NOTE

A 'CORPORATE DEMOCRACY'?: FREEDOM OF SPEECH AND THE SEC

*By Karl M. F. Lockhart**

In Citizens United, the Supreme Court stated that increased recognition for corporate speech rights is not problematic because corporations are themselves mini-democracies; shareholders have mechanisms to check management control over corporate speech. But due to statutory changes and judicial actions, these checks and balances are no longer effective. Managers have nearly unbridled power over corporations' expanded speech rights, allowing them to use companies as outsized megaphones for their own personal political and social positions.

An axiom of First Amendment doctrine is that the remedy for speech that some find problematic is "more speech, not enforced silence." Thus, if the increase in speech rights for corporate managers is an issue, the solution is not to rein in those rights but rather to see how investors' speech is limited and to remove those barriers, enabling investors to fully participate in the corporate democracy.

Securities and Exchange Commission ("SEC") regulations prohibit investors from communicating about corporate elections without filing disclosures and providing proxies to every shareholder. These regulations limit investor speech and are slanted in favor of management because they exacerbate the collective-action problem among shareholders who oppose poorly performing managers. Investors should challenge these regulations on First Amendment

* J.D., 2018, University of Virginia School of Law; B.A., Linguistics, 2013, Boston College.
A.M.D.G. I would especially like to thank Professor Fred Schauer for directing the independent study that ultimately resulted in this Note, suggesting research advice, and offering much-needed critiques and insights. My Notes Advisor George Carotenuto, Notes Editor Hutton Marshall, and their *Virginia Law Review* teams also deserve massive shout-outs for reviewing multiple early drafts of this piece, even over school holidays, and providing crucial comments and edits. I would also like to thank Professor Albert Choi for his thorough course on corporate law and his encouragement to write on this question.

grounds, and courts should apply some form of exacting scrutiny because speech in corporate elections is as important as political speech in many circumstances. Striking down these regulations would restore balance to the investor–management relationship and allow corporate speech to fully reflect the will of companies' true owners: their shareholders.

I. INTRODUCTION

In February 2017, Uber Technologies Inc. began to wrestle with a series of issues related to gender discrimination that would ultimately result in major changes at the company. Launched by a former employee's blog post detailing an incident of workplace sexual harassment and the halfhearted internal response,[1] the company hired former Attorney General Eric Holder to conduct an internal investigation.[2] The investigation found a systemic pattern of overlooking high performers' misconduct—especially towards women—and a win-at-all-costs mentality that had created a workplace culture which championed fiscal success and power over all other values.[3] By accepting and fostering such a culture, Uber, led by CEO and founder Travis Kalanick, had essentially condoned and supported the message that women's wellbeing and safety were less important than creating a "unicorn" start-up with high returns. Kalanick was also under fire for

[1] Mike Isaac, Uber Investigating Sexual Harassment Claims by Ex-Employee, N.Y. Times (Feb. 19, 2017), https://www.nytimes.com/2017/02/19/business/uber-sexual-harassment-investigation.html [https://perma.cc/R43D-9M62]; Susan Fowler, Reflecting On One Very, Very Strange Year At Uber, Susan Fowler's Blog (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/9X98-UQML].

[2] Mike Isaac, Inside Uber's Aggressive, Unrestrained Workplace Culture, N.Y. Times (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html [https://perma.cc/EMG9-MHLV].

[3] Id; see also Liane Hornsey, Chief HR Officer, Uber, Statement on Covington & Burling Recommendations (June 13, 2017), https://www.uber.com/newsroom/covington-recommendations/ [https://perma.cc/9ZXG-FCP6]. Uber was also facing problems related to alleged theft of technology from Google, as well as its "Greyball" program which enabled drivers to evade law enforcement in cities where Uber faced regulatory challenges. Jack Nicas, Uber Fires Driverless-Car Executive at the Center of Google Legal Battle, Wall St. J. (May 30, 2017), https://www.wsj.com/articles/uber-fires-driverless-car-executive-at-the-center-of-google-legal-battle-1496172294 [https://perma.cc/KYT4-GEGH]; Del Quentin Wilber & Greg Bensinger, Uber Faces Federal Criminal Probe Over "Greyball" Software, Wall St. J. (May 7, 2017), https://www.wsj.com/articles/uber-faces-federal-criminal-probe-over-greyball-software-1493948944 [https://perma.cc/C4KP-Z4PJ].

undermining a strike against President Donald Trump's travel ban[4] and for his perceived support of the President.[5]

Though multiple employees were fired or pressured to resign,[6] including a few executives,[7] tensions continued to mount among Uber investors even as Kalanick took a leave of absence.[8] Eventually, these investors decided that they had had enough. Partners at Benchmark Capital, which owned a thirteen percent stake in Uber,[9] spoke with other investors at First Round Capital, Lowercase Capital, Menlo Ventures,

[4] Faiz Siddiqui, Uber Triggers Protest for Collecting Fares During Taxi Strike Against Refugee Ban, Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/dr-gridlock/wp/2017/01/29/uber-triggers-protest-for-not-supporting-taxi-strike-against-refugee-ban/?utm_term=.2deeb079c0be [https://perma.cc/5RRT-BUSY].

[5] Seth Fiegerman, Uber CEO Defends Trump Relationship to Employees, CNNMoney (Jan. 25, 2017), http://money.cnn.com/2017/01/25/technology/uber-ceo-trump/index.html [https://perma.cc/ZN78-72L5]. Kalanick was reported to have said, "We'll partner with anyone in the world as long they're about making transportation in cities better, creating job opportunities, making it easier to get around, getting pollution out of the air and traffic off the streets." Id; see also Kif Leswing & Alexei Oreskovic, Protestors Blocked Uber Headquarters Because of Its Ties to Trump, Bus. Insider (Jan. 20, 2017), https://www.businessinsider.com/protestors-block-uber-hq-trump-ties-2017-1 [https://perma.cc/8RKX-9X97] (reporting on protests outside Uber's headquarters because of the company's pro-Trump stance); Biz Carson, 'I Do Not Accept Him as My Leader'—Uber CTO's Explosive Anti-Trump Email Reveals Growing Internal Tensions, Bus. Insider (Jan. 24, 2017), https://www.businessinsider.com/uber-cto-internal-email-donald-trump-deplorable-2017-1 [https://perma.cc/UP6T-VKM8] (reporting a response from an Uber executive to Kalanick's perceived pro-Trump stance and that employees saw Uber as being "perceived as a pro-Trump shop").

[6] Mike Isaac, Uber Fires 20 Amid Investigation into Workplace Culture, N.Y. Times (June 6, 2017), https://www.nytimes.com/2017/06/06/technology/uber-fired.html [https://perma.cc/R7A9-RCTE].

[7] Greg Bensinger, Uber Executive Emil Michael Leaves Company, Wall St. J. (June 12, 2017), https://www.wsj.com/articles/uber-executive-emil-michael-leaves-company-1497286089 [https://perma.cc/S7K4-V8VK]; Mike Isaac, Uber Fires Executive Over Handling of Rape Investigation in India, N.Y. Times (June 7, 2017), https://www.nytimes.com/2017/06/07/technology/uber-fires-executive.html [https://perma.cc/GU4R-GJNJ].

[8] Eric Newcomer, Uber CEO to Take Leave, Have Diminished Role After Scandals, Bloomberg (June 13, 2017), https://www.bloomberg.com/news/articles/2017-06-13/uber-ceo-to-take-leave-diminished-role-after-workplace-scandals. Kalanick had been facing criticism for fostering an aggressive culture at Uber and for his own outbursts. Eric Newcomer, In Video, Uber CEO Argues with Driver over Falling Fares, Bloomberg (Feb. 28, 2017), https://www.bloomberg.com/news/articles/2017-02-28/in-video-uber-ceo-argues-with-driver-over-falling-fares.

[9] Katie Benner, For Uber, a Quiet Investor Becomes a Sudden Thorn, N.Y. Times (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/technology/uber-travis-kalanick-benchmark.html [https://perma.cc/CEW6-Q5HL].

and Fidelity Investments and formed a coalition; together, they presented Kalanick with a signed letter asking him to step down.[10] Kalanick acquiesced, noting the investor pressure.[11] As a senior partner emeritus at McKinsey, a global consulting firm, described the situation: "If investors are worried . . . they engage. They take control. And that's what happened at Uber."[12]

What happened at Uber, a privately held company, provides an example of concerned investors using their ownership stakes as leverage to enact significant change in response to a company's and its executives' support for a message that investors found repugnant. Things would have been quite different had Uber been a publicly traded company. First, publicly traded companies have much more dispersed ownership; it would be rare for a single investor to hold thirteen percent of shares, as Benchmark did at Uber.[13] Because each shareholder typically owns a small fraction of the company, a collective-action problem limits shareholders' ability to encourage changes at publicly held firms. A shareholder will only benefit from improvements to the extent of her ownership;[14] thus, shareholders with very small ownership blocks will have little incentive to put in effort to spur changes.[15]

[10] Greg Bensinger & Maureen Farrell, How Uber Backers Orchestrated Kalanick's Ouster as CEO, Wall St. J. (June 21, 2017), https://www.wsj.com/articles/how-uber-backers-orchestrated-kalanicks-ouster-as-ceo-1498090688 [https://perma.cc/5QFL-WV3R].

[11] Id.

[12] Katie Benner, Silicon Valley Investors Flexed Their Muscles in Uber Fight, N.Y. Times (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/silicon-valley-investors-flexed-their-muscles-in-uber-fight.html [https://perma.cc/9M5M-52KZ].

[13] Marco Becht, Beneficial Ownership in the United States, in The Control of Corporate Europe (Fabrizio Barca & Marco Becht eds.) 287–89 (2002) (stating that almost half of non-financial, U.S.-incorporated companies that are listed on NASDAQ or the New York Stock Exchange do not have a single shareholder that owns more than 5 percent of the company, and that the median "largest voting blocks" for NYSE- and NASDAQ-listed firms were 5.3 percent and 8.6 percent of shares, respectively); see also Nilanjan Basu, Imants Paeglis & Mohammad Rahnamaei, Ownership Structure and Power: Evidence from U.S. Corporations, in International Corporate Governance (Kose John et al., eds.), 18 Advances in Financial Economics 1, 9–14 (2015) (stating that shareholders with more than 5 percent of a company's stock are "far less prevalent" in S&P 500 firms than in the authors' sample of newly public companies). But see Clifford G. Holderness, The Myth of Diffuse Ownership in the United States, 22 Rev. Financial Studies 1377, 1405 (2009) (stating that 96 percent of U.S. firms in a representative sample have at least one shareholder that owns 5 percent or more of that company's stock).

[14] This is because corporate earnings are usually paid out in dividends on a per-share basis or, alternatively, the value of the company will rise on a per-share basis if no dividend is

An effective solution to this problem would be to allow investors to form coalitions. By banding together, the costs of catalyzing corporate changes could be borne collectively, making each individual shareholder's contribution worthwhile and not excessive in comparison to her expected return. This coalition building would require substantial communications among investors as they decide what their goals would be and how best to achieve them. In particular, investors could work together to elect candidates to a company's board of directors, who could then exercise their power to enact the changes the investors believed to be beneficial.

However, this otherwise viable option is foreclosed for shareholders in public companies by the rules and regulations of the Securities and Exchange Commission ("SEC"), the government agency tasked with regulating the national securities markets.[16] While Uber investors were able to speak freely about who they wanted to manage and direct the company, shareholders in public companies are barred from soliciting proxies, or votes in a contest for corporate control, if they do not comply with intricate SEC regulations.[17] Furthermore, "solicit" has been broadly defined to include any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."[18] This definition has been still further expanded by case law[19] so as to effectively forbid investors from

paid out. Merton H. Miller & Franco Modigliani, Dividend Policy, Growth, and the Valuation of Shares, 34 J. Bus. 411, 422–26 (1961).

[15] William T. Allen & Reinier Kraakman, Commentaries and Cases on the Law of Business Organizations 164 (5th ed. 2016).

[16] See 15 U.S.C. § 78d (2012). See generally 15 U.S.C. § 78 (2012).

[17] 15 U.S.C. § 78n(a) (2012). Proxies are essentially ballots that shareholders use to vote in corporate elections; they authorize either management or insurgents to vote on their behalf so they do not have to physically attend a shareholders' meeting. See SEC, Spotlight on Proxy Matters—The Mechanics of Voting, https://www.sec.gov/spotlight/proxymatters/voting_mechanics.shtml#what_is_proxy [https://perma.cc/X5MP-URYB]. See generally Aleta G. Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, 312 (1990) ("[I]n the modern corporate world of centralized management and widely dispersed shareholders, shareholder voting by proxy has become indispensable.").

[18] 17 C.F.R. § 240.14a-1(l)(iii) (2012).

[19] Studebaker Corp. v. Gittlin, 360 F.2d 692, 696 (2d Cir. 1966) (citing SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943)) (finding that a communication constitutes a proxy solicitation "if it was part of 'a continuous plan' intended to end in solicitation and to prepare the way for success"); *Okin*, 132 F.2d at 786 ("The earlier stages in the execution of such a continuous purpose must be subject to regulation . . . ."); see also Sargent v. Genesco, Inc.,

discussing upcoming corporate elections with each other.[20] Investors could face civil or criminal penalties, including imprisonment for up to twenty years, for violations of this nature.[21]

These limitations on shareholder speech reinforce managerial entrenchment and virtually unbridled discretion over corporate decision-making. First identified in the academic literature in 1932,[22] the power struggle for corporate control between shareholders and management has tipped decidedly in favor of management over the past several decades. Although much theoretical work has been done on this problem,[23] the effects of regulations that limit shareholder communications on the struggle for corporate control have not been examined, particularly in light of the overall increase in protection for corporate speech that has been seen in First Amendment jurisprudence. This Note seeks to connect these two fields of scholarship and explain why challenging investor communication-limiting SEC Regulations on First Amendment grounds is the proper approach to restoring balance to the shareholder–management corporate dynamic.

Part II of this Note will profile the increasing breadth of corporate speech rights as well as the gradual erosion of shareholder power in the face of managerial consolidation of control. Part III will present the problem that these two trends create and explain why action is necessary. Part IV will argue that SEC regulations that limit investor speech in corporate elections should be subject to the First Amendment and furthermore, as they concern political speech, should be subject to some form of exacting scrutiny. Part V concludes with a direction for further research.

492 F.2d 750, 767 (5th Cir. 1974); Trans World Corp. v. Odyssey Partners, 561 F. Supp. 1315, 1319 (S.D.N.Y. 1983).

[20] See infra notes 122–123 and accompanying text.

[21] See 15 U.S.C. § 78ff (2012); 15 U.S.C. § 78u(d)(3) (2012). Furthermore, if the investor is a broker or a dealer, the SEC can take additional steps, including censure, limiting active ities, suspension, and even revocation of their registration. 15 U.S.C. § 78o (2012).

[22] Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property (1932). "The separation of ownership from control produces a condition where the interests of owner and ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear." Id. at 6.

[23] E.g., Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301 (1983).

II. THE INCREASE IN CORPORATE SPEECH RIGHTS AND THE EROSION OF SHAREHOLDER POWER

This Part will discuss the expansion of First Amendment rights for corporations in the context of advertising, compelled speech, and elections. It will then chart the withering away of shareholders' ability to rein in ineffective or deleterious managerial activities over the same period, setting up the issue discussed in Part III.

A. The Increase in Corporate Speech Rights

1. Advertising

For decades, commercial advertising was not thought to be covered by the First Amendment under the Supreme Court's jurisprudence.[24] This changed in 1976 with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[25] Citing a proposition found in *New York Times Co. v. Sullivan* that speech does not lose its protection simply because a profit motive is involved,[26] the *Virginia State Board of Pharmacy* Court held that communications that do no more than say "I will sell you X at Y price" are protected by the First Amendment.[27] The Court stated that consumers' interest "in the free flow of commercial information . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."[28] Furthermore, that interest was more important than any state interest in maintaining a high degree of pharmacist professionalism.[29]

The decision in *Virginia State Board of Pharmacy* was distilled into a four-part test in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[30] To determine if government regulation of advertising

[24] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973) (holding that speech that "did no more than propose a commercial transaction" was not covered by the First Amendment); Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942).

[25] 425 U.S. 748, 748–49 (1976).

[26] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.").

[27] *Va. State Bd. of Pharmacy*, 425 U.S. at 761, 770.

[28] Id. at 763.

[29] Id. at 766–70.

[30] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980).

survives a First Amendment challenge, the Court will first ask if the advertising is for a lawful activity and is not misleading.[31] If this is the case, then the Court will assess whether the government's asserted interest in limiting or banning the advertisement is "substantial."[32] If so, the regulation must directly advance the government interest.[33] Furthermore, the regulation must be "not more extensive than is necessary" to serve that interest.[34] This test has been consistently applied in the commercial speech context—speech that "does no more than propose a commercial transaction"—but there are signs that several Justices may want to raise the standard of review to a near equivalency with other forms of protected speech.[35]

2. Compelled Disclosures

After *Virginia State Board of Pharmacy*, freedom of speech became a more constitutionally salient means for corporations to challenge regulation.[36] In *Zauderer v. Office of Disciplinary Counsel of Supreme*

---

[31] Id. at 563–66.
[32] Id. at 566.
[33] Id.
[34] Id. at 566.
[35] See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring in part and concurring in the judgement) ("My continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech require me to refrain from expressing agreement with the Court's application of the third part of *Central Hudson*."); id. at 572 (Thomas, J., concurring in part and concurring in the judgement) ("At the same time, I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'"); see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501–04 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.) (noting further uneasiness about the use of the test); id. at 518 (Thomas, J., concurring in part and concurring in judgment) (same). See generally, Elizabeth Spring, Note, Sales Versus Safety: The Loss of Balance in the Commercial Speech Standard in *Thompson v. Western States Medical Center*, 37 U.C. Davis L. Rev. 1389 (2004) (arguing that the Court is now applying the *Central Hudson* test in a manner approaching strict scrutiny review). Some commentators argue that this is a means of returning to economic due process and the Lochner era. Reza R. Dibadj, The Political Economy of Commercial Speech, 58 S.C. L. Rev. 913, 915 (2007); Thomas H. Jackson & John C. Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 30–32 (1979).
[36] See generally Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765 (2004)

Court of Ohio,[37] the Court held that a lawyer could be disciplined for omitting in an advertisement that contingency-fee clients would have to pay for "costs" (as opposed to "fees") if they were to lose. This case differed from *Virginia State Board of Pharmacy* in that authorities were compelling the attorney to include information in his advertisement, rather than limiting what he could say.[38] Justice White's opinion treated this distinction as being significant for First Amendment purposes:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.[39]

The Supreme Court has given little guidance in the context of compelled disclosure beyond this case,[40] which has caused differences in the circuit courts[41] and led commentators to opine on the proper

(exploring the changes in First Amendment cases brought throughout time and the boundaries of what it protects).

37 Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 650–53 (1985).

38 Id. at 650–53. Protection from the compulsion to speak in other First Amendment contexts is frequently equivalent to one's freedom to speak. Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (citation omitted)); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

39 *Zauderer*, 471 U.S. at 651.

40 Jennifer M. Keighley, Can You Handle the Truth? Compelled Commercial Speech and the First Amendment, 15 U. Pa. J. Const. L. 539, 541–42 (2012) ("Even as mandated disclosures have become an increasingly popular form of government regulation, there has been little elaboration on the scope of *Zauderer*'s holding.").

41 Compare Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (suggesting *Zauderer* applies to compelled disclosures, even when the state interest is not preventing consumer deception), with R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (suggesting *Zauderer* only applies when the state interest is preventing consumer deception). *R.J. Reynolds* was explicitly overruled by the D.C. Circuit in *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014). Compare Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 523 (D.C. Cir. 2015) (requiring compelled disclosure to relate to "purely factual and uncontroversial information" (quoting Hurley v.

standard.[42] Many agree that the standard is lower than the *Central Hudson* test, possibly approaching rational basis review.[43]

Recently, corporations have been testing this uncertainty by challenging statutes and administrative agency rules and actions that have required disclosure. For example, within the last four years, the D.C. Circuit has struck down, on First Amendment grounds, SEC rules requiring the disclosure of products containing conflict minerals[44] as well as a Federal Trade Commission ("FTC") decision that advertisements were misleading.[45] Though the government has declined to seek certiorari in these cases,[46] the time seems ripe for the Supreme Court to clarify current doctrine on compelled commercial speech, especially in the context of agency action.

3. Elections

Arguably the most prominent expansion of corporate First Amendment rights has taken place in the field of election law, beginning

---

Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995))), with CTIA-The Wireless Ass'n v. City of Berkeley, 854 F.3d 1105, 1117 (9th Cir. 2017) (requiring that compelled disclosure must be "purely factual").

[42] E.g., Jonathan H. Adler, Compelled Commercial Speech and the Consumer Right to Know, 58 Ariz. L. Rev. 421, 434–36 (2016) (proposing the stricter intermediate-scrutiny standard from *Central Hudson*); Lucien J. Dhooge, The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?, 51 Am. Bus. L.J. 599, 603 (2014); Lloyd L. Drury, III, Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority, 58 S.C. L. Rev. 757, 788 (2007); Keighley, supra note 40, at 543; Robert Post, Compelled Commercial Speech, 117 W. Va. L. Rev. 867, 918–19 (2015). See generally Susanna Kim Ripken, The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation, 58 Baylor L. Rev. 139, 203 (2006) (questioning disclosure as a means of solving problems in the securities markets).

[43] See, e.g., Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring in the judgment) (noting the standard of review for compelled disclosures is more permissive than the standard from *Central Hudson*).

[44] *Nat'l Ass'n of Mfrs.*, 800 F.3d at 524.

[45] Pom Wonderful, L.L.C. v. FTC, 777 F.3d 478, 502–03, 505 (D.C. Cir. 2015) (challenging FDA requirements on similar grounds as *Nat'l Ass'n of Mfrs.*, 800 F.3d at 523); see also Mark Tushnet, The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 Wm. & Mary Bill Rts. J. 1073, 1095–96 (2017) (discussing *Pom Wonderful*). But see *Am. Meat Inst.*, 760 F.3d at 27 (upholding USDA country-of-origin labeling requirements).

[46] See Leslie Kendrick, Are Speech Rights for Speakers? 103 Va. L. Rev. 1767, 1776 n.36 (2017).

with the 1976 case *Buckley v. Valeo*.[47] In this landmark case, the Court addressed the validity of the Federal Election Campaign Act of 1971,[48] which limited both contributions to and expenditures in support of candidates for federal office. The Court held that both types of limits implicated First Amendment rights,[49] ruling that spending money on an election was not merely "symbolic speech"[50] and that the limits at issue were not proper time, place, or manner regulations.[51] However, the Act's expenditure ceilings were found to "impose significantly more severe restrictions" than its limitations on contributions.[52] Applying strict scrutiny, the Court struck down expenditure limitations as unconstitutional while upholding the contribution limitations.[53]

This case, which opened the door for corporations to spend large amounts in support of candidates, was further clarified by *First National Bank of Boston v. Bellotti*.[54] Faced with the question of whether otherwise-protected speech loses its protection simply because it is a

---

[47] 424 U.S. 1 (1976). It is interesting to note that this case was the same year as *Virginia State Board of Pharmacy*, both of which seem to reinforce the notion the presence of a moneyed interest does not disturb First Amendment protection.

[48] 52 U.S.C. §§ 30101–30146.

[49] *Buckley*, 424 U.S. at 16–23.

[50] Id. at 16; cf. Texas v. Johnson, 491 U.S. 397, 406 (1989) (finding the burning of a flag to be symbolic speech); United States v. O'Brien, 391 U.S. 367, 376 (1968) (finding the burning of a draft card to be symbolic speech).

[51] *Buckley*, 424 U.S. at 18; cf. Ward v. Rock Against Racism, 491 U.S. 781, 789–90 (1989) (finding a noise-level ordinance as regulating time, place, or manner); Chi. Police Dep't v. Mosley, 408 U.S. 92, 99 (1972) (finding a picketing ordinance as regulating subject matter, not time, place, or manner).

[52] *Buckley*, 424 U.S. at 23 (1976). This was because the expenditure limitations appeared to "exclude all citizens . . . from any significant use of the most effective modes of communication," while, "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate . . . . [W]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." Id. at 19–21 & n.20.

[53] Id. at 29, 51, 58. The Court defended the contribution limits:

> These [contribution] limitations . . . constitute the Act's primary weapons against . . . improper influence . . . . The contribution ceilings thus serve the basic governmental interest . . . without directly impinging upon the rights of individual citizens . . . to engage in political debate.

Id. at 58.

[54] 435 U.S. 765 (1978).

corporation speaking,[55] the Court was explicit: "We . . . find no support in the First or Fourth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[56] Spending money on elections counts as speech, even when done by businesses.

The most recent case in this line of doctrine is *Citizens United v. FEC*.[57] Widely viewed as one of the most controversial decisions of the past decade,[58] the majority in *Citizens United* held that the Bipartisan Campaign Reform Act's limits on corporate expenditures in elections violated the First Amendment.[59] This holding allows corporations to use their general treasury funds for advocacy and electioneering communications without having to form a political action committee ("PAC").[60]

Part of the justification for this increase in corporate power in elections was based on the Court's assertion that "[t]here is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[61] Here, the Court was quoting *Bellotti*, which further spelled out this idea: "[S]hareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests."[62]

---

[55] Id. at 778.

[56] Id. at 784. Interestingly, one of the arguments in favor of the statute was that it was designed to protect shareholders, which the Court found both over- and underinclusive. Id. at 792–795.

[57] 558 U.S. 310 (2010).

[58] See, e.g., RadioLab Presents: More Perfect, Citizens United, WNYC Studios (Nov. 1, 2017), http://www.wnyc.org/story/citizens-united/ (speculating that Justice Souter's retirement from the Supreme Court may have been due to his intense disagreement with the decision).

[59] *Citizens United*, 558 U.S. at 365.

[60] Id. at 320–21, 372. Previously, funds used for election purposes were limited to donations from stockholders and employees of the corporation. Id. at 321.

[61] Id. at 361–62 (quoting *Bellotti*, 435 U.S. at 794). But see Reza R. Dibadj, Expressive Rights for Shareholders After *Citizens United*, 46 U.S.F. L. Rev. 459, 472–73 (2011) (critiquing the corporate democracy defense).

[62] *Bellotti*, 435 U.S. at 794–95.

Justice Stevens's dissenting opinion in *Citizens United* vigorously contested this point. Incredulous of the majority's confidence, he went on to state: "By 'corporate democracy,' presumably the Court means the rights of shareholders to vote . . . . In practice, however, many corporate lawyers will tell you that 'these rights are so limited as to be almost nonexistent,' given the internal authority wielded by boards and managers . . . ."[63]

From this discussion found in *Citizens United*, it is clear that the increasing protection for corporate speech detailed above invites questions about the balance of power in corporations. If management and shareholders have relatively equal amounts of power, then each can serve as a check on the other. However, if—as Justice Stevens asserted in *Citizens United*—managers have the upper hand, then the benefits of advanced protection for corporate speech in advertising, compelled disclosures, and elections will accrue inequitably.[64] Managers will be able to use these protections for their own gain, effectively commandeering the corporation's voice for their own purposes. The next Section explores the current balance of power between management and shareholders.

B. The Erosion of Shareholder Power

While the speech rights of corporations as entities have been expanding, the abilities of shareholders to rein in or replace management through corporate governance mechanisms have significantly diminished. This section will explore several areas of corporate law and demonstrate how shareholder power vis-à-vis management has been eroded, leaving proxy contests as the only somewhat viable method of corrective shareholder activity.

[63] *Citizens United*, 558 U.S. at 477 (Stevens, J., dissenting).

[64] Cf. Estreicher, supra note 17, at 275:

> [W]hen a corporation "speaks" it speaks through the voice of its officers and directors, who are agents exercising derivative power on behalf of their widely dispersed shareholder-principals. The state has created a structure to facilitate this delegation of authority so that the enormous aggregation of power and wealth that is the modern corporation can function efficiently, without paralyzing diffusion of decisionmaking. The same state that enables corporations to operate through centralized management has a substantial interest in ensuring that the manager-agents are in fact chosen by and act on behalf of their principals.

Shareholders have three main ways of contesting management decisions with which they disagree. First, they can employ either direct[65] or derivative[66] lawsuits to call out managerial mistakes. Second, shareholders with business know-how and access to immense capital reserves can seek to buy the company and manage it themselves. Finally, shareholders can try to use the mechanisms of corporate governance to elect new directors to the board who will steer the company in a different direction—in other words, start a proxy fight. As this next Section will make clear, only the last route is still a true option for disciplining errant managers, and it has been so limited by the prohibitive costs imposed by SEC regulations as to be rendered almost ineffective.

1. Lawsuits

Lawsuits are the first line of defense for shareholders against incompetent or duplicitous managers. Since corporate managers owe fiduciary duties of loyalty and care both to shareholders and the corporation, they can be found liable if they have breached these duties and be forced to pay for the consequences of their actions. However, statutory and judicially created defenses for managers have developed to the point that these sorts of suits are an ineffective tool for checking executive behavior.

[65] Direct lawsuits are suits brought by individual shareholders against a company or its directors and officers. Allen & Kraakman, supra note 15, at 375.

[66] Derivative lawsuits are suits brought by individual shareholders—but on behalf of the corporation—against a corporation's directors and officers. Thus, in these suits, the corporation is the plaintiff. Id. Shareholders must meet certain requirements to be able to bring a derivative suit on behalf of the corporation. See Fed. R. Civ. P. 23.1 (requiring that shareholders owned shares of stock at the time of the alleged injury; that shareholders have continued to own shares since and throughout the litigation; that shareholders' litigation "fairly and adequately" represents the interests of similarly situated shareholders; and that shareholders attempted to get the board of directors to bring the suit or that it would have been futile to demand action by the board). For more on demand futility, see *Spiegel v. Buntrock*, 571 A.2d 767, 775–76 (Del. 1990) (applying a de facto "no demand" requirement in Delaware); see also Rales v. Blasband, 634 A.2d 927, 933–34 (Del. 1993) (clarifying demand futility excuse); Levine v. Smith, 591 A.2d 194, 205–06 (Del. 1991) (same); Aronson v. Lewis, 473 A.2d 805, 807–08 (Del. 1984) (same).

First, many corporate charters contain liability waivers, which eliminate some of the directors' fiduciary duties to the corporation.[67] Managers of companies that have these provisions in their charter no longer owe these duties to the corporation and thus cannot be sued by shareholders based on breaches of these duties.[68] Furthermore, corporations are permitted to indemnify directors and officers from both direct and derivative lawsuits, so long as managers reasonably believed they were acting in the best interests of the organization and that their actions were not unlawful.[69] This means that the corporation (read: "shareholders") foots the bill for many losses due to incompetent or unscrupulous managerial behavior. Directors and officers ("D&O") insurance serves as a final cushion for managers—another cost which is ultimately passed on to shareholders.[70]

Outside of these statutory protections, courts have created further means of shielding executive behavior. In particular, the business judgment rule protects managers by instituting a high standard that

[67] See, e.g., Del. Code. Ann. tit. 8, § 102(b)(7) (2018) (permitting a corporation to eliminate or limit personal liability of directors for breaches of fiduciary duties, but not for breaches of the duty of loyalty, acts that are done in bad faith, intentional acts of misconduct, or knowing violations of the law). I will use examples from Title 8 of the Delaware Code, which is also referred to as the Delaware General Corporation Law ("DGCL"), throughout this Note, as it is the foremost corporate law regime in the United States. Del. Div. of Corps., 2012 Annual Report, available at https://corpfiles.delaware.gov/pdfs/2012CorpAR.pdf ("Delaware remains the chosen home of more than half of U.S. publicly-traded companies and 64% of the Fortune 500.").

[68] R. Franklin Ballotti & Mark J. Gentile, Elimination or Limitation of Director Liability for Delaware Corporations, 12 Del. J. Corp. L. 5, 5 (1987).

[69] See, e.g., Del. Code. Ann. tit. 8, § 145(a) (2018) (direct lawsuits); id. § 145(b) (derivative lawsuits). In addition, the legal expense of such lawsuits may be paid in advance by the corporation, leaving management completely off the hook, unless they lose the lawsuit. Del. Code. Ann. tit. 8, § 145(e) (2018).

[70] See, e.g., Del. Code. Ann. tit. 8, § 145(g) (2018). D&O insurance works as follows. Corporations pay an annual or semi-annual premium to the insurance company. If corporations need to indemnify a director or officer under Sections 145(a) or 145(b), the corporation fronts the bill and then gets reimbursed by the insurance company. A D&O insurance policy usually has limitations that include a public policy exception (in which the insurance company refuses to cover illegal or criminal activity such as securities fraud, willful violations of the law, embezzlement, etc.). D&O insurance is often broader than other forms of protection for managers, though, in that managers could potentially act in bad faith and still be covered. Allen & Kraakman, supra note 15, at 238–39, 422; Corporations and Other Business Organizations: Statutes, Rules, Materials, and Forms 1155–1171 (Melvin A. Eisenberg & James D. Cox eds., 2016).

plaintiffs must meet to recover.[71] If a director or officer made a decision about any aspect of the business that caused harm, shareholder-plaintiffs have the burden of proving that that action constituted gross negligence in order for the manager to be found liable.[72] Errors or misjudgments are not enough; managers must have perpetrated fraud or acted in bad faith.[73]

The rationale offered by courts for this incredibly deferential standard is that business executives have a level of expertise beyond that of laymen or even judges about what is best in their particular industry and for their particular company.[74] Thus, nonmanagers should not be able to second guess executive decisions that do not work out according to plan. In addition, executives must have the freedom to take risks in order to give their investors the best return. Managers should not be penalized if these risky schemes or opportunities are unsuccessful.[75]

Taken together, these statutory and juridical shields for directors and officers in the context of shareholder lawsuits have created a deep imbalance in favor of management. Furthermore, the types of activities that executives can engage in using corporate resources while still receiving protection has been vastly expanded. For example, in *A.P. Smith Manufacturing Co. v. Barlow*, a New Jersey court held that political and other types of donations are consistent with long-term shareholder value.[76] Since a sound economic and social environment is a

---

[71] Stuart R. Cohn, Demise of the Director's Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule, 62 Tex. L. Rev. 591, 592–94 (1983) (citing the business judgment rule as the "principal detriment to shareholder litigation").

[72] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (instituting a gross-negligence standard and putting the burden of proof on plaintiffs).

[73] See, e.g., Kamin v. Am. Express Co., 383 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976) (stating that "mere" error is not enough), aff'd, 387 N.Y.S.2d 993 (N.Y. App. Div. 1976).

[74] See id. at 809 (directors and officers know more than the court does about how to run a business); cf. Del. Code Ann. tit. 8, § 141(a) (2016) (board has authority over corporation); § 108(a) (2014) (newly formed corporations must have an initial organizational meeting at which directors and officers are elected to run the corporation).

[75] See generally In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (Del. Ch. 2009). After the 2007–08 financial crisis, shareholders sued Citigroup managers, alleging that they failed to properly monitor the riskiness of investments; the court held that the executives had no legal obligation to put in a monitoring system for business risks because this itself was a business judgment. Id. at 131. Finding that managers did not act in bad faith, the court dismissed the suit. Id. at 108.

[76] See A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

prerequisite to a successful business, managerial choices about donations would receive the protection of the deferential business judgment rule.[77] This rule effectively insulates executives from being checked by shareholder lawsuits in the realm of corporate spending in elections.

2. Buyouts

A second method shareholders have used to confront underperforming or errant managers is the buyout.[78] At the outset, it should be noted that this method can only be employed by shareholders who can access ample capital and are comfortable with the prospect of running a company. Usually this sort of activity is done by private-equity investors, whose business is to profit off managerial change and resulting improvements in returns due to revised strategy. But if current executives do not wish to cooperate with the buyout, the only way to force them out may be through a hostile takeover.[79] Hostile takeovers often take the form of tender offers, in which prospective owners offer to buy existing stockholders' shares.

However, two legal innovations of the past three decades virtually block prospective managers from engaging in hostile takeover activity. In the 1980s, Marty Lipton of Wachtell, Lipton, Rosen & Katz

[77] The court said that charitable donations would only be scrutinized if plaintiffs could prove an aspect of self-dealing or that they constituted corporate waste—both incredibly difficult standards to prove. Id; see also James Kwak, Corporate Law Constraints on Political Spending, 18 N.C. Banking Inst. 251, 252–53 (2013) ("decisions to support particular political organizations and causes are generally made by company executives, occasionally with oversight by the board of directors, but without meaningful input from shareholders"); John A. Pearce II, The Rights of Shareholders in Authorizing Corporate Philanthropy, 60 Vill. L. Rev. 251 (2015) (regarding charitable donations).

[78] See, e.g., Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301, 313 (1983) ("External monitoring from a takeover market is also unique to the open corporation . . . . [A]ttacking managers can circumvent existing managers and the current board to gain control of the decision process . . . by a direct offer to purchase stock (a tender offer) . . . .").

[79] Delaware courts forbid what is called "sale of corporate office" in which an officer or director agrees to step down from his or her position in exchange for an exorbitant premium on the manager's small number of shares in the corporation. See, e.g., Cooke v. Oolie, 26 Del. J. Corp. L. 609, 633 (2001). See generally Richard W. Jennings, Trading in Corporate Control, 44 Cal. L. Rev. 1, 20 (1956) (stating that an executive cannot gain profit or any advantage from agreeing to resign from his or her position).

developed what has come to be known as the "poison pill" defense against unwelcome bids for control.[80] Poison pills allow incumbent managers to substantially dilute the stockholdings of would-be hostile acquirers once the prospective managers purchase a low-threshold percentage of shares, effectively preventing a takeover from occurring.[81] This defense mechanism survived judicial scrutiny[82] and remains in use by many large corporations.[83]

The second set of legal instruments that have limited buyouts are state anti-takeover statutes.[84] These statutes prevent "interested stockholders"—stockholders with more than a certain percentage of outstanding stock[85]—from engaging in any business combination[86] with the corporation for several years, barring most methods of corporate acquisition used by takeover entrepreneurs. The few statutory exceptions

[80] Lipton calls this defense a "shareholders rights plan"—an ironic twist, considering its beneficiaries are almost always incumbent managers. See Chambers Associate, 5 Minutes with . . . Marty Lipton, http://www.chambers-associate.com/the-big-interview/marty-lipton-cofounder-of-wachtell [https://perma.cc/U9UC-4P2A] ("In a lifetime of interesting and important accomplishments, probably the matter I am most noted for is the invention of the Shareholders Rights Plan, commonly referred to as the 'poison pill.'").

[81] For a full description of how a poison pill works, see, e.g., Krishnan Chittur, Wall Street's Teddy Bear: The 'Poison Pill' as a Takeover Defense, 11 J. Corp. L. 25, 26–40 (1985).

[82] See Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (poison pill is a legal, legitimate defense against hostile transactions, and a "clear day" poison pill—adopted when there is no present threat of a hostile takeover—is subject to the permissive business judgment rule); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 124 (Del. Ch. 2011) (poison pill rarely must be redeemed—only if there is no clear basis in corporate strategy). But cf. Grand Metro. Pub. Ltd. v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988) (requiring Pillsbury to redeem its poison pill after determining that its restructuring plan compared unfavorably in value to the hostile offer); City Capital Assocs. v. Interco Inc., 551 A.2d 787, 790–91 (Del. Ch. 1988) (finding use of poison pill unreasonable given the circumstances surrounding takeover threat).

[83] See, e.g., David Futrelle, Corporate Raiders Beware: A Short History of the "Poison Pill" Takeover Defense, Time (Nov. 7, 2012), http://business.time.com/2012/11/07/corporate-raiders-beware-a-short-history-of-the-poison-pill-takeover-defense/ [https://perma.cc/C8QN-U6Q4] (stating that companies like Netflix, Yahoo, and J.C. Penney have invoked poison pills).

[84] E.g., Del. Code Ann. tit. 8, § 203 (West 2017).

[85] E.g., id. § 203(c)(5) (defining interested stockholders as those owning 15% or more of outstanding voting stock).

[86] E.g., id. § 203(c)(3) (listing proscribed types of business combinations).

require approval by the incumbent board of directors,[87] which will not take place in the context of a hostile takeover.

3. Proxy Fights

The third and final avenue by which shareholders can strike back against managerial deficiencies is through the corporate election process. Shareholders can vote out directors who do not rein in an underperforming CEO and replace them with a new board who is willing to fire executives and make sweeping changes. These contests for corporate control are known as proxy fights, as most of the voting takes place via proxies.[88] Once again, though, managers have ways to limit shareholder power.

Under state law, elections for a corporation's board of directors can be staggered such that only one-third of directors are up for election in a given year.[89] Managers at companies with these "staggered boards" are protected against being quickly thrown out, since it will take two years for challengers to gain a majority on the board and be able to enact a new agenda. State law also gives managers the ability to manipulate the date of shareholder meetings to their advantage in proxy fights.[90]

---

[87] E.g., id. § 203(a)(1); § 203(a)(3). But see § 203(a)(2) (allowing interested shareholders to engage in business combinations if they owned at least 85% of shares prior to the transaction). A corporation can also opt out of § 203 through amending its charter or bylaws, but these sorts of amendments would each almost certainly require the board's approval and are not effective for twelve months. See id. § 203(b)(3).

[88] See id. § 212(b) (allowing proxy voting in which stockholders can authorize another to act or vote on their behalf). Each side in a corporate election sends out a different proxy card to shareholders. Shareholders fill out and return the proxy card for the side they wish to vote for—either the incumbent's or the challenger's. See, e.g., David Benoit & Sharon Terlep, Activist Peltz Narrowly Wins P&G Board Seat, New Count Shows, Wall St. J. (Nov. 15, 2017), https://www.wsj.com/articles/activist-nelson-peltz-elected-to-p-g-board-1510782775 [https://perma.cc/KZ89-U4N2] (discussing different color proxy cards for the incumbent and the challenger).

[89] See, e.g., Del. Code Ann. tit. 8, § 141(d). Furthermore, if a board is staggered, directors can only be removed "for cause"—i.e., for breaching a fiduciary duty or criminal conduct. See id. § 141(k). Nearly 17% of S&P 500 companies have staggered boards. See Carol Bowie, ISS 2016 Board Practices Study, Harvard Law School Forum on Corporate Governance and Financial Regulation (June 1, 2016), https://corpgov.law.harvard.edu/2016/06/01/iss-2016-board-practices-study/ [https://perma.cc/G9G2-MQVB].

[90] Bernard S. Black, Shareholder Passivity Reexamined, 89 Mich. L. Rev. 520, 595 (1990) ("State law gives the managers substantial though not unlimited power to postpone or

Executives also entrench themselves through dual-class stock. When a private company decides to hold its initial public offering, it has the option to issue one or more classes of stock.[91] The different classes of stock are allowed to have unequal voting rights in corporate elections.[92] For example, Google has three different classes of shares: its founders and top executives hold Class B shares (which receive ten votes per share); regular investors hold either Class A shares (which receive one vote per share) or Class C shares (which receive zero votes per share).[93] This allows managers to have significant voting power without having to own the majority of shares in the company.[94]

Despite these hurdles, proxy fights are the last somewhat viable ground through which investors can challenge management. And as Part IV will describe, it is here that the First Amendment and the imbalanced nature of the corporate democracy might intersect in a manner beneficial to shareholders.

III. THE UPPER HAND THAT MANAGERS WIELD OVER RAPIDLY EXPANDING CORPORATE SPEECH IS PROBLEMATIC

Part II has detailed two trends in what are often thought of as discrete legal fields. Courts are increasingly willing to recognize First Amendment speech rights for corporations in the areas of advertising, compelled disclosures, and elections.[95] At the same time, shareholders' ability to rein in management through lawsuits, buyouts, and proxy contests has sharply diminished. These two legal developments, mapped side-by-side, lead to an unfortunate conclusion: the benefits of increased recognition for corporate speech rights are largely accruing to managers

adjourn a meeting to allow more time for lobbying, or move up the meeting date to give the proponent less time to solicit support. Such tactics are routinely used in proxy fights . . . .").

[91] See Del. Code Ann. tit. 8, § 151(a).

[92] See id.

[93] See Emily Chasan, Google's Multi-Class Stock Structure Made Alphabet Move Unique, Wall St. J.: CFO Journal (Aug. 12, 2015, 4:47 PM), https://blogs.wsj.com/cfo/2015/08/12/googles-multi-class-stock-structure-made-alphabet-move-unique/ [https://perma.cc/PZ7M-JTCZ] (noting that Groupon, Zynga, and Facebook all have dual-class stock).

[94] See Andrea Tan & Benjamin Robertson, Why Investors Are Fretting over Dual-Class Shares, Bloomberg (July 10, 2017), https://www.bloomberg.com/news/articles/2017-07-10/why-investors-are-fretting-over-dual-class-shares-quicktake-q-a.

[95] See supra Part II.A.

due to the imbalances of power in the corporate democracy. This is problematic for a number of reasons.

First, companies wield enormous clout in modern-day American society.[96] Though frequently seen as mere businesses operated for profit, corporations routinely speak and act on social and political issues, and this trend has been increasing. From State Street's placing a statue of a girl in front of the Wall Street bull to protest the lack of female leadership in the workplace,[97] to Google's very public firing of an employee for a memo advancing gender stereotypes,[98] to the coalition of companies that protested Trump's travel ban,[99] corporations have been more vocal about their political and social positions. Though it would seem that the majority of investors have supported the positions these companies have taken, one need only look at the example of Uber to see that a company's stance—whether official, or unstated but evident—is not always one that is favored by shareholders or the public at large.[100]

In particular, technology companies like Google, Facebook, and Twitter have transformed everyday life such that consumers are in near-constant interaction with their products.[101] These companies have the

[96] Cf. Berle, Jr. & Means, supra note 22, at 6:

> Size alone tends to give these giant corporations a social significance . . . . By the use of the open market for securities, each of these corporations assumes obligations towards the investing public . . . . New responsibilities towards the owners, the workers, the consumers, and the State thus rest upon the shoulders of those in control.

[97] Emily Chasan, After Fearless Girl, State Street Puts Men-Only Boards on Notice, Bloomberg (July 26, 2017), https://www.bloomberg.com/news/articles/2017-07-26/after-fearless-girl-state-street-puts-men-only-boards-on-notice.

[98] Daisuke Wakabayashi, Contentious Memo Strikes Nerve Inside Google and Out, N.Y. Times (Aug. 9, 2017), https://www.nytimes.com/2017/08/08/technology/google-engineer-fired-gender-memo.html.

[99] Adam Chandler, Cars, Shoes, Tech: An Array of Corporations Protests the Immigration Ban, The Atlantic (Jan. 31, 2017), https://www.theatlantic.com/business/archive/2017/01/corporations-protest-immigration-ban/515076/ [https://perma.cc/B7HD-EY6E].

[100] Cf. Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970) (Tamm, J.):

> [T]hose who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came under the control of banking groups, men forgot that they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs.

[101] See, e.g., Jillian D'Onfro, Here's a Reminder of Just How Huge Google Search Truly Is, Bus. Insider (Mar. 27, 2016), http://www.businessinsider.com/google-search-engine-

ability to influence the way that society thinks about issues simply by nudging consumers through their algorithms towards or away from certain sources of news, posts, or Tweets. The views of the leaders of these companies are thus highly influential in shaping even the way we see our news and the social issues at stake.

Furthermore, the leaders of these companies operate with relative freedom to dictate company policy and positions, especially when compared with political leaders who are subject to the checks and balances of other branches of government. Though investors ostensibly perform this function, they have been hamstrung in the ways previously described, and boards of directors usually fall in line with executives' vision and plans.[102] Board collegiality is usually preferred to contentious questioning of a CEO's methods or preferences.

Managerial power centralized in a few executives makes sense in many circumstances, especially given the complexities of running multinational operations that employ workforces greater in size than many cities. In an age of political gridlock and protest, it can even be refreshing to see concrete actions taken without weeks of debate, discussion, and horse trading. But placing multibillion-dollar capital reserves in the hands of one or a few (mostly) white (mostly) male leaders with near-unbridled discretion is inherently disconcerting, especially for minorities. Given, for example, the low bar executives must meet for political donations to receive the protection of the permissive business judgment rule, it is easy to imagine a situation where supporting an autocratic candidate would be viewed as consistent with increasing long-term shareholder value.

Corporate speech thus risks becoming merely a private benefit of control if shareholders cannot effectively participate in corporate

facts-2016-3/#first-a-trip-down-memory-lane-heres-what-googles-search-page-looked-like-back-in-1997-1 [https://perma.cc/5UEQ-UN3V] (noting that there are 2.3 million Google searches per minute); James B. Stewart, Facebook Has 50 Minutes of Your Time Each Day. It Wants More., N.Y. Times (May 5, 2016), https://www.nytimes.com/2016/05/06/businesss/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html [https://perma.cc/3YKT-CF22] (stating that the average Facebook user spends 50 minutes a day on its platforms).

[102] See Black, supra note 90, at 534 ("[M]ost directors have closer ties to a company's officers than to its shareholders: some are officers themselves; others have business ties to the company that make them reluctant to disagree with the CEO; even 'independent' directors generally serve at the CEO's pleasure.").

governance. The economic literature defines a private benefit of control as any of the ways managers derive value from their positions beyond their explicit forms of compensation.[103] Usually described in terms of the capacity to command firm amenities for personal pleasure—such as flying the firm's private jet to a vacation destination—the rise in corporate speech creates another resource that managers can use for private benefit. By controlling which issues corporate funds are devoted to and what a company says, executives transform their firms into outsized megaphones for their own personal politics.

Aside from these pragmatic reasons, there is a final argument to be made against executive control over corporate speech: this is not the way that the "corporate democracy" is supposed to function. According to many, the purpose of corporate law is to maximize shareholder value, not to favor the interests of management over investors.[104] When an imbalance has been created to the extent seen today, the only proper response is to look for a means to fix it.

And that solution should match the nature of the problem. If the issue stems from increased corporate speech due to an expansive view of the First Amendment, then a parallel response is required. The First Amendment generally proscribes state actors from placing limits on even troublesome speech. In sharp contrast to other countries' laws against hate speech and derogatory language,[105] freedom of expression in the United States takes a different approach. Justice Brandeis's concurrence in *Whitney v. California* exemplifies this alternative method of dealing with problematic speech: "[T]he remedy to be applied is more

[103] See, e.g., Oriana Bandiera et al., Matching Firms, Managers, and Incentives, 33 J. Lab. Econ. 623, 631 (2015) (listing the social status associated with leading a business, the opportunity to pursue pet projects, and the ability to give relatives prestigious jobs as examples of private benefits of control); see also Ronald J. Gilson & Alan Schwartz, Contracting About Private Benefits of Controls 3 (Yale Law Sch., Program for Studies in Law, Econ. & Pub. Policy, Research Paper No. 461, 2012) (describing an example of a private benefit of control: "A nonpecuniary private benefit may accrue to a controller if, say, he uses his position as head of a substantial company to advance his political agenda."); Richard Heaney & Martin Holmen, Shareholder Diversification and the Value of Control 3 (Stockholm Univ. Sch. of Bus. Working Paper 2002) (positing that value of firm control is substantial for individual owners and founders).

[104] See Allen & Kraakman, supra note 15, at 2.

[105] See, e.g., Jamal Greene, Hate Speech and the Demos, *in* The Content and Context of Hate Speech: Rethinking Regulation and Responses 92 (Michael Herz & Peter Molnar eds., 2012).

speech, not enforced silence . . . . Such must be the rule if authority is to be reconciled with freedom."[106]

First Amendment jurisprudence thus endorses the idea of counterspeech.[107] If one group is uncomfortable with the messages or power of another group, they must be permitted to express their own message in opposition. Though the efficacy of counterspeech has been questioned,[108] the principle remains a compelling piece of the intellectual framework underlying the First Amendment, especially for those who worry about government regulation of speech as an alternative. With this in mind, the correct solution to increases in recognition for corporate speech rights that have benefited managers at the expense of investors becomes clear. As Justice Kennedy stated in *Citizens United v. FEC*, "the remedy is not to restrict speech but to consider and explore other regulatory mechanisms."[109] Thus, a proper response should seek to target the ways in which investor speech in the corporate setting has been limited. Those barriers should be removed. In this way, the "remedy to be applied" for increased managerial control over corporate speech will be "more speech" for shareholders, not "enforced silence."

IV. SEC REGULATIONS LIMITING INVESTORS' SPEECH SHOULD BE CHALLENGED ON FIRST AMENDMENT GROUNDS TO COUNTERBALANCE GAINS IN CORPORATE SPEECH THAT HAVE ACCRUED TO MANAGERS

The solution to the conundrum of increased corporate speech in the context of investor–management imbalances must meet two criteria. First, it must target an area of law that is currently imbalanced in favor of corporate executives. Second, it must accomplish the first task by increasing the First Amendment rights of shareholders, giving them the capacity for counterspeech. This Part will first outline the requirements of SEC proxy solicitation regulations; it will then argue that these

[106] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[107] See Ishani Maitra & Mary Kate McGowan, Introduction and Overview, *in* Speech and Harm: Controversies Over Free Speech 1, 10 (2012) (stating that the "'more speech' response is perhaps the most discussed potential remedy to harmful speech").

[108] Id. at 9–10 (discussing and summarizing arguments against the "more speech" principle by First Amendment scholars, including, among others, Professors Frederick Schauer and Catharine MacKinnon).

[109] 558 U.S. 310, 362 (2010).

regulations are slanted in favor of management while simultaneously curtailing the ability of shareholders to speak. Finally, it will assert that the speech that is limited by these regulations is covered by the First Amendment as political speech and should thus be subjected to an exacting standard of review. Investors should therefore challenge SEC proxy solicitation regulations on First Amendment grounds in order to restore balance to the structures of corporate power.

A. Proxy Regulations as Management-Favoring Restrictions on Investor Speech

1. Proxy Regulation Requirements

As mentioned in the introduction, public companies are subject to rules and regulations enforced by the SEC,[110] which was created in the wake of the Great Depression. Congress, worried about another financial crisis and wanting to protect investors, passed the Securities Exchange Act of 1934.[111] Section 14 of the Act regulates proxies, the means of voting in corporate elections.[112] It bans soliciting proxies in any manner that contravenes rules and regulations prescribed by the SEC.[113] Thus, anyone who wants to seek election must follow the SEC's rules, which interpret Section 14 and provide further guidance and specifics.

These rules have undergone a series of mostly expansionary changes over time. After initial rules were propagated in 1935, the rules were revised in 1942 and again in 1956.[114] The 1956 revisions were the most

---

110 See 15 U.S.C. § 78d (2012).

111 See 15 U.S.C. § 78b; Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (finding that purpose of Act was to protect investors). See generally John Pound, Proxy Voting and the SEC: Investor Protection Versus Market Efficiency, 29 J. Fin. Econ. 241, 245 (1991) (pointing to three themes at play during the founding of the SEC and proceeding years: "suspicion of management, concern about disclosure, and distrust of financial markets").

112 15 U.S.C. § 78n (2012). Courts have interpreted the purpose of this section as promoting the free exercise of voting rights of stockholders and giving true validity to the concept of corporate democracy. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970) (holding that intent was to promote free exercise of voting rights of stockholders); Werfel v. Kramarsky, 61 F.R.D. 674, 678 (S.D.N.Y. 1974) (holding that purpose is to give "true vitality to the concept of corporate democracy").

113 15 U.S.C. § 78n(a).

114 See Pound, supra note 111, at 253–63. The initial rules "left most aspects of the voting market undisturbed. They did not limit the private provision of information about voting issues, or prevent soliciting parties from making whatever arguments they wished, as long as

sweeping, shifting the definition of "solicit" to include communications between shareholders and a soliciting party that take place prior to a formal voting campaign.[115] In 1976, the SEC announced it would look at the rules governing investor communication to decide if changes were necessary to increase shareholder participation in corporate governance.[116] Almost fifteen years later, the SEC promulgated a new set of regulations governing proxy communications, which are still in place today.[117]

no formal voting request was included in the same communication." Id. at 253. In addition, the 1935 rules applied only to communications made through the mail or other instrumentalities of interstate commerce. Id. Face-to-face conversations and requests were initially not covered, but the 1942 revisions expanded the definition of solicitation to include communications that did not make use of the mails or interstate commerce. Id. at 258.

[115] Id. at 265. Previously, "solicitation" had only encompassed formal requests for proxies. Id.; see also id. at 269 ("The regulations in place since 1956 . . . erected procedural barriers that [made] certain types of shareholder initiatives a practical impossibility . . . . [T]he rules sharply restricted information transmission. Affected were information provision [sic] by proxy contest protagonists . . . .").The SEC itself later said, in regards to the 1956 amendments, "The literal breadth of the new definition of solicitation was so great as potentially to turn almost every expression of opinion concerning a publicly-traded corporation into a regulated proxy solicitation. . . . [This could include] private conversations among more than 10 shareholders." Regulation of Communications Among Shareholders, Exchange Act Release No. 34-31326, 57 Fed. Reg. 48276 at 48278 (Oct. 22, 1992) [hereinafter SEC 1992 Release].

[116] Pound, supra note 111, at 268.

[117] The 1992 amendments were hotly debated, garnering over 1,700 comment letters and causing four congressional hearings during the three-year process. Douglas G. Smith, A Comparative Analysis of the Proxy Machinery in Germany, Japan, and the United States: Implications for the Political Theory of American Corporate Finance, 58 U. Pitt. L. Rev. 145, 191 n.242 (1996). Although the adopted changes did allow more communication regarding proxies through a number of exemptions, these more-or-less applied to only investment advisors or public declarations in the media of how a shareholder planned to vote. They did not allow shareholders to discuss issues amongst themselves or form coalitions. See 17 C.F.R. §§ 240.14a-1(l)(2)(iv)(A), 240.14a-2(b)(1) and (3); see also Bernard S. Black, Disclosure, Not Censorship: The Case for Proxy Reform, 17 J. Corp. L. 49, 51 (1991) (calling the proposed SEC amendments, which were more expansive than the rules later promulgated, a "small, incremental step"); id. at 57–77 (including a letter signed by sixteen professors at top law schools supporting even more expansive changes than those under consideration in 1991); Jill A. Hornstein, Note, Proxy Solicitation Redefined: The SEC Takes an Incremental Step Toward Effective Corporate Governance, 71 Wash. U. L.Q. 1129, 1134 (1993) (calling the changes "important but inadequate"). For commentators who saw the 1992 amendments as going too far, see Joseph Evan Calio & Rafael Xavier Zahralddin, The Securities and Exchange Commission's 1992 Proxy Amendments: Questions of Accountability, 14 Pace L. Rev. 459, 537–39 (1994) (arguing that the amendments favor

To solicit a proxy from another shareholder, one must follow the rules laid out in Schedule 14A.[118] Civil or criminal penalties—including the possibility of imprisonment for up to twenty years—await shareholders who fail to include correct information as prescribed by the rules or solicit a proxy outside of the defined manner.[119] The Supreme Court has held that a private right of action exists to remedy violations of these rules, thus also opening up those who do not comply to civil liability.[120] Furthermore, "solicit" is broadly defined to include any "communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy."[121] This has been still further expanded by case law,[122] such that sending a letter critical of management to other shareholders could constitute "soliciting" a proxy.[123] The SEC does not shy away from enforcing its regulations that prohibit investor communication and coalition-building without disclosure.[124]

institutional investors over management and could make things worse off); Smith, supra, at 213 (claiming that the 1992 amendments were too beneficial to shareholders at the expense of management).

[118] 17 C.F.R. § 240.14a-3.

[119] See 15 U.S.C. § 78u(d)(3) (2012); id. § 78ff; 17 C.F.R. § 240.14a-9. Furthermore, if the investor is a broker or a dealer, the SEC can take additional steps, including censure, limiting activities, suspension, and even revocation of the broker or dealer's registration. 15 U.S.C. § 78o(b)(4).

[120] J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964).

[121] 17 C.F.R. § 240.14a-1(l)(iii).

[122] SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943) ("The earlier stages in the execution of such a continuous purpose must be subject to regulation . . . ."); see also Sargent v. Genesco, Inc., 492 F.2d 750, 767 (5th Cir. 1974) (finding sufficient solicitation to make out private cause of action although "there was no attempt to obtain any proxy in the narrow or common usage sense of that term"); Studebaker Corp. v. Gittlin, 360 F.2d 692, 696 (2d Cir. 1966) (holding that a communication constitutes a proxy solicitation "if it was part of 'a continuous plan' intended to end in solicitation and to prepare the way for success"); Trans World Corp. v. Odyssey Partners, 561 F. Supp. 1315, 1319 (S.D.N.Y. 1983) (same).

[123] See, e.g., Canadian Javelin Ltd. v. Brooks, 462 F. Supp. 190, 192–94 (S.D.N.Y. 1978). There is a de minimis exception for soliciting ten or fewer investors. 17 C.F.R. § 240.14a-2(b)(2).

[124] E.g., Liz Hoffman et al., SEC Probes Activist Funds Over Whether They Secretly Acted in Concert, Wall St. J. (June 4, 2015), https://www.wsj.com/articles/sec-probes-activist-funds-over-whether-they-secretly-acted-in-concert-1433451205 ("As part of a broader effort to promote transparency, the SEC is looking at whether certain investors coordinated their efforts without filing appropriate disclosures."); Matt Levine, The SEC Doesn't Like It When Hedge Funds Talk to Each Other, Bloomberg (June 5, 2015),

To ensure that they do not run afoul of these rules, investors who wish to challenge management must adhere to the proper proxy format and file all communications with the SEC.[125] Most communications require pre-approval by the SEC before transmitting, although a few small categories of statements can be filed with the SEC on the day of first use without pre-approval.[126] Once a proxy fight begins, nearly any statement made to other investors, publicly or privately, must be disclosed, according to one noted practitioner.[127] Prior to the voting date, insurgents must send properly formatted proxy cards,[128] which serve as ballots, to all shareholders, asking for their support. Unlike in a typical political election in which there is one ballot that has different parties listed, each group that wants to run a candidate must distribute a separate ballot to each of the shareholders.[129] Shareholders choose which side they wish to support and then fill out and return that side's proxy card.[130]

2. Proxy Regulation Requirements Limit Speech and Favor Management

SEC proxy solicitation regulations infringe upon shareholders' power to speak in two ways. First, as described above, the regulations facially seek to bar communication among security holders who do submit their materials for pre-approval.[131] All sorts of communications are covered, including conversation scripts and slide decks made for presentations to other investors.[132] This makes shareholders hesitant to speak with other

https://www.bloomberg.com/view/articles/2015-06-05/the-sec-doesn-t-like-it-when-hedge-funds-talk-to-each-other.

[125] 17 C.F.R. §§ 240.14a-3, 240.14a-101 (Schedule 14A).

[126] 17 C.F.R. §§ 240.14a-6; 240.14a-12.

[127] Warren S. de Wied, Practical Law Corporate and Securities: Proxy Contests 9 (2017) (authored by a partner at law firm Fried, Frank, Harris, Shriver & Jacobson LLP).

[128] 17 C.F.R. § 240.14a-4. E-proxies are allowed in some circumstances but there are multiple additional requirements. 17 C.F.R. § 240.14a-16.

[129] 17 C.F.R. § 240.14a-4(d). The SEC's Rule 14a-11 would have allowed insurgents to have the right to have their candidates for board of director seats listed on the same proxy as management's candidates, but this rule was struck down by the D.C. Circuit after being challenged by a management-friendly advocacy group. Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

[130] Allen & Kraakman, supra note 15, at 174.

[131] See supra Subsection IV.A.1.

[132] SEC 1992 Release, supra note 115, at 48282; Pound, supra note 111, at 269–70. It is also interesting to note that beneficial owners of more than $5 million of securities subject to

shareholders about managerial faults for fear that they will be found to have solicited a proxy in violation of the law.[133] From a law and economics perspective, these rules heighten the cost of communication and lead to less of it,[134] since investors must factor in the possible penalties they face should they get caught when deciding whether or not to discuss company issues that need to be addressed. These speech-limiting aspects of the regulations prevent communications that could lead to pushes for managerial change.

For shareholders who are ready to challenge management, the cost of compliance with SEC proxy rules is itself a deterrent, both from a time and resources perspective. As described above, after filling out extensive background information,[135] insurgents must mail or transmit a proxy card to each shareholder that has a vote. Since public companies will have millions if not billions of shares outstanding,[136] the costs of disseminating this information and trying to persuade shareholders to vote can reach the low seven figures or higher.[137] Although management also must send out its own proxies,[138] corporate funds can be used to pay for these expenses,[139] even if managers lose.[140] This means that while

a solicitation do not have notice or filing requirements for oral solicitations. See 17 C.F.R. § 240.14a-6(g). The SEC tried to make clear that this was not for First Amendment reasons:

> The First Amendment applies equally to written and oral communications. However, regulatory requirements can impose different degrees of burdens on different types of speech. Imposing a notice requirement on oral communications would result in greater burdens on communications about proxy voting issues than the Commission believes are warranted or necessary to achieve statutory requirements.

SEC 1992 Release, supra note 115, at 48281 n.38.

[133] Cf. Canadian Javelin Ltd. v. Brooks, 462 F. Supp. 190 (S.D.N.Y. 1978) (finding defendant's mailings to other shareholders constituted proxy material subject to registration requirements).

[134] Pound, supra note 111, at 244–45.

[135] Id. at 269–70; Black, supra note 90, at 539.

[136] For example, Apple has over 4.9 billion shares outstanding as of the writing of this Note. Apple Inc. (AAPL) Stock Report, NASDAQ.com, https://www.nasdaq.com/symbol/aapl/stock-report (last visited Aug. 26, 2018).

[137] Recently, the most expensive proxy fight in history concluded, costing both sides in total a sum of over $60 million. Benoit & Terlep, supra note 88.

[138] Estreicher, supra note 17, at 312.

[139] See SEC 1992 Release, supra note 115, at 48279:

> The cost of compliance with the proxy rules likewise could deter shareholders . . . . The regulatory scheme imposed virtually the same requirements and therefore costs on discussions about management . . . nominees . . . . In most instances management, with access to corporate funds to finance the solicitation, would be the only party

insurgents rack up massive costs in a proxy fight, managers have no skin in the game. They can spend freely from their companies' treasuries without a worry that they will be personally liable for the costs.

The fear of punishment and excessive costs imposed by SEC proxy rules exacerbate the collective action problem that already exists among widely dispersed shareholders. The rules limit "information dissemination, communication, and coordinated action"[141] and hamper shareholders from effectively exercising control through the fundamental mechanism of voting.[142] Instead, they are isolated and cannot push for corporate change.[143] To take on management, shareholders need the assistance of other shareholders to pay for the costs of the proxy contest.[144] But to communicate with other shareholders is to risk being found to have "engaged in 'solicitation' under the broad terms of the proxy rules,"[145] so even "communicating about . . . forming such a coalition, has mandated a full-fledged filing

willing to assume the regulatory costs, resulting in a one-sided discussion of the merits of the matters put to a vote.

[140] The "Froessel Rule," as laid out in *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 128 N.E.2d 291, 293 (N.Y. 1955), provides that so long as the proxy fight was a bona fide contest over corporate policy, incumbent directors have the right to have their expenses reimbursed by the corporation.

[141] Pound, supra note 111, at 243.

[142] Id. at 242–43.

[143] Id. at 242.

[144] Before the stringent versions of today's SEC regulations, shareholders often created coalitions like those described above to influence corporate decisions and challenge management. Other methods investors used included informal means, such as "special shareholder committees, negotiations, circulation of letters among shareholders, and resolutions offered at shareholder meetings." Id. at 274. These informal communications "arguably represent the best, least-cost way for large shareholders to influence corporate strategy." Id. at 278.

[145] Ronald J. Gilson & Reinier Kraakman, Reinventing the Outside Director: An Agenda for Institutional Investors, 43 Stan. L. Rev. 863, 895 (1991); see also Calumet Indus., Inc. v. MacClure, 464 F. Supp. 19, 32 (N.D. Ill. 1978) (defendant's actions did not meet broad definition of solicitation); Scott v. Multi-Amp Corp., 386 F. Supp. 44, 73 (D.N.J. 1974) ("Persons who have invested money in a corporate entity should be free to express their mutual concern among themselves . . . . The mere fact that these persons are shareholders does not raise such communications to the level of proxy solicitation."); Black, supra note 90, at 538 (noting a "fine line between gauging the market pulse and drumming up proxy support" (quoting Pantry Pride, Inc. v. Rooney, 498 F. Supp. 891, 902 (S.D.N.Y. 1984)) (internal quotation marks omitted)).

process, and thus imposes large costs."[146] As a group of legal scholars arguing for change put it, "Why stick your neck out and question management if no one else is going to go along?"[147]

The above discussion shows that proxy regulations clearly benefit management at the expense of shareholders.[148] This is almost certainly far from the outcome intended by the SEC, whose mission is to protect investors.[149] Judge Tamm of the D.C. Circuit noted almost half a century ago, "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements . . . should not be permitted to perpetuate themselves by the misuse of corporate proxies."[150]

Having argued that SEC proxy solicitation regulations limit investors' speech and unfairly benefit managers at the expense of shareholders, this Part will now turn to the question of whether the investor speech that is limited in corporate elections is or should be covered by the First Amendment.

---

[146] Pound, supra note 111, at 279.

[147] Black, supra note 117, at 76 (supporting even more expansive changes than those under consideration in 1991). Furthermore, these rules affect institutional investors that hold significant portions of Americans' retirement savings accounts—not an inconsequential fact. Serdar Çelik & Mats Isaksson, Institutional Investors and Ownership Engagement, 2013 OECD J. Fin. Mkt. Trends 93, 98 (2014). These institutional investors might "wish to determine whether an informal institutional coalition could be formed to pressure management to alter the structure of the board . . . . Yet the proxy rules have prohibited even telepho- ning more than ten other institutions to discuss such matters." Pound, supra note 111, at 279. But see Sarah Krouse, At BlackRock, Vanguard and State Street, "Engagement" Has Different Meanings, Wall St. J. (Jan. 20, 2018), https://www.wsj.com/articles/at-blackrock-vanguard-and-state-street-engagement-has-different-meanings-1516449600 [https://perma.cc/WF7N-F4W3] (discussing how some institutional investors attempt to "engage" company leadership directly before supporting one side or another in a proxy contest).

[148] See Black, supra note 117, at 51 ("[Corporate managers] understand full well the protective bulwark that the proxy rules offer."); see also id. at 77 (noting that corporate managers were the "sole source of opposition" to the SEC's 1992 proposals aimed at improving shareholder communication); Pound, supra note 111, at 280 ("The current proxy system can be argued to be of net benefit to management, which must absorb the costs associated with routine proxy rule compliance but is afforded significant protection from organized shareholder oversight.").

[149] Estreicher, supra note 17, at 251.

[150] Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970) (quoting H.R. Rep. No. 73-1383, at 13 (1934)).

B. First Amendment Challenges and the Proper Standard of Review

The previous Section has argued that proxy solicitation regulations limit investor speech. However, the First Amendment does not apply to all speech. For example, one cannot assert a freedom of speech defense to conspiracy on the grounds that the words used to discuss the crime were protected by the First Amendment.[151] This concept is known as the First Amendment's "coverage." After determining that speech is covered by the First Amendment, the next step is to determine what standard of review should be applied to the speech, which is generally done based on the category of speech at issue. This Section will argue that the speech limited by SEC proxy regulations should be covered by the First Amendment as it constitutes political speech, a type of speech at the core of the First Amendment. It will then argue that the proper standard of review is an exacting level of scrutiny similar to what courts apply in the context of other political speech.

1. Securities Regulations and First Amendment Coverage

Courts have almost never seen challenges based on freedom of speech to proxy regulations and securities regulations in general.[152] This is likely because there has been semi-frequent Supreme Court dicta stating that statements subject to securities regulation are outside of the coverage of the First Amendment.[153] However, all of these comments have been in passing, and the other types of speech listed along with statements regulated by securities laws are almost always longstanding criminal acts, such as making threats and perpetrating fraud.[154]

---

[151] Schauer, supra note 36, at 1802.

[152] Estreicher, supra note 17, at 311.

[153] E.g., Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967).

[154] See, e.g., *Ohralik*, 436 U.S. at 456 ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees . . . ." (citations omitted)); *Curtis Publ'g*, 388 U.S. at 150 ("Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'"). The cases the Court cited in *Ohralik* did not include any First Amendment analysis whatsoever, favorable or

Furthermore, when the 1934 Act was passed, First Amendment jurisprudence was in a startlingly different place than it is today.[155] Communists and others were being imprisoned for giving speeches and passing out pamphlets,[156] and such modern classics as *An American Tragedy* were legally labeled as obscene.[157] Over time, the coverage of the First Amendment has expanded, meaning that more and more categories of speech are now seen as speech to which the First Amendment applies.[158]

When the Court recognized commercial speech for the first time in *Virginia State Board of Pharmacy*, many commentators thought that securities regulations and freedom of speech were on a collision course.[159] But the collision never came. The closest thing to a crash was the 1985 case of *Lowe v. SEC*.[160] In *Lowe*, the Supreme Court had the opportunity to rule on whether a publication from an investment advisor who had been prosecuted for violating securities regulations could receive First Amendment protection. The majority did not reach the First Amendment issue, deciding the case on statutory grounds,[161] in keeping

negative. See, e.g., Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).

155 Pound, supra note 111, at 267 (arguing that at the time of the 1934 Securities Exchange Act's passage, corporate speech was not protected the same as public, political speech as it is today). The legislative history of the 1934 Act has no debate regarding the freedom of speech implications of proxy regulation. Estreicher, supra note 17, at 311 n.365.

156 Whitney v. California, 274 U.S. 357, 365–66 (1927); Gitlow v. People of New York, 268 U.S. 652, 655 (1925); Abrams v. United States, 250 U.S. 616, 617 (1919); Debs v. United States, 249 U.S. 211, 212 (1919); Schenck v. United States, 249 U.S. 47, 49 (1919).

157 Commonwealth v. Friede, 171 N.E. 472, 474 (Mass. 1930).

158 Schauer, supra note 36, at 1775–76; Tushnet, supra note 45, at 1080, 1088–89.

159 E.g., James C. Goodale, The First Amendment and Securities Act: A Collision Course?, N.Y.L.J., Apr. 8, 1983, at 4 ("The decision in *Lowe* may only be the start of more intensive judicial scrutiny of the government's regulation of securities.").

160 472 U.S. 181, 188–89 (1985).

161 Id. at 211. Justice White wrote a concurring opinion joined by two other Justices which stated that the publication did receive First Amendment protection. Id. (White, J., concurring in the judgment). *Lowe*'s holding has for the most part been read narrowly. See, e.g., R & W Tech. Servs., Ltd. v. Commodity Futures Trading Comm'n, 205 F.3d 165, 174–76 (5th Cir. 2000) (declining to extend *Lowe* to the Commodity Exchange Act). But see Agora, Inc. v. Axxess, Inc., 90 F. Supp. 2d 697, 701–02 (D. Md. 2000) (finding that electronic publication of investment information receives protection).

with the canon of constitutional avoidance.[162] Though the 1992 changes to SEC regulations were made to some extent with an eye to First Amendment issues,[163] no serious challenges to proxy regulations have been mounted in courts based on freedom of speech.

Academics, mostly writing during the 1980s and early 1990s, were quick to take sides in the debate over whether statements subject to securities regulation should be covered by the First Amendment, and if so, what the proper standard of review should be.[164] Many thought that such statements were outside the coverage of the First Amendment,[165] while others thought that the entire system of securities regulation, or aspects of it, should be subjected to scrutiny.[166] For those who argued in favor of coverage, most thought that the standard of review should be the *Central Hudson* test for commercial speech, since securities regulations limit speech in the context of business enterprises.[167] After

[162] See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341–46 (1936) (Brandeis, J., concurring); Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1012–14 (1994).

[163] See, e.g., SEC 1992 Release, supra note 115, at 48279:

> A regulatory scheme that inserted the Commission staff . . . into every exchange and conversation among shareholders . . . on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment, particularly where no proxy authority is being solicited by such persons. This is especially true where such intrusion is not necessary to achieve the goals of the federal securities laws.

It is at least arguable that these statements are still applicable, given how little changed. See also Smith, supra note 117, at 192–95 (stating that the three main purposes of the amendments were to facilitate communication among shareholders, avoid First Amendment issues, and decrease financial costs of complying with proxy regulations).

[164] For commentators on both sides of the debate, see generally Symposium, The First Amendment and Federal Securities Regulation, 20 Conn. L. Rev. 261 (1988).

[165] Dibadj, supra note 35, at 915; Frederick Schauer, Commercial Speech and the Perils of Parity, 25 Wm. & Mary Bill Rts. J. 965, 979 (2017); Michael R. Siebecker, Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment, 48 Wm. & Mary L. Rev. 613, 620–21 (2006); Allen D. Boyer, Free Speech, Free Markets, and Foolish Consistency, 92 Colum. L. Rev. 474, 491–94 (1992) (reviewing Nicholas Wolfson, Corporate First Amendment Rights and the SEC (1990)).

[166] Estreicher, supra note 17, at 324–26; Burt Neuborne, The First Amendment and Government Regulation of Capital Markets, 55 Brook. L. Rev. 5, 62 (1989) (SEC rules should be attacked on freedom of speech grounds but probably will not be); Antony Page, Taking Stock of the First Amendment's Application to Securities Regulation, 58 S.C. L. Rev. 789, 829–30 (2007).

[167] E.g., Hornstein, supra note 117, at 1157–60 (subjecting SEC regulations to the *Central Hudson* test); Page, supra note 7, at 826–28 (same). But see Nicholas Wolfson, Corporate

Lowe and the 1992 SEC regulation changes, much of the academic discussion around this issue has dried up.[168] In reviving this discussion, this Note puts forth an updated theory for coverage and a standard of review in light of the expansions in corporate speech jurisprudence[169] and the imbalance of power currently seen in corporate law.[170]

2. Speech in Corporate Elections is Political Speech

Many theories that explain the coverage of the First Amendment (what types of speech and what settings it applies to)[171] are based on one or more of several major rationales that have been offered for the protection of speech. These include the search for truth in the marketplace of ideas, personal autonomy and self-expression, and distrust of the government.[172] Arguments could be made based on each one of these theories to support the idea that SEC regulation of proxy solicitation falls within the First Amendment's coverage. Removing proxy solicitation regulations could allow more possible "truths" into the "marketplace of ideas" about a given company and thus more information upon which to make informed decisions. Corporations

First Amendment Rights and the SEC 157 (1990) ("[S]peech regulated by the SEC is not commercial speech as traditionally defined, and is indistinguishable from fully protected speech."); id. at 123 (speech regarding proxies is not like regular "commercial speech" in that it is not proposing a transaction or advertising a product or service); id. at 51, 53.

[168] See, e.g., Frederick Schauer, Towards an Institutional First Amendment, 89 Minn. L. Rev. 1256, 1279 (2005); Schauer, supra note 36, at 1809.

[169] See supra Part II.A.

[170] See supra Part II.B.

[171] There is some evidence that the Supreme Court is inching away from the distinction between the coverage and the protection of the First Amendment. See Tushnet, supra note 45, at 1093–94 (postulating that the Court may be moving away from the coverage–protection distinction, which might entail that more forms of speech might be subject to First Amendment analysis).

[172] Schauer, supra note 36, at 1785–86 (surveying four major rationales for the First Amendment: self-government and democratic deliberation, the search for truth in the marketplace of ideas, personal autonomy and self-expression, and distrust of the government). But see id. (using a descriptive method to explain what the First Amendment covers). According to Professor Schauer, face-to-face, informational, particular speech for private gain is usually not covered, while public, normative speech that seeks to inspire social change and is general rather than related to a specific transaction, often receives coverage. Id. at 1801. In addition, and perhaps most relevant to this discussion, elaborate regulatory schemes usually mean that a certain type of speech is not covered by the First Amendment. Id. at 1805–06. See also Wolfson, supra note 167, at 63.

expand individual choice by providing a multitude of ways of self-expression,[173] so whatever causes them to malfunction—including unfair managerial dominance over shareholders—will decrease our choices and thus our autonomy. And finally, a distrust of the government rationale might favor stripping away these regulations and instituting some form of private ordering. None of these lines of reasoning seem thoroughly persuasive.

But beyond these arguments, one of the most crucial rationales for the protection of speech is for the purpose of self-government and democratic deliberation.[174] While this is usually thought of in the context of politics, if businesses truly function as "corporate democracies," then rules that limit speech in those democracies should be forbidden, just as they are in the political context. In the same way that limiting speech in political elections would cause imbalances of power, so too the limiting of speech in corporate elections has entrenched managers whose time is long past due.

Following from earlier discussions about the ubiquity of corporations in modern life, it seems reasonable to see corporate elections as important as—if not more important than—some of the political elections that take place across the country. For example, Loving County, Texas, with a population of 113 people,[175] has thirteen elected officials.[176] Each of those officials' campaigns receives the full protections of the First Amendment, including the candidates' ability to

[173] Wolfson, supra note 167, at 138 ("The modern publicly held corporation is a significant intermediating structure in American life. Like the family, church, and other private groups, it . . . enriches the life and diversity of individuals.")

[174] See generally, e.g., Alexander Meiklejohn, Free Speech and its Relation to Self-Government 19–26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Cal. L. Rev. 2353, 2367 (2000) ("The First Amendment is understood to protect the communicative processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way.").

[175] U.S. Census Bureau, Annual Estimates of the Resident Population: Apr. 1, 2010 to Jul. 1, 2016, https://factfinderr.census.gov/bkmk/table/1.0/en/PEP/2016/PEPANNRES/0500000US48301 [https://perma.cc/E4LA-DCSJ].

[176] Loving County Texas, Officials of Loving County Texas, http://www.lovingcountytexas.com/CountyOfficials/officials.htm [https://perma.cc/SW98-QWFW].

lie about their qualifications for office.[177] It would be patently illegal for the government to force candidates to have their stump speeches cleared in advance by some sort of censor.[178] All for 113 people. Compared with Fortune 500 companies that hire thousands of employees, make multi-billion dollar profits,[179] and have cash reserves nearing a quarter of a trillion dollars,[180] it is difficult to see why elections in the second context have more prohibitions laid on inter-voter communications. As the Supreme Court itself has said, consumers' interest "in the free flow of commercial information . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."[181] This may be all the more true in de facto company towns, which are on the rise.[182] Those who live in a place where one corporation is the major employer may be far more interested in who is running that company and her policies than who becomes the next county treasurer.

This argument becomes all the more persuasive as external speech rights for corporations are broadly recognized.[183] The increase in protection for external corporate speech would seem to necessitate a

[177] Compare United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (holding that candidates can lie in elections) and Brown v. Hartlage, 456 U.S. 45, 60–61 (1982) (finding that *New York Times Co. v. Sullivan* standards apply to the regulation of untruthful representations in elections by the states), with Black, supra note 90, at 539–40 (citing Rule 14a-9(a), which forbids misrepresentations during a proxy contest).

[178] Wolfson, supra note 167, at 136–37 (comparing management to an incumbent Senator and arguing that it should be similarly illegal to limit the speech of challengers); id. at 124 (explaining how it would be illegal to force candidates to have their speeches cleared in advance); Estreicher, supra note 17, at 253 (same). See generally Wolfson, supra note 167, at 123; id. at 53; Estreicher, supra note 17, at 227.

[179] Jen Wieczner, The Fortune 500's 10 Most Profitable Companies, Fortune (June 7, 2017), http://fortune.com/2017/06/07/fortune-500-companies-profit-apple-berkshire-hathaway/ [https://perma.cc/6H3U-DZT4] (noting that the profits of some companies eclipse the GDPs of Tanzania and Iceland).

[180] Anaele Pelisson & Graham Rapier, The 17 US Companies with the Biggest Piles of Cash, Bus. Insider (Dec. 4, 2017), http://www.businessinsider.com/chart-us-companies-with-largest-cash-reserves-2017-8 [https://perma.cc/8GS6-3W7W].

[181] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

[182] Alana Semuels, What Amazon Does to Poor Cities, The Atlantic (Feb. 1, 2018), https://www.theatlantic.com/business/archive/2018/02/amazon-warehouses-poor-cities/552020/ [https://perma.cc/W77X-7Z8G].

[183] See supra Part II.A.

corresponding increase in protection for internal speech by shareholders. As one commentator put it:

> Because so-called external speech is fully protected, it appears somewhat problematical that internal corporate governance speech is not fully protected [by the First Amendment]. The senior management usually determines the content of external speech . . . . Hence choice of which contesting team of management will prevail (a choice determined by a proxy contest) directly affects the ultimate external speech . . . . [L]ogic should suggest that both modes of speech should be protected to the same degree."[184]

Thus, the rise in external corporate speech in elections and other realms seems to require corresponding protection for internal speech in elections. The benefit of increased recognition for corporate speech rights should be passed on to shareholders, much in the same way that they receive a portion of a company's profits as dividends.

If speech in corporate elections is political speech, then it should be covered by the First Amendment and receive protection. Although this would certainly make some SEC regulations suspect—in particular those that limit communication in proxy contests—it would not necessitate the downfall of the entire regulatory scheme that girds the securities markets. Since SEC rules cover many different aspects of the marketplace and do provide investor protection in myriad ways, the whole system does not have to rise or fall together.[185] In fact, it is

[184] Wolfson, supra note 167, at 55; see also Nicholas Wolfson, The First Amendment and the SEC, 20 Conn. L. Rev. 265, 265–66 (1988). But see Boyer, supra note 165, at 475 (arguing that applying full First Amendment protection to disclosure representations would be misguided).

[185] See Schauer, supra note 36, at 1806 ("It is one thing to make it harder to regulate a certain type of utterance, but another thing entirely to dismantle a longstanding regulatory structure."). For example, investment publications—which are regulated by the SEC—have received limited First Amendment protection, depending on the jurisdiction and the nature of the information at issue. See, e.g., Commodity Trend Servs., Inc. v. Commodity Futures Trading Comm'n, No. 97 C 2362, 1999 WL 965962, at *11–12 (N.D. Ill. Sept. 29, 1999) ("[S]ince *Central Hudson* the Supreme Court has consistently analyzed regulations and/or statutes in areas subject to extensive regulation under the pure speech or commercial speech framework."), aff'd, 233 F.3d 981, 984 (7th Cir. 2000); In re Scott Paper Co. Sec. Litig. 145 F.R.D. 366, 369–71 (E.D. Pa. 1992). See generally Donald E. Lively, Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment, 60 Wash. L. Rev. 843, 852 (1985) ("The protected nature of commercial speech at least

certainly possible to believe that "the overall system of proxy regulation does not impinge upon free speech principles"[186] or that most aspects of the system governing securities would pass muster[187] while concluding that the language of a particular regulation is suspect because it limits political speech.

Turning to the particular regulations discussed earlier, the inquiry thus becomes whether the way in which "solicit" has been defined in regulations[188] and case law[189] limits speech in corporate elections, not whether the entire apparatus of securities regulation is unconstitutional. Textually, it is difficult to read out the word "communication" from the definition, and even the SEC itself has acknowledged the First Amendment implications of securities regulation, especially in the context of proxy solicitation. Former SEC Commissioner Roberta S. Karmel once noted that "[s]ecurities regulation is essentially the regulation of speech,"[190] and a former chairman spoke similarly on the subject of proxy rules.[191] After the 1992 revisions to its regulations, the

---

mandates experimentation to determine whether less heavyhanded strategies regulate effectively."). But see SEC v. Wall Street Publ'g Inst., Inc., 851 F.2d 365, 372 (D.C. Cir. 1988) (A magazine that published articles on companies that might be of interest to small investors only entitled to limited First Amendment protection because of the "federal government's broad powers to regulate the securities industry."); Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985) (Proxy rules could apply to communications appearing in publications of general circulation that were indirectly addressed to shareholders.).

[186] Estreicher, supra note 17, at 313.

[187] Page, supra note 166, at 829–30; Estreicher, supra note 17, at 228 ("This is not to suggest that speech interests must always triumph over regulatory objectives."). For example, in *Blount v. SEC*, the court applied strict scrutiny to an SEC regulation alleged to violate the defendant's First Amendment rights; the regulation was upheld. 61 F.3d 938, 944 (D.C. Cir. 1995).

[188] 17 C.F.R. § 240.14a-1(l)(iii) (2012):

> (1) The terms "solicit" and "solicitation" include: . . . .
>
> (iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

[189] See supra Part IV.A.1.

[190] Schauer, supra note 36, at 1778 n.56 (quoting Roberta S. Karmel, Introduction, 55 Brook. L. Rev. 1, 1 (1989) (introducing a symposium entitled "The First Amendment and Government Regulation of Economic Markets")).

[191] Richard C. Breeden, Chairman, Sec. Exchange Comm'n, Corporate Governance and Compensation, Remarks at Town Hall of California, Los Angeles, California 9 (June 17, 1992):

SEC admitted that "almost any statement of views could be alleged to be solicitation" because of the broad definition of solicitation, and that this definition "does have a chilling effect on discussion of management performance, out of fear that the communication could after the fact be found to have triggered disclosure and filing obligations under the federal proxy rules."[192] The SEC itself thus admits that the rule surrounding proxy solicitation causes a direct "chilling effect" on shareholder speech in corporate elections, borrowing language from First Amendment jurisprudence.[193]

Functionally, the provision prevents investors from writing and speaking about many topics. These are core ways of speaking that have been traditionally protected by the First Amendment. Over the past fifty years, the Supreme Court has applied First Amendment protections to many forms of symbolic speech, including draft card[194] and flag burning,[195] armband wearing,[196] and even nude dancing.[197] If these forms of symbolic speech are considered speech for First Amendment purposes, then the actual speech of concerned shareholders in elections should be protected as well.

3. Some Form of Exacting Scrutiny is the Proper Standard of Review

If shareholder communications are political speech and covered by the First Amendment, the next question is what level of review should be used to scrutinize laws that limit speech in these elections. This is an inherently difficult task, because it requires comparing the speech at issue with other forms of protected speech and seeing which one is most

> Though reasonable minds can differ on the subject, I believe that the current proxy rules go somewhat too far in restraining freedom of speech among shareholders. This is, after all, a free country where we take the expression of even contentious views as a sign of vitality in a wide-open marketplace for ideas . . . . Making an investment needs to be attractive, and bring rewards, not penalties. Just for buying stock a shareholder should not forfeit the right of free speech . . . .

[192] SEC 1992 Release, supra note 115, at 48279. The SEC contended that this issue had been addressed by the exceptions provided in the new regulations.

[193] For a general explanation and discussion of the "chilling effect," see Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect", 58 B.U. L. Rev. 685 (1978).

[194] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[195] Texas v. Johnson, 491 U.S. 397, 406 (1989).

[196] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

[197] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–67 (1991).

analogous.[198] In the context of securities regulation, several prior commentators have suggested the intermediate scrutiny of the *Central Hudson* commercial speech test.[199] But if speech in corporate elections is political speech, then it should receive a higher level of protection than intermediate scrutiny.

Standards of review in the First Amendment context are largely categorical, based on the type of speech at issue. Political speech—whether in the context of the advocacy of illegal conduct,[200] news reporting that is challenged as libelous,[201] or the statements of candidates themselves[202]—always receives stringent protection. Though the specifics of the tests applied are different, all of these forms of protection for political speech constitute a higher, more exacting standard of review than the intermediate scrutiny of *Central Hudson*. Only something similar to these exacting standards would provide the

[198] Many types of speech contain content that is categorically mixed. See, e.g., James J. Barney, The Mixed Message: The Supreme Court's Missed Opportunity to Address the Confused State of Commercial Speech in *Nike, Inc. v. Kasky*?, 37 UWLA L. Rev. 1, 3 (2004) (discussing a case which commentators saw as containing elements of commercial, political, and libel speech). Sometimes political speakers have economic motives, and vice-versa. Wolfson, supra note 167, at 119. Furthermore, things perceived and experienced in one sphere of life inevitably bleed into others. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 788 (1985) (Brennan, J., dissenting) ("[T]he choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us."). A final question is whether the distinctions found in the doctrine will remain. See, e.g., Tushnet, supra note 45, at 1116–17 (contemplating the possibility of "leveling up," that is, applying the current stringent stand of review, in all of its stringency, to all communicative activity). "Leveling upward does require that we bite the bullet and accept the possibility that many features of the existing regulatory state are unconstitutional under the First Amendment." Id. at 1116.

[199] E.g., Hornstein, supra note 117, at 1155–56 (subjecting SEC Regulations to the Central Hudson test); Page, supra note 166, at 826–30. Others have suggested the higher bar of securities regulation as a "prior restraint" on speech, which would basically destroy the whole schema if applied. See Wolfson, supra note 167, at 154–57. Schauer believes that were speech currently prohibited under securities laws covered by the First Amendment, then these regulations would be a "classic" prior restraint, but he does not believe such speech should be covered. Schauer, supra note 36, at 1779 & n.65 (describing how the "classic" prior restraint involves licensing of speech by a governmental authority, thus securities regulation could be seen as a "prior restraint by virtue of mandatory government approval in advance of publication, content regulation, compelled speech, and official management of representations made in elections").

[200] Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

[201] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

[202] United States v. Alvarez, 567 U.S. 709, 716 (2012).

proper level of scrutiny needed to protect speech in the consequential contests for power that take place in corporate elections.

With this level of review, the definition of "solicit" found in modern-day securities regulations would likely be struck down by courts as it strongly limits communication in corporate elections. Bolstering investors' speech rights in this manner would allow them to form coalitions and coordinate efforts to take on deleterious or inept managers in proxy fights, thus restoring balance to the management-shareholder struggle in a manner consistent with First Amendment principles—applying the remedy of "more speech" to corporate speech gains that have accrued to executives.

V. CONCLUSION

Three brief reassurances are provided for those who find this outcome distressing. First, other developed nations have less restrictive regulations surrounding their proxy solicitations, and none of them have markets that have imploded.[203] Second, as mentioned previously, most SEC regulations outside the context of corporate elections would likely withstand scrutiny and provide a counter-check to keep shareholders from themselves becoming too powerful.[204] A third, and more theoretical, response is that some commentators have posited that a larger protected zone (coverage) for freedom of speech may create increased protection for core freedoms.[205] Thus, adding speech in corporate elections to the categories of covered speech could lead to stronger protections for speech in state, local, and federal elections.

Finally, consumers themselves can also act as a check on management, perhaps at times achieving more or quicker changes than what investors are capable of. In the wake of Uber's disruption of the

---

[203] Smith, supra note 117, at 167, 182–83 (noting no preliminary filing requirements for proxy materials in Japan and few regulations regarding solicitation of proxies in Germany).

[204] E.g., Regulation 13D, which requires filings by any shareholder group owning more than 5% of outstanding stock that has entered into a voting agreement. See 17 C.F.R. § 240.13d-1(a) and (b)(1)(ii)(K) (2012).

[205] Estreicher, supra note 17, at 325 ("By gradually expanding the 'protected zone,' we may foster in the American people a broader and deeper acceptance of first amendment principles. A society that takes as given the protected nature of a broad zone of expression might prove the most effective guardian of what Professors Blasi and Schauer consider 'core' expression.").

travel ban strike at JFK airport, the hashtag #DeleteUber went viral, a form of protest encouraging riders to stop using the app.[206] Only a few days later, Uber CEO Travis Kalanick resigned from Trump's economic advisory council, despite being widely viewed as a Trump supporter.[207] The pressure was too great.

As this anecdote illustrates, perhaps corporations and their leaders are now more responsive to the demands of popular opinion or their consumers—including their consumers' political and social demands—than they are to their investors. If this is the case, it has profound implications for future power structures in corporate law, which should be explored by future research and scholarship.

[206] Faiz Siddiqui, Uber Triggers Protest for Collecting Fares During Taxi Strike Against Refugee Ban, Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/dr-gridlock/wp/2017/01/29/uber-triggers-protest-for-not-supporting-taxi-strike-against-refugee-ban/ [https://perma.cc/D34L-RCUA].

[207] Mike Isaac, Uber C.E.O. to Leave Trump Advisory Council After Criticism, N.Y. Times (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/technology/uber-ceo-travis-kalanick-trump-advisory-council.html [https://perma.cc/L52W-P9GE].