CORPORATE SPEECH AND CORPORATE PURPOSE: A THEORY OF CORPORATE FIRST AMENDMENT RIGHTS

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The negative speech right (the right to refrain from speaking) strains the standard rationale for corporate speech rights. First Amendment jurisprudence justifies speech rights with a mix of intrinsic and instrumental rationales. The intrinsic rationale is derived from the natural rights of persons, and often thought not to apply to corporations. Meanwhile the instrumental rationale, grounded on the value of speech in promoting self-government, would seem not to apply to the negative right. Remaining silent, after all, does little to advance public debate.

This article uses the SEC's shareholder proposal rule to examine the larger question of corporate First Amendment rights, ultimately finding in the doctrine of corporate purpose a stable doctrinal foundation for corporate speech rights. Corporations are not natural persons, but they exist to serve the purposes of those who form them—that is, their shareholders. Sometimes, as in the case of a closely held firm, the scope of shareholders' shared purposes may be broad, encompassing a wide array of values held in common. However, in the context of publicly held firms, where conflict in the shareholder base is inevitable, the scope of shared values narrows to one: shareholder wealth maximization.

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This vision of corporate purpose implies a limit to the state's ability to abridge corporations' negative speech rights. Government can compel speech only when the compulsion is consistent with corporate purpose.

Introduction

Every spring, hot button issues of social policy are debated on the pages of corporate proxy statements. Recent examples include abortion rights,[1] climate activism,[2] discrimination against racial and religious groups,[3] and transgenderism.[4] In these debates, the affirmative side is taken by a shareholder putting forward a resolution for reform—a "shareholder proposal"—while the negative side is taken by the company, which seeks to persuade its shareholders to reject the proposal. The company publishes and disseminates the resolution along with the arguments of both sides in its annual proxy materials.

Shareholders submitted 889 proposed resolutions in 2023.[5] A substantial majority of these (582 or 65%) raised questions of social policy.[6] Of the social policy

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[1] Clean Yield Asset Management, Notice of Exempt Solicitation Concerning Walmart, Inc. (May 16, 2023) (requesting report on the "risks and costs to the Company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies . . . that the Company may deploy to minimize or mitigate these risks").

[2] These range from requests for disclosure of greenhouse gas emissions and corporate climate policies to requests to debank the fossil fuel industry. *See, e.g.*, Trillium Asset Management, Notice of Exempt Solicitation Concerning Bank of America Corporation (Mar. 23, 2022) (resolution encouraging the bank to "take[] available actions to help ensure that its financing does not contribute to new fossil fuel supplies").

[3] *See generally* Merel Spierings, Conf. Bd., Preparing for Shareholder Proposals on Diversity in 2024 (Sept. 7, 2023), https://perma.cc/SC5Z-A8CS (reporting that in the wake of the U.S. Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, companies anticipate a surge in discrimination-related shareholder proposals, scrutinizing DEI policies from both sides and inquiring into discrimination against a wider array of groups).

[4] Visa, Inc., Request for No-Action Relief from Shareholder Proposal Submitted by Paul Chesser, Nat'l Legal & Policy Center (Sept. 13, 2023) (requesting no-action relief from a shareholder proposal demanding that the company report on health coverage for gender dysphoria and de-transitioning). The supporting statement for this proposal states that, "[r]ather than resolve health problems, 'gender affirming' therapies often exacerbate them. In such cases, patients who desire to 'de-transition' cannot find medical or insurance coverage and are permanently mutilated." *Id.*

[5] Ronald O. Mueller, Elizabeth A. Ising & Thomas J. Kim, *Shareholder Proposal Developments During the 2023 Proxy Season*, Harv. L. Sch. F. on Corp. Governance (Aug. 3, 2023), https://perma.cc/C8UM-ZSCJ. In compiling my percentages, I treated what Mueller et al. describe as "civic engagement" proposals as a form of "social issue" proposal.

[6] These are sometimes known as "ESG" issues—that is, concerns relating to environmental, social, or governance matters. Although lumped together as ESG, I exclude "governance" proposals—for example, executive compensation and independent chair proposals—from what I refer

proposals, 188 (32%) urged action relating to climate change and greenhouse gas emissions. Meanwhile, 394 (68%) focused on other social issues, such as racial equity audits and diversity, equity, and inclusion (DEI) initiatives. Slightly more than half of all the shareholder proposals received by corporations in 2023 were ultimately voted upon.[7] In some cases, proposals failed to reach the ballot because corporations successfully excluded them.[8] More often, proposals were withdrawn in connection with a negotiated settlement in which the corporation agreed to some of the proponent's requests.[9] Of the 483 shareholder proposals that went to a vote in 2023, 25 (5%) passed.[10]

Why do American companies become laboratories of democracy during proxy season? Is it that managers sense some competitive advantage in turning their attention from the product market to the marketplace of ideas? Or is it that investors are more likely to subscribe to public offerings if the company promises them an opportunity to speak their mind on social issues? Neither is the case. While it may be true that some corporations have chosen to *lean in* to the culture wars,[11] it is

to here as "social policy" proposals. The social policy proposals now discussed as ESG were once known as "CSR"—corporate social responsibility—and soon may be called something else. *See* Isla Binnie, *BlackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (June 26, 2023), https://perma.cc/PU9W-EMXT (reporting that BlackRock CEO Larry Fink would no longer use the word ESG but would "continue to talk to companies it has stakes in about decarbonization, corporate governance and social issues to be addressed"); *accord BlackRock Confirms ESG on Hold Until They Can Come up with Another Name for It that Nobody Knows About*, BABYLON BEE (July 6, 2023), https://perma.cc/YQP6-W9NX.

[7] Mueller, Ising & Kim, *supra* note 5 (stating that 483 of 889, or 54%, of shareholder proposals were voted upon during the 2023 proxy season).

[8] According to Mueller et al., 82 shareholder proposals (9%) were excluded pursuant to a no-action request. *Id.* See *infra* notes 74–75 and accompanying text for a description of the process for requesting no-action relief.

[9] Mueller, Ising & Kim, *supra* note 5 (reporting that 143 proposals (16%) were withdrawn by the proponent in the 2023 proxy season).

[10] This statistic may be deceptive, however, as passage and enactment of the referenda may not be the principal goal of shareholder proposals. *See infra* notes 59–64 and accompanying text.

[11] Gina Martinez, *Bud Light Partnership with Trans TikTok Star Dylan Mulvaney Prompts Conservative Backlash*, CBS NEWS (Apr. 6, 2023), https://perma.cc/RZ2T-KBXD.

equally certain that many corporations would prefer to lean *out* and avoid such issues altogether,[12] fearing distraction or backlash.[13] But companies cannot opt out of shareholder proposals.[14] Their participation is compelled by the government.[15]

Companies publish and distribute shareholder proposals because Rule 14a-8 of the Securities and Exchange Commission compels them to do so. Subject to a set of exceptions and exceptions-to-the-exceptions,[16] the shareholder proposal rule requires corporations to include shareholder resolutions and supporting statements of up to 500 words in the company's own proxy materials.[17] Publication of proposals raising controversial social issues are compelled either (1) under an exception to the "relevance" exemption, requiring companies to include proposals that "raise issues of broad social or ethical concern related to the company's business" even if they are not quantitatively relevant to corporate revenues or assets,[18] or (2)

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[12] *See* Richard Vanderford, *Shareholder Activists Drag U.S. Companies into Culture Wars*, WALL ST. J. (May 23, 2023) ("Companies are facing proposals from both sides of the political spectrum, dragging them into the increasingly fractious conversations over environmental, social and governance issues.").

[13] Dee-Ann Durbin, *Bud Light Is No Longer America's Top Beer Following Anti-LGBTQ+ Pushback*, ASSOCIATED PRESS (June 14, 2023), https://perma.cc/AK4X-XN64; *see also* Siddharth Cavale, *Target Removing Some LGBTQ Merchandise Following Customer Backlash*, REUTERS (May 24, 2023), https://perma.cc/764J-4675.

[14] *But see* Mohsen Manesh, *The Corporate Contract and the Private Ordering of Shareholder Proposals*, 50 J. CORP. L. (forthcoming 2024) (theorizing that corporations could opt out of the shareholder proposal rule by amending their bylaws). Opting out through bylaw amendment raises difficult questions of state corporate law as well as problems of federal-state preemption. Until the theory is attempted and the legal questions resolved, corporate compliance with the shareholder proposal rule remains mandatory.

[15] Securities and Exchange Act of 1934, 15 U.S.C. § 78n(b) (2023) ("It shall be unlawful *for any member of a national securities exchange* . . . to refrain from giving a proxy, consent, authorization, or information statement in respect of any security [registered under federal law]") (emphasis added).

[16] *See* 17 C.F.R. § 240.14a-8(i) (2023) (listing a total of thirteen potential grounds for excluding a shareholder proposal, such as the proposal's being improper under state law, suggesting a violation of law, lacking relevance, or dealing with ordinary business operations).

[17] 17 C.F.R. § 240.14a-8(d) (2023).

[18] SEC, STAFF LEGAL BULLETIN NO. 14L (CF) (Nov. 3, 2021), https://perma.cc/B7YG-N8H4 [hereinafter SLB 14L]; *see also* Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985); *see also* discussion *infra* notes 67–69 and accompanying text.

under an exception to the "ordinary business matter" exemption, requiring companies to include proposals that "raise[] issues with a broad societal impact, such that they transcend the ordinary business of the company."[19] These exceptions have swallowed the rule to the point that the majority of shareholder proposals now raise controversial issues of social policy.

But government compulsions to speak are constitutionally suspect. The First Amendment of the U.S. Constitution prohibits the government from "abridging the freedom of speech," and Supreme Court doctrine has long held that speech is abridged both when it is restricted and when it is compelled.[20] Rule 14a-8 compels speech. Through it the SEC, an agency of the government, compels corporations to speak on social controversies. While the government does not choose the words spoken—the matters are put forward by shareholders, not the government—the government compels speech by requiring companies to publish shareholder proposals that comply with the SEC rule.[21] Moreover, the structure of the rule and the choices made by the SEC in applying it regulate the content of speech in a way that is not "content-neutral."[22] This raises the question: Does Rule 14a-8 violate the First Amendment?

If Rule 14a-8 is unconstitutional, it is because corporations' negative speech rights—that is, the right to *refrain* from speaking—have been violated. But do *corporations* have *negative* speech rights? This framing of the question exposes two lacunae in First Amendment doctrine. The first is the extent to which the speech rights of corporations, as opposed to natural persons, are protected. Although it is

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[19] SLB 14L, *supra* note 18; *see also* Trinity Wall Street v. Wal-Mart Stores, Inc., 792 F.3d 323 (3d Cir. 2015); *see* discussion *infra* notes 70–71.

[20] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that states may not compel students to recite the Pledge of Allegiance); *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that states may not compel citizens to display state motto on license plates).

[21] *See* 17 C.F.R. § 240.14a-8 ("This section addresses when a company *must* include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.") (emphasis added).

[22] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (defining content-based laws as those making "distinctions based on the message a speaker conveys"). Because SEC rules prescribe the inclusion of shareholder proposals based upon the content of their message—for example, whether they raise issues of "broad social or ethical concern" or "broad social impact"—they are content-based.

now clear that corporate speech enjoys some protection under the First Amendment, it is by no means clear that these rights are fully coequal with those of natural persons. The second lacuna is the extent to which the First Amendment protects *negative* speech—that is, silence—as opposed to the *positive* freedom to speak. While natural persons have both rights, the foundations of the two are not the same. In particular, it has been unclear whether negative speech rights extend to corporations.

The Free Speech Clause has been justified as "both as an end and as a means," having both intrinsic and instrumental rationales.[23] The intrinsic rationale protects the natural right of citizens to autonomy in thought and expression.[24] The instrumental rationale promotes the production of information and opinion beneficial to democratic self-governance.[25] The intrinsic and the instrumental bases for the freedom of speech are united in natural persons, for whom each rationale supports the other.[26] More information in public debate improves individual opinion, which, when expressed, improves public debate, and so on.

The situation with corporations, however, is different. Although corporations are "legal persons" with rights protected by the Constitution, corporate speech rights are justified primarily by the instrumental rationale. Corporations can produce information and opinion as well as any individual—better, in fact, than

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[23] 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); Whitney v. California, 274 U.S. 357, 375 (1927) ("[The Framers] valued liberty both as an end and as a means. They believed liberty to be the secret of happiness. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

[24] *303 Creative*, 600 U.S. at 584 (stating that the freedom of speech is "[a]n end because the freedom to think and speak is among our inalienable human rights"). *See also, e.g.*, Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1232 (1991) (situating the freedom of speech within a framework where "the chief purpose of the law is to provide adequate protection to individual rights, understood as expression and safeguards of the individual's autonomy").

[25] *303 Creative*, 600 U.S. at 584 (stating that the freedom of speech is a means because it is "indispensable to the discovery and spread of political truth") (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

[26] Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 213 (asserting that First Amendment values are intended to protect "democratic self-governance and participation in the construction of public opinion").

many.[27] As a result, the instrumental rationale would seem to support the protection of at least some corporate speech. However, because the intrinsic rationale is based upon the *natural* right to autonomy in thought and speech, it is of doubtful applicability to corporations, which are *artificial*, not *natural* persons.

The intrinsic rationale is especially critical in the context of *negative* speech rights. A person who refrains from speaking expresses no idea, and silence does nothing to improve the quality of democratic deliberation. For this reason, the First Amendment protection of negative speech rights has been wholly grounded upon the *intrinsic* rationale and, more specifically, rooted in the integrity of "conscience"—a concept that, as variously formulated by the Court, seems to refer to the interior life, intellectual or spiritual, of *natural* persons.[28] As *artificial* entities, corporations do not have interior lives and are, as the saying goes, as bereft of conscience as they are of body and soul.[29] Unless corporations can somehow draw upon the intrinsic rationale, there would seem to be no basis for negative corporate speech rights.

A starting point for locating a basis for corporate speech rights is to focus not on the corporate entity but on the natural persons who form it and whose interests it represents. Corporations are, in their essence, associations of natural persons who, in coming together to form artificial entities, do not abandon their natural rights. An intrinsic justification for corporate speech rights thus can be derived from the people for whom it exists—that is, its shareholders. However, corporate law teaches that shareholder rights are transformed by the corporate form. Although shareholders retain individual rights to liberty and property, as shareholders they can neither command corporate action—to pay a dividend, for example—nor

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[27] Corporations may be able to produce and disseminate information more effectively than all but the wealthiest individuals. This may present problems of its own—corporate speech may overwhelm and crowd out individual speech. *See infra* note 157 and accompanying text.

[28] *See infra* notes 220–223 and accompanying text (discussing the Court's various formulations of the idea as "conscience," "mind," "sentiment," and "intellect and spirit").

[29] John C. Coffee Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981). The saying—"Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"—is attributed to Edward, First Baron Thurlow (1731–1806).

sell corporate property.[30] We might therefore expect that any intrinsic justification for corporate speech rights based upon shareholders' natural rights will be similarly transformed by the corporate form.

This article offers a theory of corporate speech that connects "conscience" to "purpose" and, in doing so, implies a basis for protecting corporations' *negative* speech rights. Starting from the premise that any intrinsic foundation for speech rights must be derived from shareholders, this article draws upon basic corporate law principles to show how the corporate form modifies shareholder rights. The extent of this modification depends, fundamentally, on the potential for conflict among shareholders' interests and objectives. Sole shareholder corporations, in which the entity is the "alter ego" of its owner, demonstrate perfect alignment between the interests of the shareholder and of the corporation. In such cases, corporations have the full speech rights of their owner. Likewise, closely held family firms where there is relatively little conflict among the shareholder base may also feature broad speech rights. The difficult case is the publicly traded corporation.

Publicly traded corporations, whose defining characteristic is a large number of widely dispersed investors, possess a broad diversity of interests and objectives in their shareholder base. This breeds conflict. Lest the conflicts in the shareholder base render the firm ungovernable, corporate law provides managers with a presumptive purpose: wealth maximization.[31] Shareholders may specify other purposes in their governing documents, but in the absence of such an election, corporate law presumes the company to be managed for the purpose of shareholder wealth maximization.[32] This presumption provides a basis for corporate speech rights.

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[30] DEL. CODE ANN. tit. 8. § 141(a) (West 2023) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors"). The central issue of corporate law is how to make the board of directors make these decisions for the best interests of all shareholders as a class.

[31] *See, e.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919) (emphasis added):

> A business corporation is organized and carried on *primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.* The discretion of directors is to be exercised in the choice of means to attain that end, and *does not extend to a change in the end itself,* to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

[32] *See infra* note 182 and accompanying text.

The wealth-maximation norm serves as the coherent internal core of the corporation. For lack of a better word, its conscience. When corporations are compelled to speak in a manner that is consistent with wealth maximization—for example, when mandatory disclosure rules prompt disclosures that financially motivated investors would ordinarily demand—the compulsion is unobjectionable. However, when corporations are compelled to address issues that are not consistent with wealth maximization, they violate the integrity principle underlying the compelled speech cases. Violation of the integrity principle triggers First Amendment protection.

Rule 14a-8 provides the ideal context in which to study these issues. First, unlike other First Amendment cases involving sole shareholder firms[33] or closely-held family businesses,[34] the rule applies only to those firms where First Amendment rights are most problematic—that is, publicly-traded corporations.[35] Second, because the rule involves a compulsion to speak, rather than a restriction on the content of speech, it highlights the context of negative speech rights. Third, because the majority of shareholder proposals under the rule involve matters of social policy invoking either the ordinary business or relevance exemptions, Rule 14a-8 presents a context in which the content of the disclosure violates the integrity principle. Thus, although corporate and securities lawyers sometimes dismiss Rule 14a-8 as a minor annoyance, in fact the rule is the ideal instrument for probing the limits of the speech rights of corporations.

From this introduction, the article proceeds as follows. Part I focuses on Rule 14a-8, first describing the origin and evolution of the rule, then reviewing the existing literature on the rule in order to understand how the rule has been approached by other scholars. It finds that the current rule, which is essentially the inverse of the original rule, is justified only by instrumental reasons, all of which are highly questionable on their own terms, and none of which provide any support for the rule's constitutionality.

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[33] *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023); *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

[34] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[35] Amalgamated Clothing & Textile Workers Union v. SEC, 15 F.3d 254, 255 (2d Cir. 1994) (stating that the petitioner's proxy material request to a "publicly traded company" was "made pursuant to SEC Rule 14a-8, which *requires a company registered with the SEC* to include in its proxy statements") (citation omitted) (emphasis added).

Part II focuses on First Amendment doctrine. It begins by investigating the first doctrinal problem—the constitutional basis of corporate speech rights. After analyzing the applicability of both the intrinsic and instrumental rationales to different forms of corporate communications, it argues for a conception of intrinsic corporate speech rights based upon the wealth maximization norm. Part III then proceeds to the second doctrinal problem—the question of negative speech rights. After combing through the court's compelled speech cases for a coherent theory of the protected interest underlying negative speech rights, it puts the two pieces together, articulating an intrinsic rationale for corporate speech rights based on the principle of integrity. The intrinsic rationale supports the right of corporations not to be made to speak for reasons other than wealth maximization. Part IV argues that these principles reveal that Rule 14a-8, at least insofar as it mandates controversial disclosures on matters of social policy, violates the First Amendment rights of corporations.

I. THE SHAREHOLDER PROPOSAL RULE

This Part provides context for the analysis to follow. It reviews, first, the origins and evolution of the shareholder proposal rule. Then it reviews the existing scholarly literature on the rule. Interestingly, prior academic work has not evaluated the constitutional difficulties raised by the rule. This may result from an accident of history, in which the relevant First Amendment doctrines did not mature until after the modern form of the shareholder proposal rule. It may also reflect the siloed nature of the legal professoriate.

At the same time, incentive problems have thus far dissuaded parties from challenging the constitutionality of the rule in court. As described below, however, recent cases suggest that this is beginning to change.

A. Origin and Evolution of the Shareholder Proposal Rule

The SEC adopted the first version of the shareholder proposal rule in 1942.[36] Its statutory basis was the SEC's authority to regulate the proxy solicitation process under Section 14a of the Securities and Exchange Act of 1934 (the "Exchange Act").[37] Originally conceived as a means of ensuring fair voting procedures, Section

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[36] SEC Rule X-14A-7, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942).

[37] Securities and Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78oo (2023), at §§ 78m, 78n, and 78u).

14a soon emerged as a trigger for reporting.[38] Unlike other Exchange Act disclosures, which merely needed to be filed with the Commission, Section 14a required the company to send the necessary information to all shareholders entitled to vote.[39]

But the statute raised a question: In addition to the annual election of directors and matters introduced by management, did Section 14a also apply to resolutions that *shareholders* intended to introduce at the annual meeting? In other words, did the statute require managers to include information about shareholder-sponsored referenda in the company's own proxy materials? By the late 1930s, an SEC staff interpretation had answered yes.[40] The original shareholder proposal rule codified that answer.[41]

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[38] *See, e.g.*, Mortimer M. Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 667 (1951) (reviewing the first fifteen years of the SEC's regulation of proxy solicitations and noting that "the current proxy rules serve to elicit practically every type of pertinent information which the average prudent investor would desire in order to vote intelligently on the items of business intended to be presented for shareholder consideration").

[39] *See* Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1358 (1966):

> Actually [the information required under the proxy rules] coincides almost precisely with the required disclosures on the same subjects in an original registration and annual reports under the 1934 Act disclosure system, but—since it is provided for the benefit of present voting stockholders, as distinguished from the general body of investors for whose benefit the reporting system is provided—it is accorded the special emphasis of being physically disseminated in the manner of a prospectus rather than being merely available in a public file.

[40] *See* Sheldon E. Bernstein & Henry G. Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. CHI. L. REV. 226, 233–34 (1940) ("It was apparently held in several cases, last year, that a proxy statement transmitted to stockholders by the management which failed to indicate that the management knew a stockholder would bring before the meeting Matter B would be misleading under some circumstances."). *Accord* Arthur H. Dean, *Non-Compliance with Proxy Regulations: Effect on Ability of Corporation to Hold Valid Meeting*, 24 CORNELL L. REV. 483, 499–500 (1939) (noting that the SEC implicitly distinguished between "valid motions by stockholders" and "invalid motions" and "apparently is of the opinion that if the management of a company is notified . . . by a stockholder of his intention to propose . . . an invalid motion, the management need not mention such fact in its notice").

[41] Notice of and an opportunity to act upon shareholder resolutions was first implemented by rule in 1940. *See* Amendment of SEC Rule X-14A-2, 5 Fed. Reg. 174, 174 (Jan. 12, 1940) (summarizing rule amendments requiring that shareholder proposals "be described . . . and means shall be

The 1942 version of the shareholder proposal rule required shareholder resolutions that were "a proper subject for action by the security holders" to be disclosed in management's proxy materials and gave the proponent an opportunity to include a 100 word statement in support of the proposal.[42] This "proper subject" language, still part of the modern rule, referred questions concerning the *substance* of shareholder resolutions to state law, leaving federal law to address only the dissemination of information.[43]

The SEC's involvement was understood as a natural extension of its control over the proxy solicitation process: If shareholder resolutions were not disclosed in proxy materials, then the ability of shareholders to make resolutions at the annual meeting, given the predominance of proxy voting over attendance at shareholder meetings, would be illusory.[44]

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provided whereby the person solicited is afforded an opportunity to specify the action which he desires to be taken pursuant to the proxy on such matter").

[42] SEC Rule X-14A-7, 7 Fed. Reg. 10655, 10656 (Dec. 22, 1942). The original rule stated, in relevant part:

> In the event that a qualified security holder of the issuer has given the management reasonable notice that such security holder intends to present for action at a meeting of security holders of the issuer a proposal which is a proper subject for action by the security holders, the management shall set forth the proposal and provide means by which security holders can [vote thereon]. Further, if the management opposes such proposal, it shall, upon the request of such security holder, include in its soliciting material . . . a statement of such security holder setting forth the reasons advanced by him in support of such proposal, provided, however, that a statement of reasons in support of a proposal shall not be longer than 100 words and provided further that such security holder and not the management shall be responsible for such statement.

Id. (cleaned up).

[43] Caplin, *supra* note 38, at 670–71.

[44] This rationale was articulated in 1943 by Ganson Purcell, then-Chairman of the SEC, as follows:

> Once a shareholder could address a meeting[.] [T]oday he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has of expressing his judgment comes at the time when he considers the execution of the proxy form, and . . . that is the time he should have the full information before him and the ability to take action as he sees fit.

Hearings on H.R. 1498, H.R. 1821, and H.R. 2019 Before the H. Comm. on Interstate and Foreign Com., 78th Cong., 1st Sess., pt. 2, at 174–75 (1943).

Still, the original rule conceived of a clear jurisdictional boundary. State law determined which proposals were valid, and federal law required disclosure of valid proposals. As summarized by an early commentator:

> The proxy rules have added nothing essential to the right of the shareholder to raise such a question at a meeting and to have it voted on by his fellow stockholders. What they have done is to place upon persons soliciting proxies, usually the management, a duty to include in their own soliciting material a description of all action proposed to be taken pursuant to the proxies.[45]

Unfortunately, because few if any states had clear rules about what sorts of shareholder proposals were appropriate under state law, the SEC soon assumed a quasi-judicial role in deciding between valid and invalid shareholder resolutions.[46] The idea that shareholder resolutions would be limited to situations where they were *expressly authorized*, either by state statute or corporate charter, was soon rejected by caselaw and replaced by the opposite proposition.[47] Shareholders could propose resolutions concerning any matter reasonably related to the business and affairs of the company that state corporate law did not *expressly reserve* for the board of directors.[48]

Nevertheless, early versions of the shareholder proposal rule were clear that proper subjects for shareholder action were limited to matters touching on the business or financial performance of the company. The SEC emphasized in 1946 that it was "not the intent of [the shareholder proposal rule] to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a

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[45] Milton V. Freeman, *An Estimate of the Practical Consequences of the Stockholder's Proposal Rule*, 34 U. DETROIT L.J. 549, 550 (1957).

[46] LOUIS LOSS, SECURITIES REGULATION 906 (2d ed. 1961) ("Inevitably the Commission, while purporting to find and apply a generally nonexistent state law, has been building up a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action.").

[47] SEC v. Transamerica Corp., 163 F.2d 511 (3d Cir. 1947) (holding that a corporate bylaw could not inhibit operation of the shareholder proposal rule where the subject was one "in respect to which stockholders have the right to act under [state corporate law]"). *See also* Caplin, *supra* note 38, at 670–72 (describing how the earlier restrictive view, adopted by corporate counsel and some officials at the SEC, was altered by the more expansive view expressed in *Transamerica*).

[48] Caplin, *supra* note 38, at 671–72 ("[I]t would seem that today a 'proper subject' for shareholder action could be any matter reasonably related to the business affairs or management of the company—provided only that such matter, by statute or decision, or by charter or by-law, be not delegated exclusively to the Board of Directors . . . .").

general political, social or economic nature."[49] Then, in 1952, in response to a proposal urging the Greyhound Bus Company to discontinue segregated seating in southern states,[50] the SEC amended the rule to give companies express grounds to *exclude* shareholder proposals made "primarily for the purpose of promoting general economic, political, racial, social, or similar causes."[51] Even as corporate gadflies, such as Lewis Gilbert, increasingly seized upon the rule to petition for corporate change, the changes they sought invariably targeted what we would now call agency costs—reforms designed to curb management excess and render managers more accountable to shareholders.[52]

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[49] Investment Company Act Release No. 448, 11 Fed. Reg. 10995, 10995 (Sept. 27, 1946).

[50] Peck v. Greyhound, 97 F. Supp. 679 (S.D.N.Y. 1951). The episode is summarized by Harwell Wells:

> In 1948, the "militant" pacifist James Peck and the civil rights pioneer Bayard Rustin each purchased one share of stock in the Greyhound Bus Company to target that company's operation of segregated buses in the American South. When Peck rose to speak at the company's annual meeting, "the corporate secretary allowed him to speak but suggested that he was technically out-of-order and should have submitted a proxy resolution." Peck did so a year later, submitting "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South," only to have Greyhound reject it, arguing that it "was not a proper subject" for shareholder proposals. While the SEC initially supported Peck's right to include the statement in Greyhound's proxy, it reversed itself in 1951, holding that the shareholder proposal was not intended to allow stockholders to communicate on "matters which are of a general economic, social, or political nature"—a ruling upheld by a federal court. Peck's campaign failed but was a harbinger of social-issues proposals that would flourish in the next decade.

Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1081–82 (2015) (citations omitted).

[51] Solicitation of Proxies, 17 Fed. Reg. 11431, 11433 (Dec. 18, 1952) (permitting exclusion if proposal is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes").

[52] *See, e.g.*, Lewis D. Gilbert, *An Independent Shareholder Appraisal*, 34 U. DETROIT L.J. 558 (1957) (discussing matters appropriate for shareholder proposals and focusing on such items as the location of shareholder meetings, approval of the auditing firm, disclosure of the results of director elections, cumulative voting, the inclusion of independent directors on the board, and management compensation). *See also* LEWIS D. GILBERT, DIVIDENDS AND DEMOCRACY (1st ed. 1956).

Widespread use of the shareholder proposal rule to propound a social agenda did not emerge until the late 1960s and early 1970s.[53] In 1968, at the height of the Vietnam War, a human rights group holding shares of Dow Chemical Company submitted a proposal urging the board to prevent the company from making napalm.[54] Although the proponents acknowledged that their motivation was primarily moral, they also claimed that the manufacture and sale of napalm for use in the Vietnam War was bad for business, allegedly because it prevented the company from recruiting quality employees.[55]

An SEC no-action letter endorsed the company's position that the proposal could be excluded under either the exemption for proposals relating to ordinary business practices (sale of a company product) or the exemptions for proposals focusing on social or political issues (the propriety of the war). But the D.C. Circuit reversed, holding that, because the social concern arose directly in response to a company product, these general exclusions did not apply.[56] In reaching this holding, the court emphasized that the interplay of the ordinary business and social policy exclusions put proponents on the "horns of [a] dilemma" under which essentially all proposals could be excluded as either too specific, thus interfering with management's prerogative to manage ordinary business matters, or too general,

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[53] Donald E. Schwartz & Elliot J. Weiss, *An Assessment of the SEC's Shareholder Proposal Rule*, 65 GEO. L.J. 635, 637 n.11 (1976) ("Although shareholder proposals raising social issues were not unknown prior to 1970, almost all proposals before that date dealt with corporate governance or corporate-shareholder relations.").

[54] Med. Comm. for Hum. Rts. v. SEC, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1972).

[55] *Id.* (noting that the group's objections are "primarily based on the concerns for human life" but that the product "is also bad for our company's business" because "it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth"). The group also claimed that the manufacture and sale of napalm may be bad for the company's reputation in global markets. *Id.*

[56] *Id.* at 681:

> [T]he proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.

raising abstract social justice issues.[57] Excessive application of these bases for exclusion vitiated the principle of "corporate democracy" that, according to the court, motivated the proxy rules.[58]

The anti-war proposals aimed at chemical companies and weapons manufacturers[59] were soon joined by other leftist proposals aimed at industrial and financial companies more broadly.[60] The agenda items were a hodgepodge of environmental, labor, race, and gender issues.[61] What unified them was an agreement as to tactics—to use shareholder power within corporations to influence national policy. As described by Professor Schwartz, who was also a participant in the campaign against General Motors ("Campaign GM"):

> [A] new tactic was adopted by some dissenters who saw corporations to be the core of the problem. They analogized corporations to the state, and saw them as the maker of economic policy. To affect national policy, the dissenters concluded, required them to influence economic policy, and this in turn meant that they had to work within the organizations that make such policies. Therefore, the plan evolved to oppose corporate policies not as outsiders, but as participants in the process.[62]

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[57] *Id.* at 679.

[58] *Id*. at 676 (claiming that it was "obvious to the point of banality" that Congress intended the proxy rules "to give true vitality to the concept of corporate democracy"). To support this assertion, the court quoted legislative history to the effect that: "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies." *Id.* (quoting H.R. REP. NO. 1383, at 5, 13 (1934)).

[59] *See also, e.g.*, State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 408 (Minn. 1971) (considering whether weapons manufacturer Honeywell was required "to produce its original shareholder ledger, current shareholder ledger, and all corporate records dealing with weapons and munitions manufacture").

[60] *See* Donald E. Schwartz, *Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 423 (1971) (documenting "Campaign GM" in the context of other shareholder proposals).

[61] Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 487–88 (1972) (stating that Campaign GM "dealt specifically with social policy issues such as safety, pollution, and minority hiring").

[62] *See* Schwartz, *supra* note 60, at 422 (citations omitted). Schwartz, a Professor at Georgetown University Law Center who also served as counsel to the Campaign GM movement, celebrated the shareholder proposal as a weapon of the "corporate guerilla fighter." *See id.* at 421.

The tactic, in other words, was to leverage the corporation as an instrument of social change, a part of what others have characterized as the "long march through the institutions."[63] The shareholder proposal was thus seized upon as a means of bending corporations to serve, or at least publicize, a set of social or political goals.[64]

The modern era of the rule began with the SEC's acquiescence on social proposals. The agency reversed course in two rule changes issued during the 1970s. First, in 1972, the SEC softened the basis for excluding social proposals, by limiting the exclusion to proposals that are "not significantly related to the business of the issuer" or are "not within the control of the issuer."[65] As a result of the change,

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[63] "The long march through the institutions" was a phrase used by student activists to describe a tactic of entering institutions in order to turn them to leftist ends. As described by Marcuse:

> Rudi Dutschke has proposed the strategy of the *long march through the institutions*: working against the established institutions while working within them, but not simply by 'boring from within', rather by 'doing the job', learning (how to program and read computers, how to teach at all levels of education, how to use the mass media, how to organize production, how to recognize and eschew planned obsolescence, how to design, et cetera), and at the same time preserving one's own consciousness in working with others.

HERBERT MARCUSE, COUNTER-REVOLUTION AND REVOLT 55–56 (1972). The "long march through the institutions" invokes Antonio Gramsci's concept of a "war of position," though it may not be directly attributable to him. *See, e.g.*, Joseph A. Buttigieg, *The Contemporary Discourse on Civil Society: A Gramscian Critique*, 32 BOUNDARY 2, 50 n.21 (2005) (noting that the "phrase is not Gramsci's, even though it is ubiquitously attributed to him").

[64] As described by Henry Manne in the early days of this movement:

> [T]he real importance of corporate activism does not lie in lengthy shareholder meetings or cosmetic business changes. The real significance of these moves can only be understood in terms of a broadly-waged propaganda war that has been going on in the United States against large-scale corporate capitalism since at least the early part of this century. The ultimate ramifications of this ideological struggle are presumably felt in the form of government supervision of the economy. The battles in this war may be fought on many grounds, including matters like shareholder social proposals, but the victories and defeats are measured by the amount of hostile or unflattering publicity one side scores against the other. Only in this sense do the issues of shareholder social proposals or corporate social responsibility seem important. Taken alone they cannot be said to have created any fundamental change in the corporate system.

Manne, *supra* note 61, at 492–93.

[65] Adoption of Amendments to Proxy Rules, Investment Company Act Release No. 7375 (Sept. 22, 1972) (stating that the Commission's goal was "to replace the subjective terms of the provision

proposals, such as the one at issue in *Dow Chemical*, that raised broad issues of social policy but that were nevertheless directly connected to a product or practice of the company (and therefore within the company's control) would no longer be excludable.

Then, in 1976, the SEC issued an interpretive release holding that the "ordinary business" exclusion would apply only to proposals involving "business matters that are mundane in nature and do not involve any substantial policy or other considerations."[66] As a result, matters that might otherwise be excludable as "ordinary business"—for example, the manufacture or sale of a product and the hiring, firing, and promotion of employees—could be elevated to non-excludable status by connecting them to broader social or political concerns. Hence the shareholder proposal rule at the close of the 1970s was the diametric opposite of the shareholder proposal rule that had opened that decade. Instead of allowing shareholder proposals to be excluded because they promoted general social concerns, the SEC now treated proposals challenging ordinary business practices as non-excludable precisely because they invoked general social concerns.

Judicial decisions construing the modern shareholder proposal rule have extended the rule's receptiveness to issues of social policy. For example, in *Lovenheim v. Iroquois Brands, Ltd.*, a federal district court held that a proposal motivated by animal rights concerns about the mistreatment of geese in producing *pâté de foie gras* could not be excluded in spite of clearly failing the quantitative tests relating to relevance.[67] The relevance exception provided for the exclusion of proposals concerning matters that accounted for less than 5% of the company's total assets or less than 5% of its net earnings and gross sales as long as the proposal was "not otherwise significantly related to the issuer's business."[68] The company's sale of *foie gras* accounted for far less than the 5% threshold. Nevertheless, the court held that the rule's "otherwise significantly related" language permitted consideration of non-

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with objective standards to the extent feasible and thereby create greater certainty in the application of the rule").

[66] Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52997–98 (Dec. 3, 1976).

[67] 618 F. Supp. 554 (D.D.C. 1985). *Pâté de foie gras* is made from fatty livers harvested from geese that have been force fed in a process that was considered cruel by the shareholder proponent. *Id.* at 556 n.2.

[68] *Id.* at 557.

quantitative factors, including a proposal's "ethical and social significance," issues which rendered the animal rights proposal non-excludable.[69]

Other decisions have allowed exclusions while still preserving the exception for urgent social concerns. For example, in *Trinity Wall Street v. Wal-Mart Stores, Inc.*, the Third Circuit allowed the retailer to exclude a proposal relating to the sale of firearms while nevertheless articulating an analytic framework that required policy issues which "transcend" ordinary business matters to be included.[70] But when are social issues transcendent? The opinion offers examples but no answers.[71] Unsurprisingly, the SEC has considerable discretion in determining whether a social policy issue is transcendent and therefore non-excludable.

The modern rule enumerates thirteen possible bases to exclude shareholder proposals in question-and-answer format.[72] Among these are the "ordinary business" exclusion which, as we have seen, allows social and political issues to "transcend" the exemption, and the "relevance" exclusion which, as qualified by *Lovenheim*, allows issues of "ethical and social significance" to trump the company's ability to exclude proposals.

Under current practice, companies invoking these or any other bases for exclusion apply to the SEC's Division of Corporate Finance for a "no action" determi-

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[69] *Id.* at 559–60.

[70] 792 F.3d 323, 346–47 (3d Cir. 2015) ("[W]e think the transcendence requirement plays a pivotal role in the social-policy exception calculus. Without it shareholders would be free to submit proposals dealing with ordinary business matters yet cabined in social policy concern.") (citation and internal quotations omitted).

[71] The pattern of examples in the opinion suggests that social issues are more likely to be transcendent for manufacturing businesses than for retailing businesses. *Id.* at 349 ("[W]e look to the difference in treatment of stop-selling proposals sent to retailers and those sent to pure-play manufacturers. A policy matter relating to a product is far more likely to transcend a company's ordinary business operations when the product is that of a manufacturer with a narrow line."). The pattern of the examples suggests, at best, that social issues are more likely to be found transcendent for manufacturers than they are for retailers.

[72] 17 C.F.R. § 240.14a-8(i) (2023).

nation—that is, an SEC staff commitment to take no action if the company excludes the proposal.[73] Staff "no action" decisions are quasi-judicial.[74] Prior rulings serve as persuasive authority but are not binding. Staff decisions are appealable to the Commission,[75] but if, as is often the case, the Commission declines review, the staff ruling becomes a final order of the Commission, appealable in federal court.[76]

As a result, if the staff issues no-action relief, the proponent of the resolution bears the burden of appeal. If the staff declines no-action relief, the company may either appeal or risk defending an SEC enforcement action. In either case, given the cost of further proceedings, both the shareholders submitting proposals and the corporations seeking to exclude them very often accede to the initial ruling, and staff determinations are effectively final.[77]

The SEC staff's current approach to the "ordinary business" and "relevance" exemptions is outlined in Staff Legal Bulletin 14L. With regard to the significant social policy exception to the ordinary business exclusion, the staff stated that it would not require a nexus between the social policy and the company's business

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[73] *See* Securities Exchange Act, 15 U.S.C. § 78d-1(a); *see also* 17 C.F.R. § 200.30-1(f)(4) (establishing not only the Commission's authority to delegate functions of the agency to a division of its choice, but also delegating enforcement of Rule 14a-8 to the Division of Corporation Finance, respectively).

[74] SEC staff interpretations of the shareholder proposal rule are explained in Staff Legal Bulletin 14. *See* SLB 14L, *supra* note 18.

[75] Securities Exchange Act, 15 U.S.C. § 78d-1(b) (providing that "the Commission shall retain a discretionary right to review the action" of staff delegees).

[76] *See* 15 U.S.C. § 78d-1(c):

> If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, administrative law judge, employee, or employee board, shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission.

See also Axon Enter., Inc. v. FTC, 598 U.S. 175, 181 (2023) ("[I]f no such review has occurred [by the Commission], the [delegee's] ruling itself becomes the decision of the Commission").

[77] Lewis S. Black Jr. & A. Gilchrist Sparks III, *The SEC as Referee—Shareholder Proposals and Rule 14a-8*, 2 J. CORP. L. 1, 10 (1976) ("For all practical purposes, the Staff's decision with respect to any particular proposal is final.").

operations.[78] Claiming that the social policy exception is "essential for preserving shareholders' right to bring important issues before other shareholders,"[79] the staff stated that it would consider only the "significance" of the social policy issue, asking "whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company."[80]

Similarly, with regard to the "social and ethical" exception to the "relevance" exemption, SEC Staff Legal Bulletin 14L reaffirmed the holding of *Lovenheim v. Iroquois Brands*.[81] According to the staff, "proposals that raise issues of broad social or ethical concern related to the company's business may not be excluded, even if the relevant business falls below the economic thresholds of [the relevance exclusion]."[82] The staff thus claims for itself the discretion to determine not only social "significance" but also the "breadth" of social and ethical issues.

Given the staff's discretion in deciding whether a social policy is sufficiently "significant" or whether a concern raises ethical or social issues of sufficient "breadth," it is perhaps not surprising that the staff's determinations show a signif-

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[78] The staff rejected its prior approach requiring a nexus between the company's business and the social policy in question involved the staff in irrelevant questions and led to inconsistent determinations. SLB 14L, *supra* note 18 ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance.").

[79] *Id.*

[80] *Id.* The staff justifies its approach by citing the 1998 Release and the 1976 Release. *See id.* at n.4 (quoting SEC Release No. 34-40018 (May 21, 1998)) ("[P]roposals . . . focusing on sufficiently significant social policy issues . . . generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote"); *see also id.* at n.3 (quoting SEC Release No. 34-12999 (Nov. 22, 1976)) (stating, in part, "proposals of that nature [relating to the economic and safety considerations of a nuclear power plant], as well as others that have major implications, will in the future be considered beyond the realm of an issuer's ordinary business operations").

[81] Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985). *See supra* notes 67–69 and accompanying text.

[82] SLB 14L, *supra* note 18.

icant ideological skew. Empirical work has found that the SEC grants no-action relief allowing the exclusion of conservative social-issue proposals at a significantly higher rate (50%) than the general rate at which it provides no-action relief (31%).[83]

B. Prior Literature

Prior academic commentary on the shareholder proposal rule has focused on policy arguments for and against it. These can be categorized into five basic types of arguments: social value arguments, democratic process arguments, information arguments, efficiency arguments, and statutory authority arguments. Of course, commentators often make arguments in more than one category. Interestingly, however, no prior commentator has analyzed the First Amendment problems raised by the rule.

This section briefly reviews the principal arguments raised in the prior academic literature both for and against the shareholder proposal rule. These arguments raise, at best, second order concerns. Whatever strengths and weaknesses the rule may have from a policy perspective, the rule must have a firm constitutional footing, lest all else is moot. The failure to seriously engage the constitutional questions raised by the shareholder proposal rule is the principal deficiency of prior academic work in this area. This section therefore closes with some conjecture about why prior scholarship on the shareholder proposal rule has missed this central question.

1. Social value arguments

Some of the prior literature defends the shareholder proposal rule as an important means of pushing corporations to act on or at least consider issues of social and political significance. Professor Schwartz was one of the first to argue for an expansive vision of the shareholder proposal rule as a means of achieving "corporate social responsibility."[84] Arguing against the view that business exists only to

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[83] C. Edward Allen, Soc'y for Corp. Governance, Comment Letter on Proposed Rule to Amend Rule 14a-8 Under the Securities Exchange Act of 1934 (Sept. 13, 2022), https://perma.cc/ZFE6-JDPJ.

[84] Schwartz, *supra* note 60, at 462 (outlining and defending an agenda for corporate social responsibility).

maximize returns to shareholders,[85] Schwartz treats the corporation as a "a focal point for social action and . . . a forum for social questions."[86] Similar arguments defend the shareholder proposal rule as a means of advancing "stakeholder" interests—that is, corporate constituencies other than shareholders.[87] The most recent iteration of this argument sees the shareholder proposal as a means of promoting "ESG issues."[88] Although the vocabulary has shifted—from corporate social responsibility to stakeholderism to ESG—all of these accounts focus on the shareholder proposal rule as a means of forcing corporate action on some larger social value of concern to the proponent.

Perhaps the most common counterargument to this view is that, well-meaning though they may be, because shareholder proposals so rarely pass, they are at best meaningless and, at worse, a wasteful source of compliance costs for managers with more important things to do.[89] Shareholder proponents are thus portrayed as quixotic do-gooders, whose aspirational goals cost everyone else money. However, the substantive-value argument does not define victory as winning a corporate election but rather as instigating social change. Adherents can thus point to instances in

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[85] *Id.* at 461 ("[T]he ultimate question must be what is the role of the modem corporation in society; that is, do corporations have a social responsibility. If questions of social and political significance are germane to a corporation, the shareholders' role would seem legitimately to embrace questions of policy.").

[86] *Id.* at 423.

[87] Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 87 (2008) (arguing that "shareholders do use their voting power to advance stakeholder-oriented issues" and defending shareholder proposals on that basis). *Accord* Jill Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113 (2022) (defending the shareholder proposal rule as a mechanism that enables shareholders to convey "their views about corporate purpose to their fellow shareholders and management.").

[88] Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1457 (2021) (arguing that "expanded ESG disclosure would be in service of informing shareholders' voting, engagement with management, and investing").

[89] *See, e.g.*, George W. Dent Jr., *SEC Rule 14a-8: A Study in Regulatory Failure*, 30 N.Y. L. SCH. L. REV. 1, 4 (1985) ("Measured by the support shareholder proposals receive from shareholders . . . the rule is an abysmal failure.").

which corporations have taken actions related to the subject of a shareholder proposal as success, regardless of how shareholders ultimately voted.[90]

The more fundamental problem with social value arguments is the question of values generally. Namely, *which* values, held by *whom*? Implicitly the rule answers these questions by pointing to shareholder values. It is shareholders, after all, who submit proposals.

But this raises the question of what to do when shareholder values conflict. Not all shareholders support the same causes, and those that do may not support them in the same way or to the same degree. The question thus becomes: *which* shareholders? The shareholder proposal rule relies on voting to answer this question. Proposals must receive a majority vote to pass and a greater than *de minimis* vote in order to be resubmitted the following year. In this way, social value arguments draw some of their support from democratic process arguments, discussed below. However, modeling the business corporation as a vehicle for promoting the social values of shareholder sub-groups is fundamentally at odds with basic theories of the firm, as explored in greater depth in Part III.B.

2. Democratic process arguments

Another strain in the literature defends the shareholder proposal rule as an important procedural mechanism without regard to substantive causes or outcomes. Descriptions of the rule as a form of "corporate democracy," a formulation common even in early descriptions of the rule, celebrate its procedural attributes.[91] Democratic processes are said to enhance the legitimacy of the corporation as a social institution.[92] Democratic processes are also trusted to prevent shareholders'

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[90] *See* Schwartz & Weiss, *supra* note 53, at 642–48 (citing as examples of the rule's success divestment from South Africa, the creation of equal employment opportunities, and non-compliance with Arab countries seeking to boycott Israel).

[91] David C. Bayne, *The Basic Rationale of Proper Subject*, 34 U. DETROIT L.J. 575, 575 (1957) ("The proxy is the sole, present means for democratic action in the corporation. The day when the shareholders' meeting performed its full, democratic function, and substantially every shareholder attended, is gone. Remove the effective use of the proxy and corporate democracy is no more."); Frank D. Emerson & Franklin C. Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807, 808 (1952) (discussing the shareholder proposal rule as a means of achieving "fuller realization of the goal of 'Stockholder Democracy'").

[92] Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 112 (1988) ("[S]hareholder consultation can make management decisions more

bad ideas from becoming corporate policy.[93] Furthermore, democratic processes are said to provide dissatisfied shareholders with an alternative to simply selling their shares.[94]

Process arguments treat corporations as democratic republics and shareholders as citizens. The analogy works to a degree. Both shareholders and citizens elect representatives who, in theory at least, exercise managerial discretion on their behalf. But corporations are investment vehicles formed to capitalize business enterprises, not governments constituted for the general welfare. This difference in the scope of activity between corporations and republics implies differences in the meaning of voting rights extended to shareholders, on the one hand, and citizens, on the other. These differences are discussed in greater depth in Part III.B below.

3. Information arguments

A third argument in support of the shareholder proposal rule emphasizes its role in producing information. The premise of these arguments is that voting operates as a means of aggregating private information held by voters.[95] Shareholder

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'legitimate' if a weak form of democratic theory is applied and the public corporation is considered as a social institution.").

[93] Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation,* 45 ALA. L. REV. 879 (1994) (arguing that the marketplace of ideas will operate to eliminate destructive proposals); Fairfax, *supra* note 87, at 102 (arguing that "shareholder democracy will weed out all but the most value enhancing initiatives").

[94] Schwartz & Weiss, *supra* note 53, at 642 ("The shareholder proposal rule provides the interested investor with an opportunity to voice his concerns and keep his stock."). However, substituting shareholder proposals for the "Wall Street Walk" may be contrary to shareholders' interests. *See* Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 448 (1984) ("To the extent that stockholders attempt to use Rule 14a-8 instead of selling their shares, the market for corporate control works less effectively.").

[95] Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1378 (2014) (describing voting as an "information aggregation device for private information held by shareholders").

voting conveys information about their preferences to managers.[96] Surfacing this information to management may improve managerial decision-making.[97]

Furthermore, as some commentators have pointed out, the exchange of information goes both ways.[98] The shareholder proposal rule works by forcing managers to include the proponent's resolution and supporting statement in the company's proxy materials, but inclusion of the proposal in turn creates an incentive for managers to expand upon their opposition to it or face the possibility that it may succeed in the ultimate vote. Forcing management to state its reasoning in opposition to the proposal is thus seen as a key feature of the rule.[99]

Moreover, the public nature of proxy solicitations, in comparison with in-person shareholder meetings, puts additional pressure on management to *publicly* articulate compelling reasons for its opposition. Professor Freeman described the public scrutiny inherent in shareholder proposals as follows:

> On the floor of the meeting a shareholder's resolution is quickly raised and quickly disposed of. Occasionally but rarely it receives some publicity after the event. Under [the shareholder proposal rule] it is necessary for management to set forth in print and send to all shareholders a proposal in which management does not believe and to

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[96] Randall S. Thomas & Paul H. Edelman, *The Theory and Practice of Corporate Voting at U.S. Public Companies*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 459, 468 (Jennifer G. Hill & Randall S. Thomas eds., 2015) ("[A] shareholder vote acts as a measure of the intensity of shareholders' interests . . . conveying to the board the concerns and beliefs of the shareholders.").

[97] Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 292 (2016) ("[B]y facilitating information gathering, analysis, and dissemination, the proposal process may also contribute in important ways to improved decision making by management.").

[98] Freeman, *supra* note 45, at 556 (arguing that the value of the shareholder proposal rule lies in "requir[ing] management to explain its actions to its shareholders"); *see also* Ryan, *supra* note 92, at 112 (offering a "shareholder consultation" model according to which corporate decision-making is improved by forcing management to articulate the reasons behind those corporate policies deemed controversial by shareholder proponents); *see also* James D. Cox & Randall S. Thomas, *The SEC's Shareholder Proposal Rule: Creating a Corporate Public Square*, 3 COLUM. BUS. L. REV. 1147, 1153 (2021) (analogizing the shareholder proposal rule to the "public square" for the exchange of "current and useful information about [the corporation's] investors and stakeholders' concerns").

[99] Freeman, *supra* note 45, at 551 ("The value which I see in the rule is that to the extent that stockholders challenge the judgment of management, management is required to make a defense of its position."); *see also* Ryan, *supra* note 92, at 112 ("[A] shareholder proposal, and management's response to it, may force management to articulate its reasons for pursuing a particular policy.").

> which it may be bitterly opposed. It cannot ignore the matter. It cannot give an off-hand refusal.[100]

Picking up on the public nature of the shareholder proposal, Cox and Thomas defend the shareholder proposal rule for its ability to inform directors generally, not merely the directors of the company subject to the proposal,[101] of the interests and attitudes of shareholders generally, not merely the shareholders of the subject company.[102]

These arguments all assume that shareholders have something relevant to convey in the shareholder proposal process—either through the resolution itself or through the voting on the resolution. The relevant audience for this information is management, either at the subject company or elsewhere in corporate America. Just what information is relevant to managers and whether, if it is lacking, shareholder proposals are a likely means of gathering it are questions addressed in Part III.B. Like the social value and democratic process arguments noted above, these questions go to the essential nature of the corporation: its purpose.

4. Efficiency arguments

Several commentators offer efficiency arguments analyzing the benefits and costs of the shareholder proposal rule. On the benefit side, commentators often focus on corporate changes made in response to proposals.[103] However, corporate changes in response to shareholder proposals are only beneficial if the change itself creates a net benefit for the relevant community, a claim that is often difficult to

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[100] Freeman, *supra* note 45, at 551.

[101] Cox & Thomas, *supra* note 98, at 1154 (describing the rule "as a mechanism for assisting corporate directors generally, meaning not just those on the board of the corporation that is the target of the proposal, but directors at all corporations, in gathering valuable information to help them perform their duties").

[102] *Id.* at 1197 (asserting that the shareholder proposal rule operates as "a forum where management and investors can witness the contesting visions among investors and between investors and management").

[103] *See, e.g.*, Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 597–98 (2021) (finding that management-sponsored proposals followed in the wake of 64.5% of successful gadfly proposals). *See also* Schwartz, *supra* note 60 (offering anecdotal account of corporate change in the wake of shareholder proposals).

demonstrate.[104] Moreover, the value of a corporate change is especially difficult to quantify when part of the claimed benefit is a positive social externality, as in the case of proposals focusing on environmental or social issues.

Quantitative studies using shareholder-focused metrics for value, typically share price, have found either no effect or a very small positive effect on share price.[105] But quantitative studies are highly sensitive to differences in the time period surveyed.[106] A recent study finds that the share price effect of proposals varies depending upon characteristics of the proponent (gadfly proposals destroy value) and of the voting base (proposals that pass with significant institutional support are more likely to enhance value).[107]

On the cost side, commentators also separate direct, measurable, costs of shareholder proposals from their indirect, harder to measure, costs.[108] For example, Susan Liebeler counts the direct costs as legal costs, information costs, the costs of printing and mailing, and the opportunity cost of management time.[109] Among the

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[104] *See* Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE L.J. REG. 174 (2001) (collecting empirical studies showing that shareholder proposals have no effect on firm performance and concluding that this result is likely driven by the inherent lack of value of the one-size-fits all governance reforms insisted upon by proponents, such as board independence, de-classified board structures, and compensation reforms).

[105] Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405, 409 (2017) (showing a meta-study compiling results of event studies on shareholder proposals).

[106] *Id.* at 408 ("We also note the sample periods in these studies because some results have changed over time."). One explanation for these changes, in particular for studies finding that proposals may have a positive effect on share price is the "the emergence of hedge fund activists, who sometimes also initiate shareholder proposals" as part of a larger strategy to create value at a subject company. *Id.*

[107] Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy: Gadflies and Low-Cost Activism*, 34 REV. FIN. STUD. 5629 (2020) (presenting data on shareholder proposals from a sample period between 2003–2014).

[108] *See, e.g.*, Dent, *supra* note 89, at 14 ("Rule 14a-8 has many costs; some are both tangible and readily quantifiable, while others are neither.").

[109] Liebeler, *supra* note 94, at 454 ("The direct costs include increased postage, printing, and tabulating expenses, as well as the alternative use of resources, such as the time that management, legal advisors, etc., must devote to shareholder proposals."); *accord* Dent, *supra* note 89, at 15 (adding administrative costs, both in terms of SEC staff time, and in terms of judicial costs).

indirect costs, Liebeler focuses on the "unrealistic concepts of social responsibility and corporate governance" fostered by the rule, which lead ultimately to a misallocation of corporate resources and misguided governmental interventions.[110]

Ultimately, the efficiency arguments for and against the rule are inconclusive. Although some aspects of the rule are amenable to quantitative analysis,[111] much of the argument rests upon estimates of indirect costs and benefits that cannot be quantified and that depend, instead, upon one's priors regarding the values at stake. For some, any cost is acceptable to contribute even in a small way to ending systemic racism or averting climate catastrophe, while for others, diverting managers from wealth maximization can only impoverish everyone. Moreover, insofar as the relevant constituency of a proposal is society generally, the net benefits of such a proposal cannot be measured by studies that focus only upon share price.

5. Statutory authority arguments

Finally, commentators have raised statutory authority arguments concerning the shareholder proposal rule. Recall that the rule was promulgated by the SEC under Section 14(a) of the Exchange Act, which authorizes rulemaking "necessary or appropriate in the public interest or for the protection of investors."[112] Some commentators argue that the statute grants the SEC broad authority to advance the public interest under the proxy rules. For example, Professor Williams argues that Congress intended the securities laws to confer upon the SEC broad powers to use disclosure as a means of regulating corporate conduct.[113] Professor Williams supports

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[110] *Id*. at 454–55*; accord* Dent, *supra* note 89, at 16 (adding, as an indirect cost, that "shareholder proposals may divert the attention of busy managers to insignificant matters").

[111] *See generally* Denes, Karpoff & McWilliams, *supra* note 105 (summarizing empirical research).

[112] Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (2023).

[113] Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1237 (1999) (arguing that although statutory interpretation ordinarily narrows the meaning of in the "public interest" to the purpose of the statute, a broader purpose for securities regulation can be inferred by reference to the Securities Act of 1933, which uses disclosure as a means of "protecting investors from fraudulent or manipulative practices . . . , promoting market efficiency, fully informing shareholders of facts that may have a material impact on the value of securities, and inculcating higher standards of business ethics in corporate managers and securities underwriters.").

her analysis with evidence from the legislative history, including committee reports, and the statements of senators and congressmen indicating an interest in using the proxy rules to increase shareholder power over "major questions of policy."[114] Similarly, Professor Ryan points to support in Congress at the enactment of the proxy rules for both "shareholder monitoring and shareholder decisionmaking" and expressions in congressional hearings that "reveal further understandings about shareholder participation that have social and political overtones."[115]

In contrast, other commentators argue that the legislative history of the rule supports limiting the SEC's authority to providing for the disclosure of matters likely to be raised at the annual meeting. For example, Professor Bainbridge argues that "the legislative history reflects a congressional desire to do nothing more than enable shareholders to make effective use of whatever voting rights they possess by virtue of state law."[116] Bainbridge's reading of the legislative history finds no congressional intent to change substantive voting rights, only an interest in full disclosure and fair voting procedures.[117] Reading the legislative history in essentially the same way, Professor Liebeler argues that the SEC has exceeded its legislative authority in enacting the shareholder proposal rule.[118] Without becoming embroiled in the larger methodological debate concerning the right way to read a statute,[119] it seems fair to conclude, as one commentator has, that the use of legislative history

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[114] *Id.* at 1245–46.

[115] Ryan, *supra* note 92, at 146.

[116] Stephen M. Bainbridge, *Redirecting State Takeover Laws at Proxy Contests*, 1992 WIS. L. REV. 1071, 1118 (1992).

[117] *Id.* at 1111–12.

[118] Liebeler, *supra* note 94, at 462 (citation omitted):

> Congress did not preempt state corporation law when it enacted the Securities Exchange Act of 1934. Rather, the fundamental purpose of the securities laws is disclosure. The Commission cannot exceed the power granted it under section 14(a) of the Act by using its disclosure authority to legislate shareholder voting requirements.

[119] *See generally* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 358 (2005) (citations omitted):

> [T]extualists seek a somewhat more "objective" form of intent than intentionalists—one that depends less on "the mental states of any particular legislators." Textualists are more apt than intentionalists to treat the legislative process as a black box that spits out the laws to be interpreted but whose internal workings in any particular case are not part of the context that should be ascribed to an "appropriately informed" reader.

in this particular case is indeterminate.[120] How else, then, might we approach the statute?

As I have argued at length elsewhere, the "public interest" language, as used in the securities laws, narrows rather than expands the overall statutory purpose of "investor protection."[121] The context and larger purpose of the securities laws is to protect investors by triggering the release of value-relevant information.[122] The "public interest" language builds in the additional requirement that whatever rules the SEC makes towards this end must also be in the public's interest. Rulemaking *must* protect investors, but rulemaking purporting to do so *must also* be scrutinized for whether it promotes efficiency, competition, and capital formation.[123] The meaning of "public interest" analysis in this context is thus limited to efficiency, competition, and capital formation, and does not encompass other possible interests such as democracy, social justice, or racial and gender equality.

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[120] Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1131 (1993) ("The statutory language and legislative history are ambiguous as to whether the SEC is authorized to enact rules with a substantive effect on corporate governance or simply to implement disclosure requirements.").

[121] Sean Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 917–38 (2023) (arguing, in part, that "public interest must be understood in light of . . . surrounding context" and investor protection in the context of the SEC's disclosure regime means protecting investors "as investors" from concerned citizens where disclosure requirements that only *might* be relevant to financial return are *not* justified) (emphasis added).

[122] *See* ANDREW N. VOLLMER, MERCATUS CTR., DOES THE SEC HAVE LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES? 6–9 (2021), https://perma.cc/5JN2-KL24 (providing statutory analysis of the language and context of each relevant provision).

[123] The securities laws specify the content of the "public interest" analysis as follows:

> Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Securities Exchange Act, 15 U.S.C. §§ 77b(b), 78c(f) (2023). Note the additive "also," meaning that the Commission shall consider investor protection and also the three interests (efficiency, competition, and capital formation) nested within "public interest" analysis. *See id.*

6. On the absence of constitutional arguments

Statutory and policy analyses alike are moot if the rule is unconstitutional. Yet the prior literature on Rule 14a-8 has essentially ignored the First Amendment. Why? The answer to this question likely involves accidents of legal history. The relevant First Amendment doctrines developed alongside the evolution of the shareholder proposal rule, but the rule reached its present form first, in the early 1970s, while the relevant First Amendment doctrines continued to mature.

The First Amendment was not clearly applicable to the securities laws when the regulatory regime first appeared in 1933 and 1934. Securities regulation can generally be viewed as a form of commercial speech regulation—rules aimed at advertisements and other communications made in connection with the purchase or sale of a product—the product being, in this case, an investment security.[124] Advertising could be freely regulated when the securities laws were first passed. In fact, in 1942, the U.S. Supreme Court declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[125]

The Court did not begin to protect "purely commercial" speech until 1976,[126] and what is now described as the "commercial speech doctrine" emerged only piecemeal, with major cases in 1980,[127] 1985,[128] and 2018.[129] Similarly, important cases addressing the speech rights of nonmedia corporations are a product of the

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[124] Griffith, *supra* note 121, at 894 (citing the origin of the commercial speech doctrine).

[125] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). *See* discussion *infra*.

[126] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). *See* discussion *infra*.

[127] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[128] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985).

[129] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).

same era.[130] The first case recognizing election-related speech rights for corporations arrived in 1978.[131] It was reaffirmed in 2010,[132] with other important cases addressing corporate rights decided as recently as 2014 and 2023.[133] In other words, the relevant doctrinal paradigms for evaluating the First Amendment issues raised by securities regulation generally and by the shareholder proposal rule in particular reached maturity only recently, long after the full maturation of securities regulation as a field of law.

Specialization may also play a role. Professors with expertise in securities regulation are not often equally expert in constitutional law. The reverse is also true. Moreover, the incentives of publication and prestige often result in academic silos where important questions requiring expertise in disparate areas of the law may go unasked and unanswered.

There are also tactical reasons. Now that the social policy regime under Rule 14a-8 is established, a corporation would have to defy entrenched SEC authority in order to challenge its constitutionality. Given the considerable discretionary authority that the SEC has over corporations—from securities offerings to periodic disclosures to trading and compliance programs—companies may hesitate to challenge the constitutional basis of the agency's authority.

Furthermore, outside groups with an interest in challenging the SEC's constitutional authority may find that they lack legal standing. In the context of shareholder proposals, for example, only the proponent and the company have standing to sue, and the proponent has no incentive to challenge the constitutionality of the

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[130] Corporations' basic rights under the First Amendment have been recognized as far back as the 1930s and 1940s. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936) (holding that, because "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses," newspaper corporations are protected under the First Amendment from taxes aimed at suppressing dissent in the press); Thomas v. Collins, 323 U.S. 516, 537 (1945) (stating that the Court has "recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty") (citing NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941)).

[131] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978). *See* discussion *infra*.

[132] Citizens United v. FEC, 558 U.S. 310 (2010). *See* discussion *infra*.

[133] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (deciding the corporate rights question under the Religious Freedom Restoration Act, but with clear First Amendment implications); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

rule since doing so could only void his or her proposal.[134] But if companies hesitate to question the constitutional basis of the rule, it will go unchallenged. And in the absence of cases raising novel legal theories, legal commentators lack a controversy upon which to comment.

II. Corporate Speech

Whether corporations have First Amendment rights is now beyond serious dispute. They do.[135] However, whether corporate speech rights are fully co-equal with the rights of natural persons remains an open question.

This Part examines the basis of corporate speech rights. It finds that the speech rights of corporations are based primarily upon instrumental reasons relating to the production and dissemination of information in specifically political and commercial contexts.

But the freedom of speech also has an intrinsic rationale recognizing "the freedom to think and speak [as] among our inalienable human rights."[136] Corporations have access to the intrinsic rationale under certain circumstances, so far limited to corporations with small numbers of shareholders united by some common purpose. However, publicly traded corporations—firms with many shareholders and no discernable common objective other than profit—have only narrow access to the intrinsic rationale. The interplay of these two rationales implies a limited basis for corporations' freedom from compelled speech.

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[134] A recent case in the Fifth Circuit Court of Appeals illustrates the problem. *See* Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230 (5th Cir. 2023). In that case, a shareholder whose proposal was excluded filed suit claiming the SEC abused its discretion and, in doing so, violated the constitution. However, the shareholders stopped short of asserting the unconstitutionality of Rule 14a-8 as a whole since success on that argument would have affirmed the exclusion of their proposal, mooting the lawsuit. The larger First Amendment question, however, was raised by an intervenor. I filed an amicus brief in support of the intervenor in this case. *See* Brief for Professor Sean J. Griffith as Amicus Curiae Supporting Intervenor, National Association of Manufacturers, in Nat'l. Ctr. for Pub. Pol'y. Rsch. v SEC, No. 23-60230 (5th Cir. 2023), https://perma.cc/696F-6PZF.

[135] *See Grosjean*; *Thomas*, 323 U.S. at 537; *Bellotti*; *Citizens United*.

[136] 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023) (stating that the freedom of speech is "[a]n end because the freedom to think and speak is among our inalienable human rights"). *See also* C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment. 251, 254 (2011) (arguing that a person's autonomy, or their "authority (or right) to make decisions about herself" includes self-expressive rights).

A. Instrumental Rationales for Corporate Speech

Instrumental rationales justify rules based on the rules' usefulness in producing some outcome. The instrumental rationale for the freedom of speech thus is premised upon the potential to generate useful speech. The rule is most often justified by its potential for producing useful *political* speech. Democratic self-governance requires access to information and opinion so that citizens can form their own positions and take action concerning the issues of the day.[137] However, the freedom of speech is also justified by an intrinsic rationale that is based on its ability to produce useful *commercial* speech. The U.S. Supreme Court has unambiguously recognized corporate speech rights based upon each of these instrumental rationales. Less clear is whether corporations are entitled to protection for speech that fits neither category, such as speech that is merely expressive.

1. Political speech

First National Bank of Boston v. Bellotti is the first case to justify in detail the speech rights of non-media corporations.[138] The case involved a Massachusetts criminal statute that prohibited corporations from spending money to influence ballot referenda "other than [those] materially affecting any of the property, business or assets of the corporation."[139] The Court found the statute unconstitutional, holding that "speech that otherwise would be within the protection of the First

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[137] *See* Post, *supra* note 26, at 213*; see also* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) ("In my view, the best possible explanation of the shape of First Amendment doctrine is *the value of democratic self-governance*. Many who advocate this value, like Meiklejohn, Professor Owen Fiss, and Professor Robert Bork, believe that the value of democratic self-governance lies in *informed democratic decision making*.") (emphasis added).

[138] 435 U.S. 765 (1978). Prior cases had concluded without much discussion that the speech of nonmedia corporations is protected under the First Amendment. *See, e.g.*, *Thomas*, 323 U.S. at 537 (stating that the Court has "recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty") (citing NLRB v. Va. Elec. & Power Co., 314 U.S. 469 (1941)). The Court has been especially concerned to protect the First Amendment rights of media corporations. *See, e.g.,* Grosjean v. Am. Press Co., 297 U.S. 233 (1936). However, more recent decisions question whether the institutional press has any greater First Amendment rights than other speakers. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 353, 884 (2010) ("[D]ifferential treatment [of media corporations and other corporations] cannot be squared with the First Amendment").

[139] 435 U.S. at 768.

Amendment" does not lose protection "simply because its source is a corporation."[140] In reaching this conclusion, the Court expressly denied that it had decided "whether corporations have the full measure of rights that individuals enjoy under the First Amendment"[141] or "whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities."[142]

Bellotti instead rests upon the nature of the speech in question—*political* speech, specifically, speech concerning a ballot initiative.[143] Treating the promotion and protection of political speech as the core First Amendment value, the Court refused to relegate the production of political information and opinion to media companies, holding instead that corporate speech generally "may contribute to society's edification."[144] By emphasizing the importance of political speech to third parties—the voting public—as opposed to the corporate speaker, the majority rests its holding on the instrumental rationale.

Writing in dissent, Justice White joined by Justices Brennan and Marshall, criticized the court for treating corporate speech rights too much like the speech rights of natural persons. White emphasized that the rationale of individual self-expression does not extend to corporate entities,[145] except perhaps those formed with the

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[140] *Id.* at 784.

[141] *Id.* at 777.

[142] *Id.* at 777 n.13.

[143] In a footnote, the Court clarifies its position that core political speech, more than general self-expression, lies at the heart of First Amendment protections.

> The Court has declared, however, that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). And self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945), quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

Id. at 777 n.12.

[144] *Id.* at 781–83 (emphasizing that "informing and educating the public, offering criticism, and providing a forum for discussion and debate" is not the exclusive domain of press or media companies) (citations omitted).

[145] *Id.* at 804–05 (White, J., dissenting) ("[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.").

express purpose of engaging in speech,[146] because investors in large corporations cannot be presumed to hold a common opinion concerning social or political matters.[147]

> Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. . . . This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment.[148]

Having rejected any intrinsic right to corporate speech beyond speech that furthers the corporation's economic interest, White turns to the instrumental rationale. Acknowledging that the promulgation of ideas, whatever their source, may further First Amendment values,[149] White argued that because corporate investors with political opinions remained free to express their ideas through means other than the corporation, the supply of ideas in the marketplace would not necessarily be curtailed by the restriction of corporate political speech.[150] White also worried

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[146] *Id.* at 805 ("[T]here are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression.").

[147] *Id.* ("Shareholders [in large for-profit corporations] do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion.").

[148] *Id.* at 805–06 (citations omitted).

[149] *Id.* at 806–07.

[150] *Id.* at 807:

> [T]he restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public. . . . Even the complete curtail-

that corporate financing of political discourse would overwhelm the expression of individual opinion.[151]

His solution was to separate politics and profit. White cited the shareholder proposal rule, which then allowed corporations to exclude social policy proposals from their reports, as an example of effectively separating politics and profit.[152] However, the SEC's subsequent reversal of position on the rule, the result of which is that corporations are now *required* to mix politics and profit, has effectively inverted the proposition White intended to express.[153]

The court's decision in *Citizens United v. Federal Election Commission* thirty years later amounts to a straightforward application of *Bellotti*'s core logic to corporate electioneering about candidates.[154] In *Citizens United*, the majority reaffirmed the principle that political speech is protected under the First Amendment whether spoken by corporations or natural persons.[155] But the Court once again dodged the question of whether speech that is *not* narrowly political receives the same degree of First Amendment protection when it is spoken by a corporation. Again the dissent—this one authored by Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor—criticized the majority both for failing to distinguish

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ment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts.

[151] *Id.* at 809 ("The State need not permit its own creation to consume it."); *see also id.* at 826 (Rehnquist, J., dissenting) (noting that corporate "properties, so beneficial in the economic sphere, pose special dangers in the political sphere.").

[152] *Id.* at 819 ("[T]he Securities and Exchange Commission's rules permit corporations to refuse to submit for shareholder vote any proposal which concerns a general economic, political, racial, religious, or social cause that is not significantly related to the business of the corporation or is not within its control.") (citing Rule 14a-8(c), 17 C.F.R. § 240.14a-8(c) (1977), and SEC v. Med. Comm. for Hum. Rts, 404 U.S. 403 (1972)).

[153] *See supra* Part I.A.

[154] 558 U.S. 310, 347 (2010) ("*Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti* 's central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

[155] Citizens United v. FEC, 558 U.S. 310, 342–43 (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.'").

between corporations and natural persons[156] and for failing to appreciate that corporate speech may stifle individual voices in political debate.[157]

Writing separately to dispute the dissent's claim that an originalist interpretation of the Constitution cannot support corporate speech rights, Justice Scalia, joined by Justices Thomas and Alito, argued that the First Amendment permits no distinction between corporations and natural persons:

> The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion.[158]

Scalia's concurrence goes farther than the majority's opinion, which leaves the basic logic of *Bellotti* (and the basic grounds for criticizing that logic) essentially unchanged. Because political speech—that is, speech about a ballot issue, whether a candidate for office or a referendum—is central to the First Amendment, it is protected whether the speaker is a corporation or a natural person. Any governmental attempt to regulate political speech, whether of a corporation or a human being, receives heightened judicial review, a form of scrutiny that is "strict in theory and fatal in fact."[159]

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[156] *Id.* at 466 (Stevens, J., dissenting) ("[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of 'We the People' by whom and for whom our Constitution was established.").

[157] *Id.* at 469–70 (citations omitted):

> The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. . . . Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good. The opinions of real people may be marginalized.

[158] *Id.* at 392–93 (Scalia, J., concurring). In response to the dissent's argument that corporate speech may have a negative effect on public debate, Scalia answers that "to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate." *Id.*

[159] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (explaining the Warren Court's use of strict scrutiny as strict in theory and fatal in fact); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006)

2. Commercial speech

Like political speech, corporate commercial speech is protected for the usefulness of the information it produces. Here, however, it informs economic rather than political decision-making. Because economic rights are not accorded the same degree of constitutional protection as political rights, governmental efforts to regulate commercial speech receive less First Amendment protection. Judicial scrutiny in this context is intermediate rather than strict. But this protection unambiguously applies to corporations as well as natural persons.

The commercial speech doctrine was originally invented to *deny* First Amendment protection to advertising. In the 1942 case of *Valentine v. Chrestensen*,[160] the Supreme Court announced that, with regard to "the freedom of communicating information and disseminating opinion . . . , the Constitution imposes no such restraint on government as respects purely commercial advertising."[161] The Court repudiated its own doctrine three decades later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*[162] There the Court squarely confronted "purely commercial" speech but nevertheless held that the state did not have unbounded authority to regulate it.[163] It is now clear that commercial speech is protected under the First Amendment but it receives a lesser degree of protection than other forms of speech.[164]

In *Virginia Board*, the Court justified the protection of commercial speech on the basis of the instrumental rationale. The Court did not focus on whether individuals have a natural right to advertise products for sale but rather on the benefits that commercial speech produces for consumers. In so holding, the Court drew an

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(examining the application of strict scrutiny through empirical analysis to conclude whether the standard is in fact fatal to state laws in all cases that it is applied to).

[160] 316 U.S. 52 (1942).

[161] *Id.* at 54.

[162] 425 U.S. 748, 762 (1976) ("Our question is whether speech which does no more than propose a commercial transaction . . . is so removed from any exposition of ideas . . . that it lacks all protection. Our answer is that it is not.") (citations and internal quotations omitted).

[163] *Id.* at 769–70.

[164] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (noting that the First Amendment provides "lesser protection to commercial speech than to other constitutionally guaranteed expression").

analogy between the instrumental value of political speech to voters and the instrumental value of commercial speech to market participants. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[165]

Because the commercial speech doctrine rests upon the instrumental rationale, it allows for regulation consistent with that goal. And because commercial speech aims at informing consumers about products in the market, regulation aimed at protecting consumers from deception is permissible under the doctrine.[166] The Court articulated a test for such commercial speech regulations in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[167] In that case, the Court held that in order to be upheld, state regulations of commercial speech must (1) advance a "substantial" government interest,[168] and (2) be no more restrictive than necessary, as measured by two criteria: (a) It must "directly advance" the state interest, providing more than "only ineffective or remote support,"[169] and (b) be "no more extensive than necessary" to achieve the state's ends.[170] This Court later described its test as a form of "intermediate scrutiny."[171]

B. Toward an Intrinsic Rationale for Corporate Speech Rights

If instrumental justifications confine corporate speech rights to the somewhat narrow contexts of political and commercial speech, might there be an intrinsic justification that goes farther? Although commentators generally limit the intrinsic rationale, resting as it does on natural rights, to natural persons rather than legal

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[165] *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

[166] *Id.* at 771–72 ("The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

[167] 447 U.S. 557 (1980).

[168] *Id.* at 564.

[169] *Id.*

[170] *Id*. at 569–70. This aspect of the *Central Hudson* test, the Court later explained, requires a fit "that is not necessarily perfect, but reasonable." Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (citing *In re* R.M.J., 455 U.S. 191 (1982)).

[171] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (describing *Central Hudson* as holding that "restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny").

fictions,[172] First Amendment doctrine does supply a basis for extending the intrinsic rationale to corporate entities on the basis of the natural persons who come together to form them.[173] Corporations, after all, are associations of persons with constitutional rights, including First Amendment rights, who do not necessarily abandon them when they form corporations. The question thus becomes the extent to which persons transmit their rights to the entities they form.

The transmittal of individual rights into corporate form is the logic underlying the Court's reasoning in *Burwell v. Hobby Lobby Stores, Inc.*[174] The question in that case was whether individual rights to the free exercise of religion—on the basis of a statute paralleling the First Amendment's Free Exercise Clause—transferred to the corporations they formed.[175] There was no claim in *Hobby Lobby* that a corporate free exercise right would serve instrumental purposes. If the corporate right existed at all, it could only be derived from the intrinsic free exercise rights of the individual human beings who formed the corporation.

In holding that corporations may, under some circumstances, possess such rights, the Court emphasized that these rights, like everything else a corporation does, must be derivative of the rights and interests of the human beings who form them. "Corporations, separate and apart from the human beings who own, run,

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[172] *See, e.g.*, Dan-Cohen, *supra* note 24, at 1248 (arguing that corporate speech rights are "derivative of . . . the listener's interests" while the speech rights of an individual, by contrast, "in addition to having the same derivative rights as a corporation, is also protected by an original active right to self-expression").

[173] Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1695 (2015) (referring to corporate constitutional rights as "derivative"—that is, derived from the rights of their incorporators).

[174] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) ("An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

[175] *Id.* at 688–90. The question of whether the corporations had religious freedom rights was outcome-determinative. If the corporations had religious freedom rights, then they could not be compelled to provide health insurance coverage for abortion-inducing drugs to which the corporation's owners objected. If the corporations had no religious freedom rights, they had no basis under the statute to deny coverage. While the Court's holding stemmed directly from the statutory text (and the Dictionary Act), the protections of which may go beyond the Free Exercise Clause, the Court also suggested that the Free Exercise Clause likely covered corporations as well. *Id.* at 714–15.

and are employed by them, cannot do anything at all."[176] Thus, the majority reasoned, if the shareholders were uniform and sincere in their religious convictions, they could exercise those beliefs, just as they could pursue other interests, in corporate form.[177]

In this way, *Hobby Lobby* suggests a basis for inferring corporate speech rights. Just as corporations "do not separate and apart from the actions or belief systems of their individual owners . . . pray, worship [or] observe sacraments,"[178] they also do not speak or otherwise express themselves—their owners do.[179] However, the logic of this case has an important limitation. *Hobby Lobby* involved businesses that were started by families and remained closely held by owners who shared the same set of values. Large public corporations, by contrast, have many owners with widely divergent values.[180] *Hobby Lobby* was, in a sense, an easy case because all of the family members/shareholders held similar religious beliefs. For this reason, the case is unhelpful in the event of substantial conflict among the shareholder base. Moreover, such conflict is likely to be the norm in companies with larger numbers of unaffiliated shareholders, the paradigmatic example of which is the publicly held company.

A shareholder, like any other human being, may have all sorts of values. One may care only for profit. Another may care principally about the environment. Two shareholders who care about the environment may care about it differently. One may care principally about conservation—clean lakes, pristine forests, and the

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[176] *Id.* at 707 (internal quotation marks omitted).

[177] The Court emphasized that corporate law does not limit corporate activities to seeking profit. "[M]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes . . . ." *Id.* at 711–12.

[178] *Id.* at 707 (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Hum. Servs., 724 F.3d 377, 385 (3d Cir. 2013)).

[179] There would, of course, be an exception for corporations that produce these things, such as press and media companies.

[180] The majority expressly avoided comment on the question of how to understand these rights in the context of publicly traded corporations, emphasizing that its decision only applied to the closely held corporations before it. *Id.* at 717 ("These cases, however, do not involve publicly traded corporations . . . [W]e have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family.").

preservation of wildlife—while another cares principally about greenhouse gas emissions and climate change. Other shareholders may care about all of the above but attach different weights and rankings to these preferences. The combination of divergent preference sets and different preference rankings in a large enough group—such as all of the shareholders of a publicly traded company—makes it impossible to accurately describe any position on any issue as reflecting collective shareholder values.[181]

Except one. The one value that it is safe to assume that all investors share is an interest in the financial return on their investment. And we can go one step farther. We can also assume, other things being equal, that they would prefer a larger return to a smaller one. We can assume, in other words, that investors are united behind the norm of shareholder wealth maximization.[182]

This is not to argue that shareholders as people do not have other values or that those values do not conflict with each other or with the value of wealth maximization. But it is important to emphasize that *shareholder* values are not *human* values. The linguistic pairing of "shareholder" with "value" implies an interrelationship between the two words such that the meaning of the second is qualified by the first. People who talk about "human rights," for example, focus on the universal set of rights that attach to human beings as such. In the same way, those who focus on "animal rights" seek to define the set of rights that attach to animals as such. The

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[181] *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951) (showing that, given divergent individual preferences, there is no means of deriving a collective social welfare function). *See also* Robert Wutscher et al., *Mathematics in Economics: An Austrian Methodological Critique*, 33 PHIL. INVESTIGATIONS 44 (2010).

[182] *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 62 (1996); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (observing that "profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity" and suggesting that "the presumption of profit maximization could be changed by express shareholder approval."). The SEC has also acknowledged the uniform interest in financial return among investors:

> The SEC's experience over the years in proposing and framing disclosure requirements has not led it to question the basic decision of the Congress that, insofar as investing is concerned, the primary interest of investors is economic. After all, the principal, if not the only, reason why people invest their money in securities is to obtain a return.

Securities Act of 1933 Release No. 5569 (Feb. 11, 1975) & Securities Exchange Act of 1934 Release No. 5627 (Oct. 14, 1975).

linguistic pairing of "shareholder" and "values" requires us to ask what values attach to shareholders as such. The answer is not, as we have already seen, whatever values any particular shareholder might hold. Instead, the question is what value or values might be shared by all shareholders as such. There is only one such value. It is *concern for the financial return of their shares*.

Individual human beings have divergent objectives and may, on occasion, seek to pursue these objectives through their shareholdings. For example, they may invest to end the production of fragmentation bombs[183] or to disrupt collusive settlements in merger litigation.[184] Other shareholders, however, will disagree with these objectives.

The effect of disagreement and conflicting objectives in the shareholder base is to cancel out idiosyncratic interests as an appropriate objective of the firm. The multiplicity of conflicting personal objectives eliminates purely *personal* interests from the collective entity. The corporation becomes increasingly impersonal as it takes on more investors with divergent interests until it becomes, as the French call it, the *société anonyme*—literally, the anonymous society. The more shareholders there are, the more their personal interests offset until all that remains is an uncontradicted, impersonal interest in profit and loss.

This vision of the publicly held corporation—the anonymous association, held together only by a common interest in profit—provides the kernel for an intrinsic theory of corporate speech rights. Corporations may have intrinsic rights to express any idea linked to a common purpose of the shareholder base. Closely held corporations may, under the right circumstances, have many such purposes, but a publicly held corporation can have only one. Profit. Thus, publicly traded corporations may claim an intrinsic right only to expression that serves the profit interest.

This version of the intrinsic speech rights of corporations offers a means of squaring the majority and dissenting opinions in cases like *Bellotti* and *Citizens*

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[183] State *ex rel.* Pillsbury v. Honeywell, Inc., 191 N.W.2d 406, 411 (Minn. 1971) (stating that petitioner Pillsbury bought shares of Honeywell "for the sole purpose of asserting ownership privileges in an effort to force Honeywell" to stop production of fragmentation bombs).

[184] *See* Sean J. Griffith & Anthony A. Rickey, *Objections to Disclosure Settlements: A "How To" Guide*, 70 OKLA. L. REV. 281, 292 (2017) ("Starting in late 2014, [Professor Griffith] began purchasing a portfolio of shares of public companies that announced a merger or acquisition, anticipating that these transactions would inevitably lead to litigation, which would ultimately be resolved in a disclosure settlement.").

United. In each of those cases, Justices writing in dissent—first White, then Stevens—resisted the broad extension of speech rights to corporations by arguing that such rights should be limited to corporate speech in furtherance of business interests.[185] Nevertheless, in each of those cases, the majority extended corporate speech rights without regard to business interests, provided the speech was narrowly political.[186] It may be that the majority and dissenting opinions were operating according to alternative First Amendment rationales. The majority opinions applied the instrumental rationale to recognize a corporate right to political speech, which it portrayed as useful to a democratic society, regardless of the speaker. The dissenting opinions, drawing upon a nascent articulation of the intrinsic rationale, argued that corporate speech rights should be limited to speech serving the profit interest. Once we recognize corporate speech rights as having two possible foundations—one instrumental and one intrinsic—we see that both accounts can be right.

Moreover, as the dissents by White and Stevens suggest, an intrinsic rationale that requires corporate speech to serve the ends of shareholder wealth maximization *limits* rather than expands the scope of corporate speech rights. Because wealth maximization is a limiting principle, the intrinsic rationale does not justify broad expressive rights for corporations as it does for individuals, whose natural rights have no such limitation. Because their speech must be grounded on wealth maximization, corporations have no intrinsic right to non-commercial expression. Outside of the instrumental contexts of political and commercial speech, corporations can participate in non-commercial discourse only to the extent that their discourse serves a wealth maximizing purpose. The farther corporate expression drifts from

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[185] *Compare* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 807–08 (1978) (White, J., dissenting) ("[C]orporate expenditures designed to further political causes lack the connection with individual self-expression . . . I recognize . . . [t]here is also a need for employees, customers, and shareholders to be able to receive communications about matters relating to the functioning of corporations. Such communications are clearly desired by all investors . . . ."), *with* Citizens United v. FEC, 558 U.S. 310, 446 (2010) (Stevens, J., dissenting):

> Over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in [politics] to "preserve the integrity of the electoral process, prevent corruption, sustain the active, alert responsibility of the individual citizen, [and] protect the expressive interests of shareholders" . . . . Time and again, we have recognized these realities in approving measures that Congress and the States have taken.

[186] *See supra* notes 154–157 and accompanying text.

this central purpose, the more countervailing interests—such as the concern that corporate speech may crowd out individual expression—justify regulation.

Political speech, because it is justified by the instrumental rationale, remains an exception to this principle. Corporate political speech—speech about ballot questions and candidate endorsements—cannot be regulated because it produces a positive externality for all of the citizens in a democracy. However, other forms of corporate expression are subject to regulation to the extent that they do not advance the purpose of shareholder wealth maximization.[187]

III. The Constitutional Protection of Negative Speech Rights

Freedom of speech is abridged both when speech is restricted and when it is compelled. The curtailment of freedom in the two cases, however, is not identical. A restriction constrains freedom by preventing an action. In doing so, it curtails a positive freedom—the right to act. A compulsion constrains freedom by requiring action. In doing so, it curtails a negative freedom—the right to abstain.[188] The positive right, in the context of speech, is speaking, and the negative right is remaining silent.[189]

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[187] The logic of this argument has implications for recent controversies. For example, the Florida "Stop WOKE" Act, which barred businesses from holding mandatory DEI sessions for employees, might have been upheld, at least as to business corporations, insofar as the speech in question had no plausible connection to profitability. Because the speech did not implicate profitability, the corporation had no intrinsic right to engage in it. Because the corporation had no intrinsic right, the state's regulation did not violate the First Amendment. Instead of confronting this issue, however, the Eleventh Circuit panel assumed that business corporations have First Amendment rights that are fully coequal with those of individual citizens. *See* Honeyfund.com Inc. v. Governor, State of Fla., 94 F.4th 1272 (11th Cir. 2024).

[188] This is freedom from versus freedom to.

[189] Ordinarily, we think of the right to remain silent in connection with the Fifth Amendment. However, protection of negative speech rights is narrower in scope under the Fifth Amendment than under the First Amendment. The Fifth Amendment prevents compelled speech only insofar as it would incriminate the speaker. *See generally* Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 478 (1995) ("To gain the protection of the Fifth Amendment privilege against self-incrimination, one must show that a statement is (a) compelled by the government, (b) incriminating, and (c) testimonial."). The Supreme Court declined to extend Fifth Amendment rights to corporations, on the view that the right against self-incrimination belongs to individuals, not to entities. Hale v. Henkel, 201 U.S. 43, 69–70 (1906) ("The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege . . . The question whether a corporation is a 'person' within the meaning of this amendment really does not arise."). Although

The core interest protected by the freedom of speech clause is the expression of ideas, especially political ideas.[190] A silent person expresses no idea, political or otherwise. But perhaps this is too glib. Negative speech rights might be founded not upon silence *per se*, but rather the right to refrain from expressing a particular message. Negative speech rights might be understood not as a right to express nothing but rather as the right not to express *something*—a particularly disagreeable idea or set of ideas.

This Part reviews Supreme Court jurisprudence on compelled speech and finds within it a principle of non-contradiction. The negative interest protected by the freedom of speech is the right not to be coerced into expressing messages that contradict one's own values and beliefs. Understood in this way, the Court's compelled speech cases are ultimately about protecting the integrity of a person's values and beliefs.

A. The Compelled Speech Cases

All of the compelled speech cases involve factual situations in which a government actor compels speech.[191] However, the cases differ on *whose message* must be expressed. Sometimes the message is the government's. Sometimes it is someone else's. In the former category of cases—here referred to as "compelled content" cases—the Court characterizes the harm as an offense to conscience. The harm is the imposition of a state credo upon non-believers.

In the latter category of cases—here referred to as "compelled carriage" cases—the Court is less clear in defining the essential harm. As we shall see, however, the concern animating the two categories of cases is closely related. In the

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the intrinsic rationale for speech rights is similarly individual in character, the Court has recognized the aggregation of First Amendment rights in corporate form. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). The aggregation of speech rights into corporate form creates the theoretical basis for an intrinsic rationale for corporate speech rights discussed in this Part.

[190] *See supra* note 23 (citing the belief of the Framers that freedom of speech is essential to seeking political truth).

[191] Here I am excluding, as outside the scope of the present inquiry, cases in which the government compels spending, through the assessment of fees and the direction of subsidies, towards groups or issues with which the assessed person disagrees. *See, e.g.*, Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (upholding university's use of student fees to create a public forum where allocation of funds to student groups was viewpoint neutral). For commentary on this line of cases and discussion of how they might apply to the compelled speech cases, see Abner Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1498–1506 (2018).

compelled content cases, the Court seeks to protect the integrity of the speaker's conscience. In the compelled carriage cases, the Court seeks to protect the integrity of the speaker's message.

1. Compelled content

The Court's compelled speech jurisprudence begins with two classic cases, *West Virginia State Board of Education v. Barnette*[192] and *Wooley v. Maynard*.[193] *Barnette* invalidated a West Virginia statute requiring school students to recite the Pledge of Allegiance. *Wooley* likewise invalidated a New Hampshire law requiring license plates to display the State's "Live Free or Die" motto. Central to each analysis were the conflict between the state's message and the individual's personal beliefs, and the state's attempt to enforce ideological conformity with its message.

The problem with mandating the Pledge, *Barnette* found, was that the state was forcing the students to speak in order to influence how they thought.[194] The Pledge and the attendant symbolism of the flag amounted, the Court said, to "a short cut from mind to mind."[195] Through the pledge, the state hoped to indoctrinate students into a set of beliefs.[196] By making the pledge compulsory, the state sought to "coerce uniformity of sentiment"[197] by eliminating the "freedom to differ."[198] But, as the Court saw it, the state cannot force ideological conformity upon its citizens.[199] Hence the oft-quoted passage:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

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[192] 319 U.S. 624 (1943).

[193] 430 U.S. 705 (1977).

[194] *Barnette*, 319 U.S. at 631 (noting that the pledge amounted to "a compulsion of students to declare a belief").

[195] *Id.* at 632.

[196] *Id.* at 633 ("[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.").

[197] *Id.* at 640 (noting that "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men").

[198] *Id.* at 642 (referring both to a "freedom to differ" and a "right to differ").

[199] *Id.* at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.").

> other matters of opinion or force citizens to confess by word or act their faith therein.[200]

It is not that public officials cannot have views about politics or matters of opinion; nor, of course, is it that the government cannot express official views on politics or other matters of opinion. It is simply that the government cannot coerce its subjects into expressions of conformity with those views because doing so "invades the sphere of intellect and spirit."[201]

The *Wooley* court defined the license plate issue in essentially the same way.[202] Although acknowledging that a message on a license plate might be less serious than compulsory recitation of the Pledge of Allegiance, the Court nevertheless treated the difference as "one of degree."[203] In both cases, the individual (or his property—in this case, his automobile) was made "an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[204] Even if the message is one with which a majority agrees, indeed especially then,[205] coerced speech may not be used to coerce belief.[206] Making the individual "a mobile billboard for the State's ideological message,"[207] the Court held, "invades the sphere of

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[200] *Id.* at 642.

[201] *Id.*

[202] Wooley v. Maynard, 430 U.S. 705, 713 (1977) (defining the question before the court as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public").

[203] *Id.* at 715.

[204] *Id.*

[205] According to the Court:

> The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Id.

[206] *Accord* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840 (2005) (arguing that the core concern of the compelled speech cases is "the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker").

[207] *Wooley*, 430 U.S. at 715 (internal quotations omitted).

intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[208]

Seen in this light, the problem with coerced speech is not, as is sometimes suggested, that the state's views will be misattributed to the individuals forced to mouth them.[209] The logic of the misattribution rationale implies that there would be no problem with compelled speech if everyone (or, at least, a "reasonable observer") understood that there was an ironic gap between the speaker's words and the speaker's beliefs.[210] Moreover, some have argued that an ironic gap would be implicit in any coercive regime.[211] Where the state can compel the speech of its subjects, everyone should understand that the subjects do not always speak sincerely.[212] Thus, if the only concern were misattribution, the omnipresent potential of an ironic gap would negate the risk of misattribution and, therefore, all constitutional difficulty.

But the logic of the *Barnette-Wooley* dyad does not rest upon the perspective of any *outside* observer. Instead, the focus of the Court in these cases is on the interior perspective of the speaker—on the speaker's integrity of mind. According to the Court in both cases, compelled speech is a problem because it might interfere with or unfairly influence the formation of individual beliefs.[213] The risk is not that some

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[208] *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[209] *See* Abner S. Greene, *(Mis)attribution Symposium: Government Speech*, 87 DENVER U. L. REV. 833, 834 (2009) ("It's a complex question how the state might violate one's [First Amendment right] by falsely attributing a belief or statement or affiliation to an individual or group.").

[210] *See* Greene, *supra* note 189, at 474 ("[A] reasonable observer must know that the speech act was compelled. If a reasonable observer views the act in such a fashion, then she knows that the uttered words are not necessarily reflective of the speaker's thoughts."). *See also Irony*, MERRIAM-WEBSTER, https://perma.cc/V8F6-TWBB ("The use of words to express something other than and especially the opposite of the literal meaning.").

[211] LEO STRAUSS, PERSECUTION AND THE ART OF WRITING (1st ed. 1988).

[212] *See* Greene, *supra* note 191, at 1491 ("In most settings the reasonable observer should appreciate that the compelled speech is just that: compelled—or the observer at least shouldn't assume that the speaker/platform is endorsing the message.").

[213] *See supra* notes 201 & 208 and accompanying text.

outsider will mistake the speaker's statements for her actual beliefs. The risk is rather that coerced statements will shape the speaker's beliefs.[214] The operative principle is that the government cannot catechize its citizens.[215]

Understood in this way, the First Amendment protects negative speech rights in order to protect individual integrity. Forced to profess a state belief contrary to one's own, a person confronts a choice between truly conforming her beliefs to the state's, thus compromising her intellectual integrity, or dishonestly claiming to hold the state's beliefs, thus compromising her personal integrity.[216] Either way, the state corrupts. The intuition embedded in the compelled speech doctrine is that state corruption of the conscience is inconsistent with respect for individual liberty.

It may be, as we shall see, that the word "conscience" does not adequately capture the Court's concern in this area. The Court uses the word infrequently,[217] and others attempting to name the interest at stake have offered alternative formulations, such as "freedom of expressive association"[218] and "mental autonomy."[219] Therefore, I offer "conscience" merely as a place-holder—a provisional approxi-

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[214] Shiffrin, *supra* note 206, at 855 (arguing that "what one regularly says may have an influence on what and how one thinks").

[215] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n., 584 U.S. 617, 660–61 (2018) (Thomas, J., concurring) ("Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids.").

[216] *Accord* Shiffrin, *supra* note 206, at 863 ("[A] recitation requirement places the citizen who strives to be sincere, but who does not believe the contents of the recitation, in a dilemma: the citizen must either disobey the law or compromise the character virtue.").

[217] Greene, *supra* note 191, at 1521 n.224 (noting that in the *Barnette* opinion, the word "conscience" does not appear in the majority opinion as an analytical tool but only in a concurrence and in the dissent).

[218] *Id.* at 1521–25.

[219] Shiffrin, *supra* note 206, at 854.

mation for the various formulations offered by the Court. These include, in addition to "conscience,"[220] words such as "mind,"[221] "sentiment,"[222] and "intellect and spirit."[223] In using it, I do not mean to refer to meanings of "conscience" rooted exclusively in religious faith.[224] Whatever word one ultimately puts in the place of *conscience*, I will argue that the most important concept in this line of cases is *integrity*, meaning a sound or uncorrupted whole.[225] In the compelled content cases, the Court recognizes coerced ideological speech as an affront to the speaker's integrity.

2. Compelled carriage

In the second category of compelled speech cases, the central focus of the Court's reasoning is not the content of the speech, but the mere fact of forcing a person or entity to convey the speech of some other person. In these cases, the government does not compel citizens to make pledges or mouth slogans. Instead, the role of the government is limited to compelling *carriage*. The speech itself—the content of what is carried—is supplied by someone else not under control of the state. The state compels the carriage of speech, not the content of the message.

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[220] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring); *id.* at 654 (Frankfurter, J., dissenting).

[221] *Id.* at 633 ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citing *Barnette*, 319 U.S. at 637).

[222] *Barnette*, 319 U.S. at 640 ("Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men.").

[223] *Id.* at 642 ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."); *see also Wooley*, 430 U.S. at 706 (quoting *Barnette*, 319 U.S. at 642).

[224] *See generally* STEVEN D. SMITH, THE DISINTEGRATING CONSCIENCE AND THE DECLINE OF MODERNITY (2023) (tracing the evolution of the idea of "conscience" from religious to secular meanings).

[225] *See* CHAMBERS DICTIONARY OF ETYMOLOGY 535 (Robert K. Barnhart & Sol Steinmetz eds., 1999) (tracing integrity's meanings of "soundness, unimpaired or uncorrupted condition" to the Latin root meaning "whole").

The foundational case in this line is *Red Lion Broadcasting Co. v. FCC.*[226] There the Supreme Court entertained challenges to the FCC's "fairness doctrine," which required, among other things, that broadcasters provide anyone personally attacked in a radio or television segment with an opportunity to respond, free of charge.[227] In challenging the rule, broadcasters "strenuously argued" that such regulations operated as a penalty, incentivizing broadcasters to steer clear of political commentary in order to avoid the cost of the attacked person's right of reply.[228] However, the Court brushed off this objection as speculative and, were it to occur, amenable to solution through further government intervention.[229]

The Supreme Court then upheld the fairness doctrine as a legitimate exercise of the government's authority to allocate broadcast licenses.[230] In reaching this conclusion, the Court emphasized the scarcity of spectrum, the high demand for airtime,[231] and the interests of the audience over the interests of the broadcasters.[232] As

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[226] 395 U.S. 367 (1969).

[227] *Id.* at 373–75 ("When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity, or like personalities of an identified person or group, the licensee shall, within a reasonable time . . . [make] an offer of a reasonable opportunity to respond.").

[228] *Id.* at 392–93:

> It is strenuously argued . . . that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.

[229] *Id.* at 393 ("That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues.").

[230] *Id.* at 400–01:

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

[231] *See id.* at 388 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

[232] According to the Court:

a result, *Red Lion* would seem to stand for the proposition that the government can step in to compel speech in order to protect the diversity of expression when the means of expression are in scarce supply.

However, the Supreme Court declined to apply the same reasoning five years later in *Miami Herald Publishing Co. v. Tornillo*.[233] There it struck down on First Amendment grounds a Florida law requiring newspapers to give a right of reply to political candidates attacked in published editorials. In spite of acknowledging the concentration of media assets in a small number of companies controlled by a small number of individuals,[234] an observation that would seem to trigger the scarcity rationale motivating the *Red Lion* decision, the *Tornillo* Court rejected the idea that scarcity necessarily gives rise to access rights.[235] In further tension with *Red Lion*, the *Tornillo* Court expressly endorsed the penalty argument rejected in the former case,[236] holding that First Amendment rights are violated by rules imposing costs on certain forms of expression.[237]

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Id. at 390 (citations omitted).

[233] 418 U.S. 241 (1974).

[234] *Id.* at 249–50:

> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

[235] *Id.* at 253–54.

[236] *Id.* at 257 ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.").

[237] *Id.* at 256 ("The Florida statute operates as a command in the same sense as a statue or regulation forbidding appellant to publish specified matter.").

The tension between these arguments and the *Red Lion* decision is passed over in silence by the Court. *Red Lion* is cited nowhere in the *Tornillo* opinion. The Court does, however, offer an alternative basis for its conclusion in *Tornillo*, holding that the restriction of editors' freedom to decide what to print and what to exclude from publication violates the First Amendment.[238] As a result, although the statute is neutral in the sense that it does not favor particular candidates, it nevertheless violates the First Amendment by disincentivizing speech critical of political candidates and constraining the ability of editors to decide what to print.[239]

The third case in this line came six years later in *PruneYard Shopping Center v. Robbins*.[240] There the Court evaluated whether California could compel a property owner to allow protestors to use common space in his shopping center to distribute petitions and political pamphlets. In holding that the access requirement did not violate the owner's First Amendment rights, the Court distinguished *Wooley*, *Barnette*, and *Tornillo*. Unlike New Hampshire's "Live Free or Die" license plate, California had not "itself prescribed the message."[241] Because "no specific message [was] dictated by the State," there could be "no danger of governmental discrimination for or against a particular message."[242] *Wooley* could be further distinguished, the Court said, because there was little risk that anyone would mistake the protestors' views for those of the shopping center owner.[243] At the same time, the

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[238] *Id.* at 258 ("Even if a newspaper would face no additional costs to comply . . . , the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.") The Court went on to emphasize the centrality of editorial control to a free press:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

Id.

[239] *Id.* at 261 (White, J., concurring) ("[G]overnment may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.").

[240] 447 U.S. 74 (1980).

[241] *Id.* at 87.

[242] *Id.*

[243] *Id.* The Court reasoned that because the public could come and go as they pleased for commercial purposes, views expressed by members of the public on the property would not likely be confused with the owners. Moreover, the Court emphasized that the owner had ample opportunity

Court distinguished *Barnette* on the basis that the access requirement compelled no "recitation of a message containing an affirmation of belief"[244] and *Tornillo* on the basis that there was no "intrusion into the function of editors."[245] In upholding the access right, *PruneYard* implies that speech can be compelled when the government (a) does not prescribe the content of the speech, (b) provides ample opportunity for the speaker to distinguish his or her own views, and (c) does not interfere with the editorial function of the traditional press.[246]

Five years later, the Court considered another California law requiring a private business to convey speech in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.[247] There, in response to a consumer group's objection to a newsletter included in the company's billing envelopes,[248] the state utility commission held that "extra space" in billing envelopes must be fairly apportioned between the company and the consumer group.[249] Accordingly, the Commission ordered the company to distribute the consumer group's materials in the extra space up to four

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to "disclaim any sponsorship of the message" and explain that he was providing access only as required by state law. *Id*.

[244] *Id*. at 88.

[245] *Id.* (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

[246] Concerned with the breadth of this implication, Justice Powell, joined by Justice White, filed a concurrence to urge that the case be limited to its facts, including the uniquely large scale of the shopping center, the small scale and peaceful conduct of the protestors' activities, and the apparent lack of ideological objection to the protestors' ideas. *Id.* at 100–01 (urging the continuing viability of "First and Fourteenth Amendment right to refrain from speaking").

[247] 475 U.S. 1 (1986).

[248] The newsletter "included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills" and therefore did not constitute mere "commercial speech." *Id.* at 5, 8–9.

[249] Extra space was defined by the Commission to include "space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *Id.* at 6 (internal quotation marks omitted). The Commission also ruled that the "extra space" in billing envelopes belonged to utility customers, not the utility company, reasoning that it was "an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base." *Id.* at 1, 5 n.3.

times per year.[250] The company then sued on First Amendment grounds, arguing that it was being compelled to convey speech with which it disagreed.[251]

In holding that compelled access to the billing envelope was unconstitutional, the plurality in *Pacific Gas* relied on *Tornillo* and distinguished *PruneYard*.[252] Expressly extending *Tornillo* beyond the context of the institutional press,[253] the plurality reaffirmed the "freedom *not* to speak publicly,"[254] and distinguished *PruneYard* on the basis of the "peculiarly public" nature of the shopping center[255] and the apparent absence of any effect on the owner's personal self-expression, given his lack of objection to the content of the protestors' message.[256] Also unlike *PruneYard*, the access right in *Pacific Gas* was not content-neutral because the Commission's rationale—supporting a wider variety of views—could not be achieved except by fostering views that diverged from those of the company.[257] Inclusion of a contrary message in the billing envelopes would pressure the company to respond.[258] This would impair the speech rights of the company because "forced re-

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[250] *Id.* at 6.

[251] *Id.* at 7.

[252] Four Justices joined the plurality opinion, written by Powell. Concurring opinions were filed separately by Burger and Marshall. Dissenting opinions were filed by Rehnquist, joined by White and Stevens, and separately by Stevens. One Justice (Blackmun) did not participate.

[253] *Id.* at 11 ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.").

[254] *Id.* at 11 (citations and internal quotations omitted).

[255] *Id.* at 12 n.8.

[256] *Id.* at 12 ("[A]bsent from PruneYard was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets").

[257] *Id.* at 13 ("The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's."). Furthermore, the plurality emphasized:

> [T]he Commission's order identifies a favored speaker 'based on the identity of the interests that [the speaker] may represent,' and forces the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

Id. at 15 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

[258] *Id.* at 15 ("Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect

sponse is antithetical to the free discussion that the First Amendment seeks to foster."[259] Furthermore, the plurality held that the corporate (versus individual) nature of the speaker was immaterial because "the message itself is protected."[260] In sum, the plurality held that "the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold."[261]

There were two dissenting opinions in *Pacific Gas*. One, written by Justice Rehnquist and joined by Justices White and Stevens, objected to the extension of negative speech rights to corporations, an argument taken up in the next section.[262] A second dissent, written by Justice Stevens, pointed to several restrictions of commercial speech that routinely go unquestioned under the First Amendment in order to argue that the restriction of commercial speech in *Pacific Gas* ought to be similarly accepted.[263] In the course of this argument, Stevens drew an express parallel between the access order in *Pacific Gas* and SEC Rule 14a-8:

> An analog to this requirement appears in securities law: the Securities and Exchange Commission requires the incumbent board of directors to transmit proposals of dissident shareholders which it opposes. Presumably the plurality does not doubt the constitutionality of the SEC's requirement under the First Amendment, and yet—although the analogy is far from perfect—it performs the same function as the Commission's rule by making accessible the relevant audience, whether it be shareholders investing in the corporation or consumers served by the utility, to individuals or groups with demonstrable interests in reaching that audience for certain limited and approved purposes.[264]

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the utility business, appellant may be forced either to appear to agree with TURN's views or to respond.").

[259] *Id.* at 16. The government cannot compel speakers "to affirm in one breath that which they deny in the next." *Id.*

[260] *Id.* at 16 (citing *Bellotti*, 435 U.S. at 777, and Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 533 (1980)).

[261] *Id.* at 11.

[262] *See infra*.

[263] *Pacific Gas*, 475 U.S. at 36 (Stevens, J., dissenting) ("In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.").

[264] *Id.* at 39–40.

The crux of Justice Stevens' argument is that since Rule 14a-8 has not been found unconstitutional, the access order in *Pacific Gas* is not constitutionally suspect. However, as we shall see, this argument can be reversed: the unconstitutional access order may indicate constitutional infirmities in Rule 14a-8.[265]

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[266] the Court again limited *PruneYard* to the context of a uniquely public business in which the business owner "did not even allege that he objected" to the content distributed on his premises.[267] In holding that a Massachusetts public accommodations law could not be used to force the organizers of the Boston St. Patrick's Day parade to include gay and lesbian marchers, the *Hurley* Court treated the parade itself as protected expression. Neither did it matter that the parade lacked a "narrow, succinctly articulable message" nor that the message, whatever it might be, was not individually curated.[268] Instead, the Court followed *Pacific Gas* in recognizing the parade organizers' negative speech rights,[269] holding that "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[270]

In apparent contrast, in *Rumsfeld v. Forum for Academic and Institutional Rights*, the Court held that the government could compel law schools to admit military recruiters to campus on the same terms as other legal recruiters.[271] The Court

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[265] *See infra*.

[266] 515 U.S. 557 (1995).

[267] *Id.* at 580 (internal quotation marks omitted).

[268] *Id.* at 569–70 (noting that "a narrow, succinctly articulable message is not a condition of constitutional protection" and that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.") (citations omitted).

[269] *Id.* at 573–74 ("[O]ne who chooses to speak may also decide 'what not to say'") (citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11 (1986)).

[270] *Id.* at 575. *Accord* Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000) (upholding the First Amendment right of the Boy Scouts, an expressive association, to exclude a gay scoutmaster because compelling his inclusion would "interfere with [its] choice not to propound a point of view contrary to its beliefs.").

[271] 547 U.S. 47 (2006). *Rumsfeld* was a spending case, potentially invoking the unconstitutional conditions doctrine, but the Court decided the case on broader First Amendment grounds. *Id.* at 60 ("Because the First Amendment would not prevent Congress from directly imposing the Solomon

characterized the government's imposition in *Rumsfeld* as minor (the law required the universities to speak through scheduling e-mails and bulletin board postings) and clearly "incidental" to an intended regulation of conduct, distinguishing it from the broader interventions in other cases.[272] The critical distinction, however, was whether the "speaker's own message was affected by the speech it was forced to accommodate."[273] Using this rubric, the *Rumsfeld* Court ran through the compelled carriage cases, emphasizing the state's interference with the speaker's core message in each.[274] The Court found no such interference in *Rumsfeld*.[275] Recruiting communications promote student employment, a purpose which is in no way inhibited by announcements alerting students to the presence of additional employers on campus. Because the announcements did not contradict the schools' expressive purpose in recruitment, they did not "interfere with any message of the school."[276] The integrity of the speaker's essential message was intact.

The Court returned to the integrity principle again in *303 Creative LLC v. Elenis*, holding that Colorado's anti-discrimination law could not be used to compel a web designer to produce content contrary to her beliefs.[277] As in *Hurley*, the Court held that it did not matter that the designer's objection was not based on

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Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

[272] *Id.* at 62 ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.").

[273] *Id.* at 63.

[274] *Id.* at 63–65.

[275] According to the Court,

> Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

Id. at 63.

[276] *Id.*

[277] 600 U.S. 570, 588–89 (2023). The web designer in *303 Creative* did not refuse to serve homosexuals as a class but rather refused only to produce websites celebrating gay marriage, a practice contrary to the web designer's beliefs.

religion,[278] or whether it was inconsistent, misinformed, or offensive.[279] Moreover, although the speech was commercial in the sense that the speech itself—website design—was the product for sale, the Court distinguished the speech from "ordinary commercial goods" due to the expressive nature of the product.[280] Thus, the case applies the principle that if the product itself is expressive, the mere fact that it passes in commerce does not strip it of First Amendment protection. Expressive commercially distributed products receive First Amendment protection, and the state may not compel the production of content contrary to the producer's beliefs. Even commercial producers of expression have a right not to associate themselves with ideas they find objectionable.

Although not as easy to summarize as the compelled content cases, the compelled carriage cases also stand for a principle of integrity or non-contradiction. Persons—whether media organizations, parade organizers, or ordinary commercial actors such as utility companies and web designers—cannot be compelled to carry messages that contradict their own. *Pacific Gas* teaches that the disagreement need not be deeply personal, as in the compelled content cases. Furthermore, *Hurley* and *303 Creative* teach that the speaker's message need not be entirely coherent or consistent. The central question is the integrity of the message—whether the "speaker's own message was affected by the speech it was forced to accommodate."[281]

In this way, the compelled carriage cases protect the integrity of message or viewpoint, if not the integrity of conscience. Carriage can be compelled only upon the person who, as in *PruneYard*, has no viewpoint or, as in *Rumsfeld*, whose es-

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[278] In this respect, *303 Creative* extends *Masterpiece Cakeshop*, but grounds the outcome on the Free Speech Clause rather than the Free Exercise Clause. *See* Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 584 U.S. 617 (2018).

[279] *303 Creative*, 600 U.S. at 595 ("Nor, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.").

[280] *Id.* at 593 ("Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple."); *see also id.* at 598 n.5 ("[O]ur case is nothing like a typical application of a public accommodations law requiring an ordinary, non-expressive business to serve all customers or consider all applicants").

[281] *Rumsfeld*, 547 U.S. at 63.

sential message is unaffected by the speech they are made to convey. As in the compelled content cases, the principle of non-contradiction can be summarized in the concept of *integrity*.

B. Corporate Integrity

Following the account above, we can define the core protected interest in negative speech rights as integrity. Negative speech rights protect integrity by guarding one's values and beliefs from corruption through forced expression of contradictory viewpoints. The contradiction can be mild or profound. In either case, the First Amendment protects the integrity of personal values. In extending negative speech rights to corporations, however, we must determine whether this principle, rooted in the natural rights of persons, can be extended to corporate entities. To put the question another way: Do corporations have integrity?

The three-Justice dissent in *Pacific Gas* did not think so. There, Justice Rehnquist, joined by Justices White and Stevens, argued that negative speech rights should not be extended to corporations.[282] First, they described the cases recognizing negative speech rights as being rooted in "freedom of conscience."[283] Because, as artificial entities, corporations do not have consciences,[284] the dissent contended that there is no basis for recognizing the negative speech rights of corporations.[285] Given that prior decisions of the Court had extended speech rights to corporations

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[282] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 26 (1986) (Rehnquist, J., dissenting) (expressing skepticism that "negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally").

[283] *Id.* at 32 ("This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.") (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), Wooley v. Maynard, 430 U.S. 705, 714 (1977), and Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977)). The sole exception, *Tornillo*, in which the Court extended the right to refrain from speaking to a corporation, involved the institutional press, an area of special First Amendment concern. *Id.* at 33 ("Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion.").

[284] *Id.* at 33 ("To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality.").

[285] *Id.* ("Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point.").

for purely instrumental reasons[286]—namely, the goal of fostering a broad public debate[287]—the dissenters argued that because silence in no way contributes to public debate,[288] there was no basis for extending negative speech rights to corporations.[289]

The weakness of the dissent lies in the assumption that there can be no intrinsic justification for corporate expression. This assumption, built upon a narrow definition of "conscience," disregards the broad set of concepts the Supreme Court has sought to protect in its negative speech cases—including, in addition to "conscience," notions such as "mind,"[290] "sentiment,"[291] "intellect and spirit,"[292] "beliefs," and "values." The narrowly drawn lines in the Rehnquist dissent miss the broader set of ideas animating the doctrine. Taken as a whole, these ideas point to the humbler notion of core values. Corporations might not have consciences, but they do have core values. These they derive from their shareholders.

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[286] *Id.* at 33 ("In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons.").

[287] *Id.* (characterizing precedent as holding that corporate First Amendment rights "are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government") (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978), and Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 533 (1980)).

[288] *Id.* at 34:

> The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values.

[289] *Id.* ("[B]ecause the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*.") (citing Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

[290] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943); Wooley v. Maynard, 430 U.S. 705, 714 (1977); *see also supra* note 221.

[291] *Barnette*, 319 U.S. at 640; *see also supra* note 222.

[292] *Barnette*, 319 U.S. at 642; *Wooley*, 430 U.S. at 706; *see also supra* note 223.

As developed in Part II.B, shareholders associate in corporate form to project their values. When there is a single owner—a sole shareholder corporation—the owner's values and the corporation's values are identical, and the state cannot infringe upon the one without infringing the other.[293] However, the more persons that are admitted to ownership, the more their interests diverge, and the less one can plausibly identify a core set of values shared among the corporation and its owners. In a closely held family firm, it may still be possible to identify a common set of values.[294] But in the context of a publicly held corporation, there is only one: wealth maximization.[295]

Shareholder wealth maximization is the core value of publicly held corporations because it is the only value that shareholders as such can be expected to be held in common after the subtraction of their conflicting interests and opinions.[296] It is therefore the basis of the integrity principle for corporations and thus the foundation for their intrinsic speech rights. However, because of its narrow basis—shareholder wealth maximization—the corporate integrity principle can support only a narrow conception of negative speech rights. Corporations can be made to speak, but they cannot be made to contradict the principle of shareholder wealth maximization.

This principle explains the unquestioned constitutionality of most mandatory disclosure rules in securities regulation. Most of the mandatory disclosures required of corporations by the SEC do not contradict the principle of shareholder wealth maximization. Indeed, they can be said to advance it by preventing fraud or calling forth information directly relevant to the value of the issuer's securities through (1) descriptions of corporate assets and how they are used, (2) details about

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[293] *See, e.g.*, 303 Creative v. Elenis, 600 U.S. 570 (2023).

[294] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[295] *See supra* notes 31 & 182and accompanying text.

[296] *See supra* notes 183–184 and accompanying text.

the persons entrusted with managing those assets, or (3) historical information regarding the financial returns of those assets.[297] As a result, such rules are appropriately accorded deferential judicial review under the commercial speech doctrine.[298]

However, forcing a corporation to speak in a manner contrary to profit maximization is an affront to its core principle. Such coerced speech violates corporate integrity and, thus, the negative speech rights of the firm. In this way, the plurality in *Pacific Gas* was right to focus attention on the fact that the consumer group's message implicitly contradicted the company's core interest—the consumer group's interest was in keeping utility prices down.[299] The company's integrity would be threatened because it would be forced "to affirm in one breath that which they deny in the next."[300]

In so holding, the plurality claimed to be protecting "the message" rather than the corporation.[301] But what it really was protecting was the company's core principle from corruption and contradiction. It was protecting corporate integrity. Corporate integrity is worth protecting because it is the essence of the freedom of association. Persons who associate in corporate form do so for a purpose or purposes, into which the state cannot inject its own. The principle animating the compelled speech cases is that government compulsions to speak are consistent with corporate First Amendment rights if and only if the compulsion is consistent with the core value of shareholder wealth maximization.

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[297] *See* Griffith, *supra* note 121, at 893–909 (discussing the compelled speech paradigm applied to SEC disclosure mandates).

[298] *Id.* The argument of this article may be seen as a new gloss on the commercial speech doctrine, at least insofar as the commercial speaker is a for profit public corporation. Reduced to its essence, the claim here is that eligibility for First Amendment protection under the intrinsic rationale depends upon whether corporate speech serves the profit interest. So understood, the intrinsic rationale supplies an alternative basis for the commercial speech doctrine.

[299] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 14 (1986) ("[B]ecause access [to the newsletter] is awarded only to those who *disagree with appellant's views* and *who are hostile to appellant's interests*, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views.") (emphasis added).

[300] *Id.* at 16.

[301] *Id.* at 16 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978), and Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 533 (1980)).

IV. The Shareholder Proposal as Compelled Corporate Speech

Having sketched a theoretical foundation for negative corporate speech rights, we can re-engage the question with which we began. Does Rule 14a-8 violate the First Amendment rights of corporations? The answer, we can now see, is that it does—at least insofar as it mandates controversial disclosures on matters of social policy. But note that in reaching this conclusion, we are not forced to claim that the whole of securities regulation is unconstitutional. Indeed, under the theory offered above, the vast majority of mandatory disclosures under the securities laws are consistent with the requirements of the First Amendment. Rule 14a-8, however, is not.

Under Rule 14a-8, the SEC compels corporations to publish and distribute shareholder proposals.[302] In the process, the rule specifically selects for proposals that address controversial topics, exempting from exclusion proposals that "transcend the ordinary business of the company"[303] or that otherwise "raise issues of broad social or ethical concern."[304] Contrary to its modest goal of providing shareholders with notice of business to be conducted at the annual meeting, the modern rule operates to compel debate on controversial questions. As a result, the vast majority of shareholder proposals now address divisive social issues.

SEC disclosure mandates generally receive judicial deference under the commercial speech doctrine.[305] According to that doctrinal paradigm, rules compelling speech in a commercial context, such as the purchase and sale of securities, do not receive serious scrutiny provided that the mandatory disclosures are "purely factual and uncontroversial."[306] Most SEC disclosure mandates, touching on such things as business assets, the directors and officers of the company, and historical financial performance are purely factual and uncontroversial. Moreover, these provoke the

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[302] 17 C.F.R. § 240.14a-8 (2023) ("This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.").

[303] Such proposals are exempt from exclusion under the ordinary business exception. *See supra* notes 19 & 80 and accompanying text.

[304] Such proposals are exempt from exclusion under the relevance exception. *See supra* notes 18 & 82 and accompanying text.

[305] *See* SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 373 (D.C. Cir. 1988) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (noting that speech relating to the purchase and sale of securities receives intermediate scrutiny)).

[306] *See* Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

release of precisely that information which is of interest to investors—that is, information relevant to financial return. The same cannot be said of the shareholder proposal rule.

Because Rule 14a-8 compels speech on divisive social issues, it does not qualify for judicial deference under the "purely factual and uncontroversial" standard. The disclosures called forth by the rule are controversial under any meaning of the word. The Supreme Court has given meaning to the term "controversy" by focusing on whether an issue generates discord in ordinary civil discourse.[307] Rule 14a-8 satisfies this definition by compelling speech on precisely those issues most likely to divide public opinion. The rule qualifies under other definitions of controversy as well. For example, in other work, I offered a definition of controversy that focuses on how closely SEC rules hew to the goal of investor protection.[308] The shareholder proposal rule provokes controversy under this definition by triggering speech that is either irrelevant to or actively at odds with the goal of investor protection.

More fundamentally, the speech compelled by the shareholder proposal rule is contrary to the interests protected by the intrinsic rationale for the freedom of speech. Like natural persons, corporations have an intrinsic interest not to be compelled to contradict their fundamental values—that is, not to violate their integrity. But unlike natural persons, whose fundamental values are many and various, corporations have a single core value—wealth maximization. By compelling speech on matters not relevant to shareholder wealth maximization, the shareholder proposal rule violates the negative speech rights of corporations.

It is of no consequence that the speech actually compelled is not authored by the government. It is true that the content of shareholder proposals is drafted by shareholders or, more accurately, by advocacy groups. But regardless of who writes the proposal, it is the government that compels the speech. Corporations must publish and disseminate shareholder proposals because of the government's rule and the government's actions in enforcing it—specifically, the no-action process.[309]

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[307] *See, e.g.*, NIFLA v. Becerra, 585 U.S. 755, 769 (2018) (emphasizing the independent significance of "controversial" and defining it by reference to ordinary civil discourse, noting that that abortion is "anything but an 'uncontroversial' topic.").

[308] *See generally* Griffith, *supra* note 121, at 912–27.

[309] *See supra* notes 74–76 and accompanying text.

Compelled carriage, as we have seen, can be as much an affront to the First Amendment as compelled speech.

Having failed to qualify for deference under the commercial speech paradigm, Rule 14a-8 is subject to heightened judicial scrutiny. Moreover, because the rule is content-based—speech is triggered precisely because it implicates a transcendent or broadly significant issue of social policy—the appropriate standard is strict scrutiny.[310] The government must therefore supply a compelling reason for forcing corporations to mouth their shareholders' pet opinions. The most cynical but also perhaps most truthful reason—that those pet opinions frequently accord with the regnant political orthodoxy—is anathema to the First Amendment.[311]

The government's best strategy might be to offer the rule's original purpose—providing shareholders with notice of business to be conducted at the annual meeting—even though, as we have seen, this rationale no longer supports the modern rule.[312] Nevertheless, even if a court did accept this rationale as compelling, the government could not show that Rule 14a-8, in its modern form, is the least restrictive means of doing so. That the original rule accomplished this objective without compelling political speech—that is, by a narrower means than the current rule—necessarily implies that the current rule is not the least restrictive means of doing so.[313] Rule 14a-8, in its present form, violates the First Amendment.

Conclusion

The shareholder proposal rule provides an opportunity to clarify our understanding of corporate speech rights under the First Amendment. The speech rights

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[310] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (holding that content-based regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests").

[311] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *accord NIFLA*, 585 U.S. at 766 (quoting *Reed*, 576 U.S. at 163) ("This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'").

[312] *See supra* Part I.A.

[313] *See supra* notes 50–53 and accompanying text (discussing how the original version of the rule provided shareholders with notice of agenda items without requiring corporations to include proposals made primarily to advance a social or political cause).

of natural persons have been justified under both instrumental and intrinsic rationales. The Supreme Court cases recognizing corporate speech rights, however, are expressly premised on the instrumental rationale. This is important because, although positive speech rights might be justified by either rationale, the support for negative speech rights can be found only under the intrinsic rationale. Fortunately, Supreme Court precedent provides ample support for an intrinsic rationale for corporate speech rights, derived from the interests of shareholders. As a result, existing doctrine provides a basis for protecting the negative speech rights of corporations.

Negative speech rights protect integrity, whether of natural persons or corporations, by preventing the government from compelling speech that contradicts or subverts a core value or interest of the speaker. Natural persons have many such values and interests, but corporations have only one. Corporate integrity is impugned when corporations are forced to speak in ways that contradict or subvert the core value of shareholder wealth maximization.

The shareholder proposal rule violates the First Amendment rights of corporations because it compels speech that contradicts or subverts the core interest of wealth maximization. Notwithstanding its humble origins, the modern rule specifically selects proposals addressing divisive social issues, expressly requiring corporations to convey them, and implicitly requiring corporations to respond to them. Because the rule is neither supported by a compelling governmental interest nor is it narrowly tailored in furtherance of that interest, Rule 14a-8 violates the First Amendment.