karmel, *supra* note 239, at 108.

253 Facilitating Shareholder Director Nominations, 74 Fed. Reg. at 29,027.

254 *Id.* at 29,028 ("With regard to withhold vote and vote no campaigns, because some companies use plurality voting for board elections and therefore candidates can be elected regardless of whether they receive more than 50% of the shareholder vote, withhold vote campaigns may be limited in their effectiveness. In addition, restrictions under the proxy rules may limit the effectiveness of withhold vote and vote no campaigns because shareholders cannot solicit proxy authority through these campaigns."). *But see* Colin J. Diamond, *Another View: Recent SEC Proposals on Proxy Access*, CORP. COUNS., Sept. 2009 ("[T]he shift from plurality voting to majority voting has given teeth to a 'no' vote, and has enhanced shareholders' ability to hold directors accountable.").

255 Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 619 (2006) (describing the Wall Street Rule as the practice of shareholders selling their stock when dissatisfied with corporate management or performance). *But see* Bebchuk, *supra* note 250, at 716 (arguing that the ability of shareholders to sell their shares on the market, reflected in the Wall Street Rule, does not provide a satisfactory alternative to replacing corporate directors).

256 *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 676 (1995) ("Shareholders of Berle-Means corporations thus are rationally apathetic. Instead of exercising their voting rights, disgruntled shareholders typically adopt the so-called 'Wall Street rule'—it's easier to switch than fight—and sell out. The same would be true of other corporate constituents on whose behalf claims to control of the decision-making apparatus might be made, such as employees or creditors." (footnotes omitted)).

257 *See* Edward S. Adams, *Bridging the Gap Between Ownership and Control*, 34 J. CORP. L. 409, 425 (2009).

Although the SEC originally intended to vote on proposed Rule 14a-11 in early November 2009, after heated debate and public commentary, the Commission decided to delay a final vote until early 2010.[258] On December 14, 2009, the SEC announced it was reopening the comment period for the proposal under which shareholders nominate directors.[259] In the press release, the SEC staff stated its expectation to make a recommendation about implementation of the proposed rule to the Commission by early 2010.[260] The commissioners of the SEC and other commentators remained sharply divided over the feasibility and desirability of increased shareholder access to the director-nomination process.[261] In July 2010, however, Congress enacted the Dodd Act, which authorizes, but does not require, the SEC to promulgate rules giving shareholders access to the corporate proxy.[262] Finally, on August 25, 2010, the SEC adopted Rule 14a-11, which gives shareholders the right to nominate directors using the corporate proxy.[263]

2. Anti-Suffragist Concerns

In the debate over Rule 14a-11, a number of arguments against adoption were raised in commentary to the SEC and in the public arena.[264] Those comments have largely been made by corporate man-

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258 *See* Sarah N. Lynch, *Activists, Take Note: SEC Delays a Proxy Vote*, WALL ST. J., Oct. 3–4, 2009, at B3.

259 Press Release, U.S. Sec. & Exch. Comm'n, SEC Re-Opens Public Comment Period for Shareholder Director Nomination Proposal (Dec. 14, 2009), *available at* http://www.sec.gov/news/press/2009/2009-265.htm ("The Securities and Exchange Commission today announced that it is re-opening the public comment period for its shareholder director nomination proposal to seek views on additional data and related analyses received by the Commission at or after the close of the original public comment period on August 17.").

260 *Id.*

261 *See, e.g.*, Diamond, *supra* note 254 ("Proponents of proxy access believe that lowering these barriers and eliminating these costs would enhance shareholder democracy. Detractors, on the other hand, believe that proxy access lowers the cost of nominating a director to such a point that it becomes something that can be done almost casually, including by a shareholder looking to advance its own selfish interests at almost no cost."). For a general summary of positions against the proposal, see Floyd Norris, *Greater Say on Boards Holds Risks*, N.Y. TIMES, May 22, 2009, at B1 [hereinafter Norris, *Greater Say*]; Floyd Norris, *With Power, the Risk of Abuse*, N.Y. TIMES, July 17, 2009, at B1 [hereinafter Norris, *With Power*]. For a proponent's view of the proposal, see Gretchen Morgenson, *Elect a Dissident, and You May Win a Prize*, N.Y. TIMES, May 24, 2009, at B1.

262 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010).

263 Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 12; Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782–87 (Sept. 16, 2010) (to be codified at 17 C.F.R. pt. 240).

264 Jaffari & Ettelson, *supra* note 8, at 5 ("The SEC has received more than 500 comment

agement and their counsel,[265] although scholars, practitioners, and even some judges expressed disdain for enhanced shareholder voting as harmful to the basic project of the corporation.[266] The debate over proposed Rule 14a-11 brought many of these criticisms to light. But many of the arguments have been developing steadily as shareholders have adopted more activist positions in challenging the courses corporations pursue. Whether larger institutional shareholders interested in maximizing wealth or investors with particular CSR projects in mind, shareholders have become increasingly active in challenging management actions.[267] Covering some of those arguments against Rule 14a-11 and enhanced shareholder access to the corporate proxy helps elucidate the need for a new perspective in analyzing the basic relationship between shareholders and the firm.

a. Diminished Pool of Directors

One rather simple argument against granting shareholders the ability to nominate directors is the fear that the pool of candidates to serve on boards will shrink.[268] The basic notion is that candidates otherwise willing to serve on corporate boards would give pause if faced with the potential embarrassment of rejection by shareholders.[269] That rejection ostensibly would come from the ability of shareholders to nominate directors of their own choosing. Unless this fear was widespread, the impact of this newfound diffidence on the part of erstwhile corporate board candidates would seem uncertain. Nonetheless, any diminution of the pool of qualified candidates might logically have a negative impact on the ability to recruit and retain talented

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letters to its proxy access proposal."); *see also* Norris, *Greater Say*, *supra* note 261; Norris, *With Power*, *supra* note 261.

265 *See* Norris, *Greater Say*, *supra* note 261 ("Corporate managements hate the idea . . . . Companies warn the rule will lead qualified director candidates to refuse to serve rather than face the possibility of rejection by the shareholders.").

266 *See* Bainbridge, *supra* note 255, at 619–28 (suggesting that expanding shareholder franchise would cause deleterious effects on the corporation's basic project); Andrew R. Brownstein & Igor Kirman, *Can a Board Say No when Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 24 (2004) (arguing that, in some instances, corporate directors should resist shareholder pressure tactics).

267 For a general description of increased shareholder activism, see Siebecker, *supra* note 13, at 623–26; Siebecker, *supra* note 115, at 123–26.

268 *See* Norris, *Greater Say*, *supra* note 261 ("Companies warn the rule will lead qualified director candidates to refuse to serve rather than face the possibility of rejection by the shareholders."); Norris, *With Power*, *supra* note 261 ("Companies opposed to such a rule—and there are many—voice fears . . . and say the prospect of a contested election could keep some qualified people from agreeing to join boards.").

269 Norris, *Greater Say*, *supra* note 261.

corporate managers. The question for this potential drawback, as with others no doubt, is whether the potential costs outweigh any benefits that enhanced shareholder suffrage might provide.

b. Poor Decisionmaking

Some fear that giving shareholders the ability to nominate directors will undermine the quality of board decisionmaking.[270] The core of the concern is the ability of shareholders to manipulate directors by threatening a proxy fight unless shareholder demands are met.[271] Under the new rule, only certain large shareholders with long-term holdings can take advantage of the nomination privilege.[272] But the fear is that the interests of large holders or institutional investors might not properly align with the best interests of the corporation or the diffuse masses of shareholders who cannot avail themselves of the nomination privilege.[273] As a result, shareholders may use the proxy nomination process to extort gain beneficial to themselves but harmful to the corporation.[274] In effect, then, shareholder nomination of directors will corrupt the incentives of directors and steer the management down a path inconsistent with the best interests of the corporation.[275]

What compounds this potential problem is the fear that shareholders will nominate directors beholden to certain political, social, or

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270 *See* Lipton & Savitt, *supra* note 131, at 744–45 (positing that activist special interest shareholders act to the detriment of the broader corporate good); Norris, *With Power*, *supra* note 261.

271 Norris, *With Power*, *supra* note 261 ("A big stockholder with interests at odds with that of the other stockholders will privately inform board members what it wants . . . . The board will understand that to stiff the stockholder risks a proxy fight, perhaps ostensibly based on concerns not at all related to the stockholder's demands. Directors who don't want a proxy fight will quietly go along." (internal quotation marks omitted)).

272 *See supra* notes 242–46 and accompanying text.

273 *See* Norris, *With Power*, *supra* note 261.

274 *See id.*; *see also* Lipton & Savitt, *supra* note 131, at 745–46 ("Properly conceived, a director's obligation is to manage the affairs of the corporation to ensure its sustainable long-term growth. But certain vocal shareholders, notably hedge funds and arbitrageurs, invest over much shorter time horizons—they are primarily financial engineers interested in the largest possible profit in the shortest period of time, who usually maintain laser-beam focus on quarter-to-quarter earnings—and they accordingly favor a short-term spike in the share price over long-term wealth creation." (internal quotation marks and footnotes omitted)).

275 *See* Diamond, *supra* note 254 ("Detractors, on the other hand, believe that proxy access lowers the cost of nominating a director to such a point that it becomes something that can be done almost casually, including by a shareholder looking to advance its own selfish interests at almost no cost."). In contrast, for a detailed analysis of how giving shareholders the right to nominate directors on the corporate proxy would lead to higher quality corporate decisionmaking, see Fairfax, *supra* note 14, at 82–96.

moral causes irrelevant to the basic project of the corporation.[276] Because corporate officers and directors will remain bound by the same fiduciary duties to shareholders, some fear a lack of transparency will arise.[277] Despite ostensibly acting on behalf of the corporation in concert with fiduciary obligations, directors may secretly embrace hidden agendas that promote the causes of special interests or constituencies wholly disconnected from the corporate project.[278] Rather than focusing on the bottom line, directors might pursue environmental initiatives or forego lucrative projects that might have a negative impact on communities in which the company operates.

This last permutation of the fear that shareholders will corrupt the ability of directors to comport with their fiduciary duties seems more like a critique of the development of CSR and SRI. A growing number of consumers and investors employ a variety of social, environmental, or ethical criteria in determining whether to purchase a company's products or stock.[279] That directors take into account the interests of those shareholders does not really provide a strike against the integrity of the board. Quite to the contrary, the consideration of interests actually possessed by shareholders would better comport with the directors' fiduciary duties than if directors made decisions based on some fictitious and stilted view of shareholders as purely, selfishly interested in wealth maximization.[280] There may indeed be a real concern that certain large shareholders might extort the board for private gain based on threats of proxy fights. But focusing the board on matters relevant to the corporation's actual shareholders hardly seems like a corruption of corporate governance and management, regardless of the substance of the interests the shareholders might espouse.

c. Shareholder Incompetence

A host of related concerns focus on the incompetence of shareholders to make informed and effective choices regarding director

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276 *See* Clark S. Judge & Richard Torrenzano, *Capitalism by Proxy Fight*, WALL ST. J., Nov. 23, 2009, at A21 ("The surface discussion will be about 'say on pay,' or 'global warming disclosure,' or 'sustainability reporting.' The underlying substance—and the critical change in corporate governance—is about placing people on boards who answer to constituents, not investors.").

277 *See id.*

278 *See id.*

279 *See* Siebecker, *supra* note 115, at 117, 123–24.

280 *See id.* at 162–69.

nominations.[281] From a structural standpoint, although directors remain bound by fiduciary duties to act in the best interests of the corporation, shareholders face no such duties to act on the corporation's behalf or in the interest of other shareholders.[282] As a result, shareholders may embrace unbridled self-interest or act on a whim in nominating directors. The concern targets the institutional incompetence of shareholders to make decisions in the best interests of the corporation because those shareholders remain unbound by the legal duties that constrain the decisions of corporate officers and directors.

In one sense, what results is an apparent agency gap.[283] Shareholders remain free to promote their selfish interests in nominating directors, but those directors will then be beholden to particular shareholder interests. As a result, the directors will not act on behalf of the corporation as a whole.[284] This might not seem like a classic agency dilemma because the directors will nonetheless be bound by fiduciary duties to act in the best interests of all shareholders rather than just a few. Still, the prospect that directors will shirk their duties and take into account the special interests of those shareholders responsible for vaulting them onto the board poses a potential harm.

Beyond the structural incompetence that the absence of fiduciary duties might cause, shareholders remain plagued by a variety of cognitive limitations that hamper their decisionmaking. At the outset, selecting an appropriate nominee for the board entails substantial effort and cost to become adequately informed.[285] Even the relatively large shareholders who gained the right to nominate directors under the new rule might not have an incentive to bear that cost and therefore might skimp.[286] As a result, the process of selecting directors will get adulterated, with shareholders potentially making ill-informed choices that do not even suit their own interests, let alone those of the corporation.

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281 *See* K.A.D. Camara, *Shareholder Voting and the Bundling Problem in Corporate Law*, 2004 WIS. L. REV. 1425, 1472–86; Karmel, *supra* note 239, at 95.

282 Karmel, *supra* note 239, at 95 ("[U]nlike directors, shareholders of public companies do not owe any fiduciary duties to other shareholders unless they exercise control.").

283 For a discussion of the problem of agency gaps, see Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231, 231–32 (2008); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–09 (1976).

284 *See* Lipton & Savitt, *supra* note 131, at 744; Norris, *With Power*, *supra* note 261.

285 Camara, *supra* note 281, at 1472–73.

286 *See id.*

Moreover, just like voters in the general electorate, shareholders face problems of bounded rationality that hamper their ability to act in their own best interests.[287] Shareholders use heuristic shortcuts to make decisions when faced with excessive costs of investigation and understanding.[288] Additionally, shareholders might not be able to make sense of the information gathered or discern whether the information remains reliable.[289] Although directors certainly are not immune from the cognitive dissonance shareholders experience,[290] the institutional position of directors makes them less vulnerable to its effects. Why? Directors have available to them the large resources of the corporation and also have access to information due to their special position in the company. Those distinguishing factors go a long way in helping directors escape the pitfalls that render shareholders somewhat less competent to make adequately informed decisions.

d. Management Distraction

Many fear that giving shareholders access to the corporate proxy will unnecessarily distract directors and harm their ability to manage the corporation effectively.[291] To the extent that shareholders can initiate changes in board composition, directors may find themselves in perpetual campaigns for office.[292] Rather than focusing on running the company, directors will engage shareholders with savvy communications designed to promote the directors as effective managers.[293] Because some research demonstrates shareholders do not have consistent preferences over time,[294] the need to campaign and maintain shareholder acceptance may take precedence over standard business

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287 *Id.* at 1478; Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 434–37 (2003).

288 Camara, *supra* note 281, at 1479; *see also* Paredes, *supra* note 287, at 437–43.

289 *See* Camara, *supra* note 281, at 1479 ("[Bounded rationality] is a further reason to think that directors are more likely to make shareholder-wealth-maximizing decisions than are shareholders. Shareholders caught up in the latest news item, say the exploitation of Chinese garment workers or a prominent academic attack on a particular governance tool, may do themselves more harm than good. Second, even if the better incentives of shareholders compensate for their bounded rationality, this bounded rationality might bias the information provided by directors. Within the limits of the securities laws and common-law prohibitions against fraud, directors have wide latitude to control the release and prominence of news. Rather than provide a thorough and digestible stream of information intended to appeal to the rational voter, directors would filter disclosure through a screen of sensationalism.").

290 *See* Paredes, *supra* note 287, at 434–37.

291 *See* Bainbridge, *supra* note 255, at 626–28; Judge & Torrenzano, *supra* note 276.

292 Judge & Torrenzano, *supra* note 276.

293 *Id.*

294 *See* Camara, *supra* note 281, at 1480–83.

concerns.[295] In essence, by giving shareholders the ability to nominate directors, the fear is that the corporation will suffer from some of the more unseemly aspects of typical elections for public office, with officials campaigning endlessly at the expense of performing their duties.[296]

e. Inefficiency

An important criticism about Rule 14a-11 is that it promotes inefficiency. The basic gist of the concern derives in large part from the conception of shareholders as simply residual interest holders in the project, if not the assets, of the corporation.[297] The corporation reflects a private ordering of implicit and explicit contracts that constitute the corporate form.[298] Nothing about shareholders in particular should elevate their concerns above other corporate stakeholders, including consumers, employees, and creditors—at least to the extent that shareholders receive a special say in determining the policies and practices of the corporation.[299] In essence, shareholders possess a special interest in corporate profits, but they remain one of many participants in the broader web of negotiated private agreements involving labor, capital, and resources that give life to the corporation.[300] Therefore, to give special consideration to shareholder views about any particular matter affecting corporate policies would adulterate the delicate balance of private orderings that sustains any corporation as a distinct entity.[301]

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295 Judge & Torrenzano, *supra* note 276 ("Until now, corporate governance issues tended to be one-day stories. Thanks to the blogosphere and social-media activism, once short-lived controversies will now drag on for weeks or months. Witness the many permutations of a boycott movement against Whole Foods after its CEO, John Mackey, dared to offer an alternative to ObamaCare in this newspaper. The boycott was a dud, but the threat to the brand was real. And in cases where groups do succeed in electing their directors, they will have savvy political and corporate insiders occupying permanent platforms from which to leak company information and agitate for more change. In this era of the permanent campaign, the corporate staff, general counsel and top communications and investor relations professionals must be ready to engage a permanent discussion.").

296 *See* Carl Bernstein, *Draining a Swamp: Take Money Out of Politics*, L.A. TIMES, July 20, 1997, at M2 (quoting lobbyist Wayne Thevenot: "They [members of Congress] have become full-time fund-raisers and part-time representatives, whose actions reflect who gives them money and how much").

297 *See* Bainbridge, *supra* note 255, at 604.

298 *Id.* at 605.

299 *See id.* at 605–06.

300 *See id.* at 604.

301 *See id.* at 605–06.

Another aspect of the criticism regarding efficiency relates to the inflexibility that federal standards impose on corporations. Some opponents, such as SEC Commissioner Troy Paredes, argue that a decision about shareholder access to corporate proxies should be made at the state level.[302] Moreover, in commenting about proposed Rule 14a-11, the Delaware State Bar Association emphasized "a single rule would unnecessarily deprive Delaware corporations of the flexibility state law confers to deal effectively with myriad different circumstances that legislators and rule makers cannot anticipate."[303] Those who are critical of a single rule regarding shareholder nomination rights complain that shareholders might actually prefer a different set of rights better tailored to their interests.[304]

But why would flexibility necessarily promote efficiency? An efficient rule regarding shareholder nomination of directors would reflect what corporate managers, shareholders, consumers, and other stakeholders would hypothetically negotiate in a world of perfect information and without the burdens of any transaction costs in bargaining.[305] The precise outcome of such a hypothetical negotiation would necessarily change as the preferences of any parties evolved. A rigid set of standards, however, cannot attend to changing preferences. To

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302 *See* Jaffari & Ettelson, *supra* note 8, at 5; Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at Conference on Shareholder Rights, the 2009 Proxy Season, and the Impact of Shareholder Activision (June 23, 2009) ("[I]n regulating the internal affairs of corporations, states . . . have adhered to a so-called 'enabling' approach as opposed to a 'mandatory' approach.").

303 *New Proxy Access*, *supra* note 250, at 2, 4. The Delaware State Bar Association also stated:

> While we do not advance any view about the merits of any particular system of proxy access, or whether to adopt any such system at all, we believe that recent changes to the Delaware General Corporation Law reflect a view that such a system may be beneficial to corporations that choose it.

Id. at 2.

304 A variety of interest groups have promoted state law flexibility over a mandatory federal standard regarding shareholder proxy access. *See* Elizabeth Bennett, *Delaware Bar Weighs In on SEC Proxy Access Proposal*, DEL. L. WKLY., Aug. 19, 2009, at 1; *see also* Letter from Lucian Bebchuk, William J. Friedman & Alicia Townsend Friedman Professor of Law, Econ. & Fin., Harvard Law Sch., to Nancy M. Morris, U.S. Sec. & Exch. Comm'n, Comment Letter of Thirty-Nine Law Professors in Favor of Placing Shareholder-Proposed Bylaw Amendments on the Corporate Ballot (Oct. 2, 2007), *available at* http://blogs.law.harvard.edu/corpgov/files/2007/10/law-professors-comment-letter.pdf (filed with the SEC in October 2007) ("[C]ompanies should be allowed to tailor governance arrangements to the companies' particular needs and circumstances. Blocking or impeding shareholder-initiated bylaw amendments concerning election procedures would greatly undermine private ordering in this important area.").

305 *See* Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1152–54 (1996); *see also* Williams, *supra* note 41, at 1201–03.

the extent preferences regarding shareholder nomination rights change over time, steadfast reliance on static standards would undermine efficiency despite providing predictability.[306]

Thus, determining whether a malleable approach or a much more static statutory framework enhances the likelihood of an efficient level of shareholder participation depends on an assessment of the nature of market preferences. If those preferences remain static, enduring the costs of a malleable approach would seem wholly unnecessary. On the other hand, if market preferences regarding the substance and character of shareholder nomination rights evolve, only a malleable approach could attend adequately to those changing preferences. Whether shareholders actually possess malleable preferences regarding their nomination rights remains an open question. But to the extent those preferences remain subject to change, a mandatory rule might provide a set of rights that shareholders would not prefer.

3. Suffragist Claims

Despite the numerous arguments against granting shareholders the right to nominate directors, proponents raise a host of competing claims promoting enhanced shareholder nomination rights. Perhaps surprisingly, some of the very criticisms levied against expanding shareholder suffrage are recast as arguments in favor of granting enhanced nomination rights. Again, surveying the landscape of extant claims sheds light on the need for a new conceptual approach to understand the relationship between shareholders and the firm.

a. Improved Management

Proponents of Rule 14a-11 argued that granting shareholders the right to nominate directors would improve management. In general, some suggest that firms perform better when shareholders play a more active role in governance.[307] A recent empirical study of companies with "hybrid boards," defined as boards with activist shareholders

306 *See* Uri Geiger, *Harmonization of Securities Disclosure Rules in the Global Market—A Proposal*, 66 FORDHAM L. REV. 1785, 1829 (1998) ("Even when harmonized standards are formed, it will take a long time until they are implemented. By then, economic conditions might have changed, causing the unified standards to become outdated and making renegotiation necessary. Indeed, a static structure would surely render the harmonized standards inefficient." (footnotes omitted)).

307 *See* Bebchuk, *supra* note 99, at 865–70 (promoting shareholder franchise to remedy the distortion created by management control); Bebchuk, *supra* note 250, at 679–82 (detailing the benefits of increased shareholder participation on corporate elections).

who won one or more seats,[308] suggests that companies with hybrid boards outperform the market by as much as seventeen percent in total returns and almost eighteen percent in share price.[309] The study, which was conducted by the Investor Responsibility Research Center ("IRRC") Institute, found that enhanced performance occurs not just in the short term, but also over longer periods.[310] The study also noted, however, that share performance of hybrid companies varied based on the number of dissident shareholder directors on the board, with share price declining as the number of dissident shareholder directors increased.[311] Still, in contrast to the notion that directors put in place by dissident shareholders will undermine corporate effectiveness, the study suggests that enhanced shareholder participation in the election of directors could provide substantial gains.[312]

The IRRC study reflects the growing concern among many within government, academia, and business that companies will fare better if shareholders possessed a greater role in the process of electing directors. For instance, SEC Chairman Mary L. Schapiro links the current economic meltdown to the inattentiveness of boards to shareholder interests. As she stated in announcing Rule 14a-11,

> The nation and the markets have recently experienced, and remain in the midst of, one of the most serious economic crises of the past century. . . . This crisis has led many to raise serious questions and concerns about the accountability and responsiveness of some companies and boards of directors, to the interests of shareholders.[313]

She also stated that "many of the problems leading to [the] economic crisis can be laid at the door of poor corporate governance."[314] Harvard Professor Lucian Bebchuk, a leading proponent of enhanced shareholder activism, suggests that giving shareholders a greater role in corporate elections would enhance value by making it easier to re-

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308 Morgenson, *supra* note 261.

309 *Id.* ("From the beginning of the contest period for a board seat through the first year of a hybrid board's existence, companies' total returns were 19.1 percent, or 16.6 percentage points better than peers'. And total share price performance through the three-year anniversary of the hybrid boards averaged 21.5 percent, almost 18 percentage points more than their peers.").

310 *Id.*

311 *Id.*

312 *Id.* ("'I think what it says is there is some value to owners being able to challenge existing management and that there are also some limits to that value . . . . Dissidents can clearly get the market to focus on the hidden value in these companies, but delivering on it takes hard work." (quoting Jon Lukomnik, director of the IRRC Institute)).

313 *Id.*

314 Jaffari & Ettelson, *supra* note 8, at 5.

place underperforming directors.[315] Lamenting that current corporate structures impede shareholder involvement, Bebchuk advocates giving shareholders a greater say in the nomination process.[316] Whether aimed at preventing corporate calamities or enhancing value by facilitating replacement of directors and managers, proponents of shareholder proxy access point to enhanced board performance and the need to rebalance the power of incumbent directors who currently control their own reelection.[317] Although not suggesting that shareholders might cause management to shift its focus, proponents argue that the distraction actually leads to enhanced shareholder value and corporate gain.

b. Enhanced Shareholder Democracy

Shifting from an economic perspective to a more philosophical outlook, some proponents of shareholder proxy access suggest it promotes the essential role that shareholders should play in governing the corporation.[318] The crux of the justification rests on a concept of shareholder as citizen,[319] in stark contrast to the opposing view of shareholders merely as residual interest holders in corporate assets and profits.[320] Within the normative construct of citizenship, shareholders should take an active role in determining the path the corporation should pursue.[321] Shareholders can only fulfill their appropriate role by deliberating about the best interests of the corporation and participating in a meaningful way in determining corporate practices.[322] Through the lens of citizenship, then, the basic relationship between the firm and the shareholder gets reexamined.[323] The proper place of the shareholder in the corporate framework becomes less an

315 *See* Bebchuk, *supra* note 250, at 679–82.

316 *Id.* at 695–97.

317 Jaffari & Ettelson, *supra* note 8, at 5.

318 *See* Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1350 (2006); Fairfax, *supra* note 56, at 785; Fairfax, *supra* note 14, at 56–57; Fairfax, *supra* note 113, at 678; Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1506 (2006); Lucas E. Morel, *The Separation of Ownership and Control in Modern Corporations: Shareholder Democracy or Shareholder Republic? A Commentary on Dalia Tsuk Mitchell's* Shareholder as Proxies: The Countours of Shareholder Democracy, 63 WASH. & LEE L. REV. 1593, 1597–98 (2006).

319 *See generally* Lee, *supra* note 67 (applying the concept of citizenship to the corporate form).

320 *See supra* notes 297–301 and accompanying text.

321 Fairfax, *supra* note 14, at 59–61; *see also* Tsuk Mitchell, *supra* note 318, at 1572–76.

322 *See* Lee, *supra* note 67, at 151.

323 *See id.* at 150–52.

economic calculation and more a consideration of political and social theory.[324]

But what advantages does the framework of democratic participation provide for understanding shareholder rights? To state the question slightly differently, why does the traditional understanding of the shareholder as an economic entity need retooling?[325] For some, the basic relationship between shareholders and directors cannot be adequately explained simply by relying on economic concepts.[326] For others, the need for enhanced shareholder participation rests on a concern about legitimacy.[327] Along that line of thinking, shareholders possess a fundamental right to participate in corporate decisionmaking.[328] At the very least, shareholders must enjoy a robust right to select those who represent them on the board, and efforts to diminish that right should be invalidated as contrary to the basic nature of the relationship between the shareholder and the firm.[329]

Perhaps on a more pragmatic level, proponents of shareholder nomination rights suggest that the existing system for director election pays little attention to shareholder interests.[330] Under existing rules, incumbents control the process for their reelection and use the corporate treasury to fund their campaigns.[331] Shareholders have little or no choice over who represents them and, as a result, may simply deem the ballot irrelevant.[332] As Roger Lowenstein quipped in a column in *The New York Times Magazine*, "Only the management (or its hand-

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324 *Id.* at 131–32.

325 *Id.* at 131 ("Most corporate theorists today adopt an exclusively economic perspective on the corporation. According to the prevailing understanding, the corporation is not a political entity at all; it is rather the nominal hub of a multilateral marketplace interaction—a 'nexus of contracts.'").

326 *Id.* at 129 ("[C]ertain features of corporations and corporate law are not adequately explained under the conventional economic understanding. If we look at the corporation only through the lens of economics, we might mistake the purpose of these features, or come to suppose that they serve no purpose.").

327 *See* Fairfax, *supra* note 14, at 91–94. For a detailed analysis of the link between corporate legitimacy and shareholder democracy, see Morgan N. Neuwirth, *Shareholder Franchise—No Compromise: Why the Delaware Courts Must Proscribe All Managerial Interference with Corporate Voting*, 145 U. PA. L. REV. 423 (1996).

328 *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 411–13 (2006) (arguing that efforts to diminish shareholder rights in electing directors are inconsistent with the fundamental rights of shareholders).

329 *Id.* at 412–13, 427.

330 *See* Bebchuk, *supra* note 250, at 688–94 (describing how current director election rules undermine the ability of shareholders to have a significant impact on who represents them).

331 Lowenstein, *supra* note 250, at 11.

332 *See id.*; *see also* Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 446 (2008) (describing the

picked board) chooses nominees, and it is an iron rule of American corporations that ballots should not contain more nominees than seats. In the former U.S.S.R., this style of democracy endured for only 72 years. In American business it is timeless."[333] In order to make the process by which shareholders give their assent meaningful, proponents suggest that a right to nominate directors remains essential.

c. Consideration of Stakeholder and Shareholder Voices

Proponents also suggest that giving shareholders the right to nominate directors will provide a greater voice to shareholder and stakeholder concerns. The basic argument entails both practical and theoretical components. The practical side of the argument relates back to the Wall Street Rule, which posits that disenchanted shareholders should simply sell their shares and seek alternative investment opportunities.[334] Although the prospect that shareholders may exit due to imprudent decisions may provide some incentive to management to avoid unwanted policy choices, the threat of exit does not convey sufficient information to corporate managers.[335] As Lowenstein explains,

> To function well, organizations need the threat of exit, otherwise voice is powerless. But for the manifold decisions that do not rise to a level of all-out confrontation, "voice" is often more effective. A management aware of a real threat of shareholder voice would be more likely to consider implementing some of the shareholders' ideas without a battle. And for dissidents who were elected, inclusion in the boardroom, in most cases, would be a moderating experience. Dissidents shout; directors discuss.[336]

Thus, giving shareholders greater voice conveys arguably valuable information to directors about the preferences of the market regarding corporate policies and practices.[337]

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traditional view that "[t]he possibility for electoral oversight was largely assumed to be impossible").

333 Lowenstein, *supra* note 250, at 11.

334 *See supra* notes 255–57 and accompanying text.

335 Tsuk Mitchell, *supra* note 318, at 1572–76; Lowenstein, *supra* note 250, at 11.

336 Lowenstein, *supra* note 250, at 11.

337 For a detailed accounting of the role that voice and exit play in organizational design and effectiveness, see generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

B. Discourse Theory and Shareholder Nomination Rights

The project here is simply to *introduce* a new discourse theory of the firm, using the question of enhanced shareholder nomination rights as a springboard for analysis. Subsequent work will articulate a more general discourse theory of the firm that targets the essential aspects of corporate organization, structure, and practice. But even the most basic tenets of discourse theory seem to provide rather clear guidance on whether the SEC should promote enhanced shareholder suffrage through director nomination rights. At bottom, corporations embrace a moral commitment to communicative action based on the fundamental right of shareholders to elect directors. The normative commitment to communicative action thus requires processes of deliberation that promote autonomous expression of ideas, fair and equal participation in the deliberative process, respectful consideration of expressed viewpoints, and the ability to alter previously accepted positions through continued discourse. Only by implementing mechanisms to ensure sufficiently fair discourse within the corporate setting can decisions about corporate policies and practices garner legitimacy. Within a new discourse theory of the firm, providing shareholders the right to nominate directors represents a first step in enhancing a continual engagement between corporate managers and the shareholders they serve. In the end, that enhanced discourse necessarily promotes a more efficient level of shareholder suffrage than prior corporate law provided.

1. Nomination as Discourse

Although there has not yet been a treatment of shareholder nomination rights under a discourse theory rubric, discourse theory has already been considered relevant to internal corporate governance.[338] In "Citizenship and the Corporation," Ian Lee suggests that political theories of citizenship should be applied to shareholders in the modern corporation.[339] Although not calling for a wholesale restructuring of the basic relationship between the shareholder and the firm,[340] Lee

338 *See* Lee, *supra* note 67, at 149–52 (discussing how within the lens of shareholder citizenship, giving shareholders greater voice could promote the best interest of the corporation).

339 *Id.*

340 *Id.* at 151–52 ("I am not arguing that the corporation is, or should be, an Athenian-style (shareholder) democracy. Clearly, the shareholder does not play a major political role within the corporation. I do not dispute that a purpose of the corporate form and of limited liability is to make possible the separation of ownership and control, to make it possible for people to supply equity capital despite having limited or no interest in management. Shareholders' limited political rights within the corporation likely reflect their (for the most part) limited political

suggests that giving shareholders a greater voice could promote the best interest of the corporation.[341] Moreover, in *The Constitutional Corporation*, Stephen Bottomley argues that the board of directors is a deliberative space.[342] The process of decisionmaking within the corporation should therefore be as open as possible and convey accurately the plurality of interests affected by corporate actions.[343] From that deliberative perspective, Bottomley argues that boards must take into account the viewpoints of shareholders and other stakeholders alike.[344] This would promote a greater sensitivity to concerns of CSR and claims of groups and individuals affected by corporate conduct who own no securities of the corporation.[345]

Although Lee and Bottomley do not squarely address the question whether shareholders should have the right to nominate directors using the corporate proxy, the application of discourse theory seems quite simple in this case. If boardrooms represent deliberative spaces that determine the corporate voice, and if corporations contribute to political debates of public import, then establishing rules that democratize the corporate board seems essential. Without standards that promote full, fair, and equal access to the deliberative space, the decisions produced through that discourse will not meet standards of legitimacy.

From a more theoretical standpoint, giving shareholders voice provides not only a means to shift the behavior of corporations, but also allows the nature of the corporation—and the relationship between corporations and shareholders—to evolve. Lisa Fairfax has written extensively on the role of rhetoric within the corporate context.[346] At the outset, Fairfax argues that the rhetoric corporate managers employ in their internal and external communications affects the

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interest. In this respect, the corporation is not so unlike the modern Western democracy, in which citizens are, to a considerable extent, passive." (citations omitted)).

341 *Id.* at 151 ("What the economic theorist strains to understand, perhaps the political theorist understands more easily. If we are willing to set aside the assumption that the corporation must only be a complex market, and that all power within the corporation must be discretionary, we may instead see shareholder voice as another example of authoritative, collective decision making within the corporation. A shareholder acts consistently with this understanding to the extent that, in the exercise of voting rights, he or she acts with a view to the best interests of the corporation.").

342 STEPHEN BOTTOMLEY, THE CONSTITUTIONAL CORPORATION 115–17 (2007).

343 *Id.* at 118–19.

344 *Id.* at 177–78.

345 *See id.* at 178.

346 Fairfax, *supra* note 56; Fairfax, *supra* note 14; Fairfax, *supra* note 113.

basic policies and practices of the business.[347] As corporations engage in discourse about issues beyond the economic bottom line, that discourse affects the basic operations of the corporation and the means the business employs to achieve its goals.[348]

In addition to describing how a corporation's own speech affects business practices, Fairfax argues that the discourse among the corporation, shareholders, and other stakeholders affects business policies, as well.[349] To the extent corporations engage shareholders and stakeholders in discussions about what matters to the corporate enterprise, those discussions have measurable impact on corporate decisionmaking.[350] Even if those corporate shareholders and stakeholders do not possess any voting rights on the issue discussed, it is the participation in the discussion that provides some movement in corporate policies.[351] That such movement occurs suggests a new role for shareholders and stakeholders within the corporate setting. By participating in discourse with the corporation, those shareholders and stakeholders effect change.

But why does discourse necessarily have an impact on corporate practices? Can corporations not simply ignore voices of those dissident shareholders or nettlesome interest groups? Certainly corporations do not heed every comment or criticism levied privately or in public. Fairfax empirically demonstrates, however, the effect that discourse inevitably has on policymaking. For when voices are engaged, the substance of the discussion shifts.[352] New perspectives get entertained that would previously have been ignored. The enhanced richness of the discussion provides more fertile ground for nurturing well-considered policies than if decisions were simply made wholly ignorant of competing viewpoints.

To the extent corporate rhetoric plays an important role in shaping the nature and project of corporations, giving shareholders the right to nominate directors seems especially important. The enhanced participatory rights contained in the new Rule 14a-11 will give at least some shareholders a seat at the table and cause corporate managers to engage their concerns more seriously. Because those shareholders might possess interests beyond promoting the economic bottom line,

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347 Fairfax, *supra* note 56, at 779–87; Fairfax, *supra* note 113, at 691–94.

348 Fairfax, *supra* note 56, at 779–87; Fairfax, *supra* note 113, at 691–94.

349 Fairfax, *supra* note 113, at 691–94.

350 Fairfax, *supra* note 56, at 773, 783.

351 *Id.* at 773.

352 *See id.*

they could serve as surrogate voices for other stakeholders. In that sense, granting shareholders the right to nominate directors on the corporate proxy would serve to enhance the quality of the discussion upon which corporate decisions get made.

What should be remembered, however, is that the goal is not to reconceptualize the basic nature of the relationship between the shareholder and the firm. Quite to the contrary, what is at stake is the protection of the processes of political deliberation that produce laws and rules affecting individual autonomy. In order for those regulations to garner legitimacy, the deliberative processes that produce those rules must meet certain minimum standards for fair discourse.

What makes an application of discourse theory essential to internal corporate governance is not some new shareholder right that must be recognized. Instead, it is the existing right of shareholders to vote on the election of directors. Because shareholders already possess a role in the selection of those who determine the ultimate direction the corporation takes, the corporation and the shareholder engage in a form of communicative action. That engagement provides a tacit recognition of the rules for a communicative exchange.

At the very least, it seems that giving shareholders the right to nominate directors provides an equalization of the disparity in discourse. Currently, management or the existing board controls the means to their perpetuation in office.[353] Giving shareholders greater power to challenge corporate positions through the election of directors more aligned with their interests will cause a greater attentiveness on the part of existing directors to shareholder interests. That will foster a greater consideration of shareholder views, including those shareholder views that might encapsulate other stakeholder interests as well.

With respect to stakeholder interests, then, it is not necessary to justify their direct participation in the discursive project involving corporate decisionmaking if some shareholders possess preferences for taking those stakeholder interests into account. To some, this may represent an end run around a more straightforward assessment of whose interests should count in determining corporate action.[354] But even if a bold application of discourse theory principles might require attending to greater stakeholder concerns, a more conservative theoretical move achieves the same outcome. For it is not a matter of

353 *See supra* notes 331–33 and accompanying text.

354 *See* Siebecker, *supra* note 115, at 124–25.

dispute that corporate boards must act on behalf of the corporation and its shareholders. If shareholders possess interests that extend beyond promoting simple profits, the corporation should take into account those interests in order for corporate decisions to garner legitimacy.

Thus, according to the most basic discourse theory principles, granting shareholders the right to nominate directors using the corporate proxy represents an essential step to secure a sense of legitimacy to the process of governing the corporation.

2. Efficient Shareholder Suffrage

Various benefits to discourse theory exist in the political realm.[355] Those may apply equally in the corporate realm as well. One benefit in particular deserves special attention because it highlights some potentially common ground that could unite current opponents in the debate over shareholder nomination rights. Properly construed, a discourse theory of the firm promotes efficiency.

But why would discourse theory as applied to shareholder nomination rights necessarily promote efficiency? An efficient outcome regarding any corporate policy or practice reflects what corporate managers, shareholders, consumers, and other stakeholders would hypothetically negotiate in a world of perfect information and without the burdens of any transaction costs in bargaining.[356] The precise outcome of that hypothetical negotiation would necessarily change as the preferences of any parties evolve.

Because shareholder preferences regarding corporate policies and practices continue to change over time,[357] mechanisms that encourage consideration of those changing preferences make it more likely that an efficient outcome will result. Permitting shareholders to use the corporate proxy to nominate directors would encourage a continual engagement between corporate managers and the shareholders they serve. In contrast, denying shareholders that nomination right insulates corporate decisionmakers from attending to actual market preferences. The ability of corporate managers to ignore shareholder voices renders it less likely that decisions will match shareholder preferences. Of course, the notion is not that corporate managers must heed every shareholder whim. Instead, by promoting a rule that encourages a more robust discourse, corporate managers will continually

355 *See supra* notes 218–26 and accompanying text.

356 *See* Hamermesh, *supra* note 305, at 1152–54; Williams, *supra* note 41, at 1201–03.

357 *See supra* note 294 and accompanying text.

assess and refine their own understanding of business policies and practices that best represent shareholder interests.

Some might counter that efficiency concerns suggest adopting a rule that permits shareholders to determine for themselves whether or not they want the right to nominate directors on the corporate proxy. This would clearly represent a deviation from former shareholder rights that did not guarantee proxy nomination privileges. But even giving shareholders the right to such a vote could not promote efficiency, for it would reflect only a momentary snapshot of shareholder preferences. In essence, were shareholders to vote to give up the right to nominate directors using the corporate proxy, the outcome might not reflect what future shareholders would prefer. To the extent those future shareholders would be bound by the prior vote, a decision to surrender nomination rights would promote subsequent misalignment of shareholder preferences and corporate policy.

What makes discourse theory and efficiency claims so compatible is the continual attention to evolving market preferences. A sustained dedication to a discourse theory of the firm would require continual dialogue between the corporation and its shareholders in order to determine effectively whether management acted sufficiently on the shareholders' behalf in articulating the corporation's goals and practices. Similarly, efficiency requires attention to evolving preferences rather than the imposition of stilted views of what rationally behaving actors would choose in a hypothetical negotiation. Therefore, allowing shareholders to waive their rights to nominate directors could not possibly accommodate changing shareholder preferences. Thus, permitting shareholders to nominate directors using the corporate proxy promotes both efficiency and enhanced corporate discourse.

Conclusion

Static models of the corporate form become increasingly brittle as corporations evolve from simple investment vehicles to full, if not dominant, participants in economic, social, and political life. As corporations change, the status of shareholders should necessarily adapt as well.

Rather than remaining wedded to descriptively stilted notions of corporate purpose and behavior, a discourse theory provides a continually reflective model that captures more accurately the dynamic relationship between corporate managers and shareholders. The suitability of discourse theory to corporate organization stems from a recognition that the fundamental right of shareholders to elect direc-

tors represents a moral commitment to communicative action. That moral commitment to communicative action then requires a set of discursive processes in order to render decisionmaking about corporate practices and policies legitimate.

Within a discourse theory of the firm, it seems all too clear that shareholders should enjoy the right to nominate directors using the corporate proxy. As adopted, Rule 14a-11 fosters robust deliberation about corporate policies and practices. Directors will pay greater attention to shareholder concerns, and perhaps other stakeholders as well, to the extent shareholders possess interests beyond maximizing corporate profits. Embracing a new discourse theory would not only promote more effective internal corporate governance, but also promote more effective governance within society generally in light of the increasingly important role corporations play in shaping public values. Moreover, attending to greater interests in determining the path corporations should follow actually promotes a more efficient outcome than turning a deaf ear to shareholder voices. In the end, to the extent enhanced discourse promotes efficiency as well as better governance both inside and outside the corporation, a new discourse theory of the firm seems better suited than existing corporate law theories to answer difficult questions regarding the rights and responsibilities of corporations and the evolving constituencies they serve.