Shareholder Lock-in and the Corporate Soul: Implications for the First Amendment

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*What would a post-*Citizens United *legal regime look like? With reform efforts gaining steam in Congress and the White House, this is becoming an increasingly relevant question. And although the last ten years have produced a mountain of books and articles to guide these projects, certain critical questions remain unexplored. One of these questions is whether corporations should be treated as unique under the First Amendment and thus subject to their own particularized regulations or whether other business entities should be treated in a like manner.*

This Article explores that question, offering a novel theory for distinguishing corporations from other business organizations under the First Amendment by looking to a single characteristic: "liquidation protection." Liquidation protection is a key but underappreciated feature of corporations that prevents a shareholder from dissociating from the organization at will. As this Article explains, that shareholders (or their equivalents) are "locked into" the organization distinguishes certain types of business entities, including corporations, from other entities that do not have this feature, such as general partnerships, and provides a conceptually coherent means of defining the scope of the First Amendment and related regulatory regimes.

INTRODUCTION

It has been over a decade since the Supreme Court in *Citizens United* held that a corporation should not be "treated differently [from the ordinary citizen] under the First Amendment simply because such associations are not 'natural persons.'"[1] The decision—which concluded that corporations have a right to spend unlimited amounts of funds from their general treasuries on independent political expenditures—thrust the issue of corporate First Amendment rights into the center of political and legal

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[1] Citizens United v. FEC, 558 U.S. 310, 343 (2010) (quoting First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

debate. Although public attention waned in the years that followed, *Citizens United* and its legacy were once again brought to the fore during the 2020 presidential race when then-candidate Joe Biden endorsed a constitutional amendment to overturn the Supreme Court's decision.[2]

Now, with Democrats in control of both the White House and Congress, the efforts to confront the legacy of *Citizens United* may be at a turning point. Indeed, the first bill introduced in the 117th House of Representatives, the For the People Act of 2021, explicitly seeks to counter what the bill describes as the "explosion of outside spending in elections" following the "Supreme Court's misinterpretation of the Constitution" in *Citizen United*.[3] The bill, passed by the House in early March 2021, faces an uphill battle in the Senate—but even so, all indicators suggest this is only the beginning of a renewed effort to examine the rights of corporations to participate in the public political sphere.

Despite a mountain of scholarship to guide these reform efforts, critical questions remain unexplored. One of these questions is whether corporations should be understood as unique under the First Amendment or whether all business organizations—including non-incorporated types of firms, such as general partnerships—should be treated in a like manner and thus subject to the same reforms. This is a weighty issue facing those interested in reshaping the scope of campaign finance law, whether through statute or constitutional amendment—particularly as alternative entity forms, such as the limited liability company (LLC), have become increasingly popular.[4]

Professor Jonathan Macey and former Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr. are some of the few scholars to address this question. Macey and Strine take issue with the *Citizens United* Court's embrace of associational language, arguing that its conceptualization of the corporation is inconsistent with state corporate law.[5] Under state law, a corporation is "an artificial, metaphysical, and legal construct that exists

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[2] *The Biden Plan to Guarantee Government Works for the People*, BIDEN-HARRIS, https://joebiden.com/GovernmentReform [https://perma.cc/YN56-F7C8] (last visited Apr. 5, 2021).

[3] For the People Act of 2021, H.R. 1, 117th Cong. § 5001 (2021).

[4] *See* Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 STAN. J.L. BUS. & FIN. 137, 139 (2019). Alternative entities, such as LLCs, are technically "unincorporated" as a matter of state law, meaning—like general partnerships—they are not treated as entities distinct from the equity investors for tax purposes; however, they can nonetheless provide the investors with many of the key benefits associated with the corporate form, such as limited liability. For this reason, they are often thought of as "hybrids" of corporations and partnerships. *See infra* Section IV.A.

[5] *See* Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 451.

separate and apart from its investors."[6] This characteristic distinguishes corporations from general partnerships, which—as a matter of state law—are not treated as "metaphysical" entities distinct from the partners that create them. As a result, "the 'association of citizens' conception of the corporation," they explain, "confuses the corporation with the general partnership."[7]

By distinguishing corporations from partnerships based on their treatment under state corporate law, Macey and Strine offer a key insight into whether different organizational forms—that is, different types of entities—should be treated differently under the First Amendment. But by relying on an argument about corporate ontology (whether a particular type of firm is treated under state law as an entity distinct from its investors), their analysis fails to grapple with how these "metaphysical" distinctions correspond to functional differences. And yet, those more pragmatic distinctions should be accorded the most constitutional significance. As John Dewey argued nearly one hundred years ago, issues relating to the legal personality of organizations should not turn on ontological line-drawing but rather by attending pragmatically to the "consequences" of assigning a particular entity a given right or duty.[8]

In this Article, I take a step toward a more functionalist account of what distinguishes different business organizations from a First Amendment perspective, focusing on the distinctions between corporations and general partnerships. As Justice Stevens, writing in dissent in *Citizens United*, observed, there was a general distrust of the "soulless" corporation at the time of the nation's founding.[9] That distrust, I suggest, was directly related to a feature of corporations that persists today and continues to distinguish corporations from other types of firms, including general partnerships: liquidation protection, the inability of a shareholder to freely dissociate from the organization.

A partner in a general partnership can, at will, exercise her right to walk away from the organization with her share of its value, even if doing so requires liquidating the partnership's assets. This feature grants each partner a powerful veto right over the firm's actions. But corporations are endowed with liquidation protection, a feature at the intersection of corporate and

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[6] *Id.*
[7] *Id.* at 455; *see* Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1201 (2019) (arguing that the Supreme Court's jurisprudence mistakenly "treats corporate entities as common law partnerships").
[8] *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 660, 667–69 (1926).
[9] Citizens United v. FEC, 558 U.S. 310, 427 (2010) (Stevens, J., dissenting) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 194 (2d ed. 1985)).

property law that serves to lock in a shareholder's capital contribution. This "lock-in"—an essential characteristic of the corporate form—changes the associational nature of the firm in important and constitutionally relevant ways.

This Article proceeds in four parts. Part I offers relevant background on *Citizens United* and the reform efforts that have followed, describing, in particular, the language of amendments that have been proposed to overturn the Supreme Court's decision. Part II explores some of the reasons the Framers may have been concerned with corporations engaging in political discourse, examining whether those concerns provide a basis for distinguishing the treatment of corporations from that of general partnerships. The answer may be that corporations are endowed with liquidation protection, which prevents individual shareholders from vetoing corporate actions. Part III explicitly connects liquidation protection to First Amendment values, explaining how that feature of the corporate form effectively renders the corporation—in contrast to the partnership—an involuntary association in which shareholders are "locked in." Part IV then demonstrates how liquidation protection can be used to distinguish different types of organizational forms, including hybrid entities and nonprofit corporations, from a First Amendment perspective. This Article concludes by considering the relevance of the distinction generated by liquidation protection for current and future reform efforts.

I. BACKGROUND: *CITIZENS UNITED* AND ITS LEGACY

How did questions of corporate personhood migrate from the highest ivory towers to cardboard protest signs carried across the Brooklyn Bridge?[10] An understanding of *Citizens United* and how it departed from then-recent precedent helps place these issues in context. In this Part, I provide an overview of *Citizens United* and the reform efforts that have followed in its wake.

In *McConnell v. FEC*, decided seven years before *Citizens United*, the Court upheld certain restrictions on corporate and labor political activities imposed by the Bipartisan Campaign Reform Act of 2002 (the "McCain-Feingold Act").[11] The Act prohibited "any corporation . . . or any labor organization" from "mak[ing] a contribution or expenditure in connection

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[10] Sam Lewis & John Farley, *Protest Like an Egyptian: An Occupation of Wall Street*, METROFOCUS (Oct. 3, 2011, 10:26 AM), https://www.thirteen.org/metrofocus/2011/09/protest-like-an-egyptian-an-occupation-of-wall-street/ [https://perma.cc/9PC7-P25H].

[11] 540 U.S. 93, 207 (2003).

with any [federal] elections."[12] This prohibition extended to any payment for an "electioneering communication," including advertisements within sixty days of a general election or thirty days of a primary that referred to a "clearly identified candidate for Federal office."[13] Notably, the Act was not a complete bar on corporate and union involvement in political spending—it expressly permitted corporations and unions to form political action committees (PACs) that could solicit voluntary contributions from employees, stockholders, and union members, which could then be used to support candidates.[14] Finding that Congress had a "compelling interest" in stemming the "virtual torrent" of corporate and union spending on political advertisements in connection to federal election, the *McConnell* Court concluded that the Act's restrictions were sufficiently tailored to withstand constitutional scrutiny: Although the Act prevented those associated with a corporation from spending from the organization's general treasury, spending through a PAC was still allowed.[15]

Overturning *McConnell* in relevant part, the Court in *Citizens United* held the McCain-Feingold Act's restrictions on corporate political spending unconstitutional. The case involved a nonprofit corporation, Citizens United, that planned to advertise and make available a film critical of then-Senator Hillary Clinton—at the time a candidate in the Democratic Party's presidential primary elections—within the thirty days prior to the primary.[16] Seeking to use its general treasury to fund the distribution and advertising of the film, Citizens United sought declaratory and injunctive relief against the enforcement of the relevant portion of the McCain-Feingold Act, arguing, among other things, that it was unconstitutional.[17] The Court agreed.[18] The holding rested in part on the conclusion that the McCain-Feingold Act operated as an "outright ban on corporate political speech," unremedied by the option of spending through a PAC, which represents "a separate association from the corporation."[19] Rejecting the argument that "political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons,'" the Court struck down the Act's prohibition on general treasury expenditures.[20]

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[12] 2 U.S.C. § 441b(a) (2006), *declared unconstitutional by* Citizens United v. FEC, 558 U.S. 310 (2010).
[13] §§ 441b(b)(2), 434(f)(3)(A)(i).
[14] *See* § 441b(b)(2).
[15] *McConnell*, 540 U.S. at 205, 207.
[16] Citizens United v. FEC, 558 U.S. 310, 319–21 (2010).
[17] *Id.* at 321.
[18] *Id.* at 366.
[19] *Id.* at 337.
[20] *Id.* at 343 (quoting First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

Although the plaintiff in *Citizens United* was a nonprofit corporation, the Court's decision was not so cabined. The scope of the opinion suggested that the managers of for-profit corporations also have a right under the First Amendment to spend uncapped amounts of general treasury funds for the purpose of influencing an election or other political process. The decision quickly garnered condemnation—including from President Obama, who the following week, criticized the opinion in the State of the Union as opening the doors for "American elections [to] be bankrolled by America's most powerful interests."[21] Within months, legislation to counteract the Court's decision was working its way through the House and Senate.[22] And by the end of the following year, multiple proposed amendments seeking to overturn the decision had been introduced in Congress.[23]

Some of these amendments have continued to be proposed in Congress. This includes the Democracy for All Amendment, which has most recently been introduced by a bipartisan group of members of the House.[24] The Amendment, which the sponsors describe as "reversing the concentration of political influence held by the wealthiest Americans and large corporations," consists of three sections that together are intended to overturn *Citizens United*.[25] Section II of the proposed Amendment is specifically intended to counter the Court's holding that corporations, as associations of persons, are entitled to the same treatment under the First Amendment as natural persons. It provides:

> Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.[26]

Language mirroring this proposed amendment can be found in the current text of the For the People Act. In particular, the Bill includes a provision

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[21] Barak Obama, President, State of the Union (Jan. 27, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address [https://perma.cc/7C7A-CM3A].

[22] *See* Jesse Lee, *President Obama on* Citizens United*: "Imagine the Power This Will Give Special Interests Over Politicians,"* WHITE HOUSE: PRESIDENT BARACK OBAMA (July 26, 2010, 3:07 PM), https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit/ [https://perma.cc/LX6C-FUH2].

[23] *See, e.g.*, H.J. Res. 90, 112th Cong. (2011); S.J. Res. 29, 112th Cong. (2011).

[24] H.J. Res. 1, 117th Cong. (2021).

[25] *See* Press Release, Congressman Tedd Deutch, Bipartisan Constitutional Amendment to Overturn *Citizens United* Introduced (Jan. 21, 2021), https://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=402908#:~:text=The%20Democracy%20for%20All%20Amendment,of%20dollars%20in%20our%20elections [https://perma.cc/AZQ6-U2AF].

[26] H.J. Res. 1, 117th Cong. § 2 (2021).

recommending a constitutional amendment explicitly permitting campaign finance regulations that "distinguish between natural persons and artificial entities, like corporations, that are created by law."[27] Thus, like the Democracy for All Amendment, the Bill utilizes the term "artificial entities" to define the scope of the enhanced regulatory authority it contemplates.

The term "artificial entities"—with its ontological undertones—is a notable choice, not the least because of its arguable imprecision. If ratified, it is not hard to imagine litigation challenging whether unincorporated forms, such as partnerships, are "artificial entities" or mere associations of persons. But more generally, the decision to extend the scope of the Amendment not only to corporations but also other "entities" raises a question: should all types of business organizations be subject to heightened regulation, or should the scope of reform be more tightly circumscribed? This is a question that has gone unexamined in the push for overturning *Citizens United*. And yet, it is a critical one—the decision to extend the scope beyond corporations would potentially subject thousands of additional firms, which vary in size and governance structure, to new regulation.

II. CORPORATE ANXIETIES AT THE FOUNDING

Even if one does not adhere to an originalist approach, plumbing the depths of American tradition and history often serves as a useful means of ferreting out guiding principles for constitutional construction. Indeed, although the majority opinion in *Citizens United* made little use of historical analysis, both Justice Stevens's dissent and Justice Scalia's concurrence engaged in extensive discussion of how the Framers and their contemporaries conceived of speech, corporations, and the intersection of the two. In the years since, engagement with the historical evidence regarding a corporation's constitutional rights has only multiplied.[28]

This Part does not attempt to relitigate either side of that debate. Instead, it looks at more limited issues: what features of corporations generated concern during the Founding era, and do any of those features justify treating corporations differently from other types of business entities, including general partnerships, from a First Amendment perspective? I suggest that there is a distinguishing feature—liquidation protection, a characteristic of corporations that effectively prevents each shareholder from individually wielding a veto right over corporate actions.

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[27] For the People Act of 2021, H.R. 1, 117th Cong. § 5001(15) (2021).

[28] *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 3 (2018).

A. THE ULTRA VIRES DOCTRINE

Before turning to liquidation protection, it is useful to consider what might seem like the most probable legal feature for distinguishing corporations from general partnerships in the context of constitutional rights: the ultra vires doctrine. In the eighteenth century, "there were no business corporations operating under so-called general incorporation statutes."[29] Instead, legislatures created corporations through detailed charters, which granted the corporations only those rights specified in the chartering document. These limitations were strictly enforced through legal mechanisms such as the ultra vires doctrine, which voided "all acts that were not authorized by a company's charter."[30] The application of the ultra vires doctrine, combined with the absence of general incorporation statutes, supports the conclusion that at the time of the Founding, corporations were viewed as creatures of *limited* rights, not entities possessing "broad expressive rights."[31] Importantly, this differs from general partnerships, which were not subject to detailed state-crafted charters and were not limited by the ultra vires doctrine.

That corporations, but not partnerships, could only exercise those rights granted to them by the legislature (along with limited ancillary rights) may well suggest that corporations are entitled to different constitutional treatment. But this alone does not show that the ultra vires doctrine today provides a basis for concluding that distinguishing corporations from other entities would advance First Amendment values. Indeed, one theory for the ultra vires doctrine was that it was intended "as a form of investor protection, assuring investors that their capital contributions to the firm would only be used in industries or activities in whose profitability they had some faith."[32] But that explanation does not draw a line between the corporation and the partnership for purposes of defining political rights: that managers might run the company in an unprofitable way is a reason to be suspicious of corporations, but not a reason to exclude them from being used as tools for participating in politics.

Other theories for justifying the ultra vires doctrine relate to the special monopolistic privileges that early corporations possessed because of their charters from the state. These theories are more promising but ultimately

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29 Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 880 (2016).
30 *Id.* at 880, 899.
31 *Id.* at 880–81.
32 Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 988 (2014).

come up short as well.[33] As Justice Scalia notes in his concurrence in *Citizens United*, the evidence suggests that at least some of "the Founders' resentment toward corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed."[34] Indeed, many Founding-Era statements regarding corporations point to concerns that—because of these special monopolistic privileges—a corporation could amass inordinate wealth and influence, enabling it "to obtain 'partial laws' in its favor."[35] Relatedly, some in the Founding Era worried that incorporation would be "doled out to favored groups,"[36] presenting the risk that those in power would enter into corrupt bargains to stay in power.

The concern that corporations' special monopolistic privileges would allow them to gain disproportionate amounts of wealth and, as a result, have too much sway in the political sphere would seem exactly the sort of distinction between the typical corporation and the partnership that would justify the disparate provision of political rights.[37] The issue, however, as Justice Scalia pointed out, is that the "inherent[ly] monopolistic character" of corporations in the Founding Era does not apply to corporations today.[38] Thus, the attendant risks of allowing these monopolistic entities to participate in the political sphere have been neutered. From this, one could conclude that the distinctive characteristics of corporations that justified the limitations on constitutional political rights implicit in the ultra vires doctrine no longer provide a basis upon which one can functionally distinguish modern corporations and partnerships for the purpose of the First Amendment.

On the other hand, although the monopolistic privileges associated with eighteenth-century corporations no longer characterize the modern corporation, it remains the case that corporations have certain "privileges" relative to general partnerships, which give them a competitive advantage. These include, for example, limited liability, which can lower the cost of capital. Thus, there are still special privileges associated with incorporation that may generate concern. But today, every entrepreneur has the choice, at least in principle, to form either a partnership or a corporation; the "special privileges" of the corporation are now available (at least in theory, if not in

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[33] *See* Strine & Walter, *supra* note 29, at 896, 899.
[34] Citizens United v. FEC, 558 U.S. 310, 387 (2010) (Scalia, J., concurring).
[35] Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 146 (2012) (quoting Joseph Stancliffe Davis, *The "S.U.M.": The First New Jersey Business Corporation*, *in* 1 JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 384, 410 (1917)).
[36] *Id.* at 118.
[37] *See* Strine & Walter, *supra* note 29, at 932.
[38] *Citizens United*, 558 U.S. at 387 n.3 (quoting 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (rev. ed. 2006)).

practice) to every person—not just the few who are granted those rights by the legislature. Thus, although there is certainly reason to be concerned that corporations provide people with a means to have disproportionately "loud" voices in the political sphere by facilitating the accumulation of wealth, the notion that corporations—in contrast to partnerships—are inherently vehicles of state-generated inequality is less true today than it was at the Founding.

B. VETO RIGHTS AND THE CORPORATION'S SOUL

Although the Founders' apprehension regarding unequal access to the special privileges of the corporation, such as limited liability, may have less application today, I do not believe that these concerns fully account for that generation's distrust of the corporation. As Justice Stevens quotes in his dissent, "[t]he word 'soulless' constantly recurs in debates over corporations."[39] Justice Stevens takes these references to the soullessness of corporations as illustrative of the general "'cloud of disfavor under which corporations labored' in the early years of this Nation."[40] But I submit that the adjective refers to something more specific: the potentially perverse incentives created by the corporate structure.

As Pennsylvania legislator (and future Congressman), William Findley explained in arguing against chartering the Confederation Congress's Bank of North America, when a man is "in disposal of his own wealth," he will use it in a way that is tempered by "his own principles" and sense of "personal responsibility."[41] In contrast, the corporation, "being in the hands of many," has as its "sole purpose [to] increas[e] wealth."[42] As a result, "personal responsibility . . . can have no place."[43] The concern was thus that corporations would act to influence politics purely to advance their own self-interests, in contrast to natural persons, who would instead act in a more principled manner. The corporation is soulless, in other words, because of its single-minded pursuit of riches, untempered by personal morality.

A corporation is not inherently prohibited from undertaking any purpose other than to increase wealth, unrestrained by personal responsibility. But Findley was correct in noting that certain features of the corporation create

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[39] *Citizens United*, 558 U.S. at 427 (Stevens, J., dissenting) (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 194 (2d ed. 1985)).
[40] *Id.* (quoting 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2 (rev. ed. 2006)).
[41] DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, ON THE MEMORIALS PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULLING THE CHARTER OF THE BANK 66 (Mathew Carey, ed. 1786) (statement of Mr. Findley).
[42] *Id.*
[43] *Id.*

in it "such tendency"[44] to operate in this fashion as compared with other business forms—and in particular partnerships. Specifically, each partner in a general partnership may unilaterally demand payout of her share of the firm's assets, providing her a great deal of control in the form of an implicit veto.[45] This ensures that each partner can wield her influence to block the firm from taking actions that violate her sense of personal responsibility.[46] In contrast, a key (if underappreciated) distinguishing feature of the corporation is that it provides liquidation protection, meaning that "neither an owner nor his personal creditors may demand unilaterally a payout of the owner's share of firm assets."[47] As a result, the typical shareholder does not wield a veto and must instead rely on whatever tools of "corporate democracy"[48] that the charter provides for—usually the election of directors.[49]

This control structure works well for ensuring that the corporation pursues ends with regard to which the shareholders' interests are homogenous, such as the maximization of wealth (or, more specifically, residual value), but it is significantly less effective at aggregating heterogeneous preferences.[50] Because shareholders are likely heterogeneous in their politics, there is serious reason to doubt that shareholders can effectively temper the corporation's actions—such as political donations—so as to cohere with any individual's sense of personal responsibility.[51]

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[44] *Id.* at 62.

[45] Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 412 (2003).

[46] One important caveat is that partners may voluntarily enter into agreements that impose restrictions on a partner's right to withdraw—requiring, for example, common consent. However, unlike in the context of a corporation, these restrictions are based in contract law, rather than in property law, and the sanction for breach is generally limited to provable damages. *See* Henry Hansmann, Reiner Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1342 (2006). For this reason, these restrictions might be better conceptualized as external restrictions on the partner's withdrawal right. Although I do not further explore the implications of these contractual modifications to the baseline rules for partnerships, the role of private contracts in affecting the function of organizational form merits further study.

[47] Henry Hansmann, Reiner Kraakman & Richard Squire, *The New Business Entities in Evolutionary Perspective*, 2005 U. ILL. L. REV. 5, 11 (2005).

[48] Citizens United v. FEC, 558 U.S. 310, 362 (2010) (quoting First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

[49] *See* Blair, *supra* note 45, at 436–37.

[50] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 477–78 (2008).

[51] *See* Leo E. Strine Jr. & Nicholas Walter, *Conservative Collision Course: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV.

The above discussion suggests that policymakers in the Founding Era appreciated that one of the distinctive features of the corporation, liquidation protection, generated a risk to the political system not present in entities such as general partnerships—specifically the risk that corporations will engage in political spending that does not reflect the views and preferences of the shareholders: the actual members of "We the People" who claim an ownership right in the corporation. Given that this risk remains true today, corporations and general partnerships can justifiably be treated differently under the First Amendment.

In other words, one feature that continues to distinguish corporations from partnerships is that shareholders, unlike partners, do not have the right to effectively veto those corporate actions that conflict with their personal consciences by threatening to force liquidation and withdraw their funds. It is the corporation's protection from these threats—liquidation protection—that allows the corporation to operate with some degree of distance from the moral concerns of the individual shareholders—a state that some in the Founding generation, I suggest, found to render the corporation soulless.

III. "LOCKED IN": CORPORATIONS AS INVOLUNTARY ASSOCIATIONS

Another way of conceptualizing liquidation protection makes the connection to the First Amendment even clearer: Liquidation protection means that once a person makes a financial contribution to a corporation and becomes a shareholder, she cannot unilaterally withdraw her capital—she is unable to disassociate from the corporation at will. Rather, she must either find a buyer willing to pay the full price for her shares, persuade the company's board of directors to repurchase her shares, or—under limited circumstances defined by state law—petition the court for relief.[52] In contrast, when someone contributes to a partnership, she can unilaterally, and at will, walk away from the partnership with her share of the entity's assets—even if this requires, for example, selling off property the

335, 364 n.119 (2015) (collecting sources suggesting that using corporate resources for political and social purposes is unwise, in part, because of minority control).

[52] One might object to this characterization by noting that the shares of some corporations are publicly traded in robust and liquid markets. Thus, one could argue—as the Supreme Court did in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978)—that dissenting shareholders are "free to withdraw [their] investment at any time and for any reason." But this appeal to the extralegal conditions against which the shareholders' rights operate is incomplete. The vast majority of stock in American public corporations is not owned by individuals, but rather "by institutional investors such as mutual or pension funds. . . . As a result, the actual human beings whose capital is invested by these intermediaries . . . only retain very limited rights of exit from the market without facing expropriatory levels of taxation." Strine & Walter, *supra* note 51, at 370. Thus, it is highly doubtful that, as a practical matter, the market for publicly traded shares alleviates the "lock in" effects created by corporations' legal properties.

partnership holds. Although this unilateral withdrawal can prevent future value from being realized, a partner is free in a literal sense to dissociate from the entity whenever she chooses.

And therein lies a key difference. In contrast to a partnership, a corporation, once formed, ceases to be a voluntary association. And once it is understood that a corporation is not necessarily the product of continued free association, the intuition underlying allowing it to exercise First Amendment rights on behalf of its members falls away. The idea that "[t]he association of individuals in a business corporation is no different" from "the Republican Party or the Democratic Party," as Justice Scalia says in his *Citizens United* concurrence,[53] is simply not true. If a member of a political party disagrees with a decision by party leadership, that member can freely renounce her membership and dissociate with the organization—indeed, even a member of Congress, elected on a specific party ticket, can become an independent or switch parties while in office. But a shareholder does not have that right; she is, as one corporate scholar has put it, "lock[ed] in."[54]

This is an important distinction. Justice Scalia may well be correct to say that the members of a political party "giv[e] the leadership of the party the right to speak on their behalf."[55] But it is also true, and more relevant, that so long as the members choose to remain associated with the organization, they are implicitly continuing to give leadership that permission. In contrast, although the shareholder might be understood to "give" certain permissions to the corporation's leadership by investing in the company, the implicit endorsement provided by continued association is absent. This severely undercuts the justification for allowing the organization's leadership to exercise First Amendment rights on the "membership's" behalf.

Although Macey and Strine do not address liquidation protection or its implications directly, the concept underlies one of their most insightful conclusions: In justifying the provocative assertion that "[a]s a matter of logic, the corporation is a legal person, and it does not have owners any more than natural persons have owners," they explain that shareholders lack the sort of "dominion and control" over the corporation that is associated with property rights.[56] But it is not merely that the bundle of rights associated with shareholding has been so whittled down that shareholders cannot be considered holders of a property interest. Rather, the loss of

[53] *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring).
[54] Blair, *supra* note 45, at 387.
[55] *Citizens United*, 558 U.S. at 392.
[56] Macey & Strine, *supra* note 5, at 483–84.

control can be associated with the shareholder's inability to freely walk away from the corporation, taking her share of the corporation with her. Because of liquidation protection, by contributing to a corporation, the shareholder essentially surrenders her capital to the corporate leadership, receiving only a limited set of control rights in return.

IV. BEYOND THE FOR-PROFIT CORPORATION

Liquidation protection offers a clear, functionally relevant means of distinguishing corporations from general partnerships for purposes of determining whether the entity should be accorded First Amendment rights derivative of its "associated" members. But what about other types of corporate entities—such as hybrid entities or nonprofit corporations? Macey and Strine suggest looking to whether a particular entity, such as a limited partnership or a limited liability company (LLC), is treated as an ontologically distinct entity as a matter of state corporate law.[57] The analysis offered here provides its own test: does that organizational form provide liquidation protection? Although I believe that this test avoids the "open-ended rough-and-tumble of factors" that "must [be] eschew[ed]" in the context of First Amendment standards,[58] it does require careful attention to the particular governance regime controlling the entity in question.

A. HYBRID ENTITIES

Consider, for example, a limited partnership. Under the Uniform Limited Partnership Act of 2001, which many states have adopted, a partner has no general "right to dissociate as a limited partner before the termination of the limited partnership," but may withdraw so long as the limited partnership has notice of the person's express will to withdraw.[59] Thus, the limited partnership provides only a qualified form of the walk-away right held by a partner in a general partnership. Although it may depend on how, in practice, courts enforce the notice requirement, it seems that even this qualified form may be sufficient to treat the limited partnership as a "free association" under the First Amendment. This conclusion conflicts with that reached by Macey and Strine, who suggest that limited partnerships should be understood as separate entities, such as corporations.[60]

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[57] *See id.* at 518, 521.
[58] FEC v. Wis. Right To Life, Inc., 551 U.S. 449, 469 (2007) (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).
[59] UNIF. LTD. P'SHIP ACT § 601(a), (b)(1) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2001).
[60] Macey & Strine, *supra* note 5, at 517.

As the analysis of the limited partnership illustrates, utilizing liquidation protection as the determinative factor in deciding how a business organization should be treated under the First Amendment requires scrutinizing the specific state law regime that governs the entity. In fact, in the case of certain types of firms, such as LLCs, that are highly customizable, treatment may depend on an individualized analysis of the dissolution rights granted to interest holders.

B. NONPROFIT CORPORATIONS

The analysis is more straightforward for nonprofit corporations, such as the titular plaintiff in *Citizens United*. A nonprofit corporation is an incorporated entity that is funded through donations or commercial activities—such as by operating a hospital or a university. The fundamental feature distinguishing nonprofit corporations from for-profit "business" corporations is that they are barred from distributing their net earnings to any individuals who exercise control over them.[61] These firms have no "owners" in the typical sense; instead, they are operated by fiduciaries to serve the interest of the firm's beneficiaries.[62] These beneficiaries—who may or may not overlap with the set of individuals who fund or otherwise patronize the firm—have no claim on the firm's assets; they cannot, in any sense, "cash out" their beneficiary interest in the firm at will. As Henry Hansmann and Reinier Kraakman have explained, this total partitioning of the firm's assets from beneficiaries' claims is essentially an extra-strong version of liquidation protection.[63]

Under the test proposed in this Article, nonprofit corporations would thus not be considered voluntary associations entitled to the same First Amendment treatment as individuals. Importantly, however, First Amendment rights may still be implicated in the regulation of nonprofit corporations. In particular, donation-funded advocacy groups incorporated as nonprofits—such as Citizens United—are intended by those who support them to serve as a means by which they engage in political activity. The corporations are, in those cases, tools by which associations of persons exercise their First Amendment rights. As a result, and as Justice Brennan explained in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, burdensome regulations of advocacy organizations may have the "practical effect . . . [of] . . . discourag[ing] protected speech" by identifiable

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[61] Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).
[62] *See* Henry Hansmann, *Ownership of the Firm*, 4 J.L. ECON. & ORG. 267, 300–01 (1988).
[63] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE. L.J. 387, 405 (2000).

individuals—a concern not implicated by other types of corporations.[64] This may well necessitate disparate treatment under the First Amendment—but, importantly, that constitutional distinction would be justified not by the firm's status as an "association" of individuals but rather due to its instrumental value in facilitating natural persons' protected-speech activities.[65]

CONCLUSION

Given its role in determining whether a particular business organization is truly a "free association" in the sense that a member can freely dissociate, liquidation protection offers an insightful—and previously unexplored—avenue for evaluating corporate constitutional rights. As such, shareholder "lock-in" and related concepts should be a part of the conversation as public focus returns to the legacy of *Citizens United*, particularly insofar as questions exist as to whether specific reforms should extend beyond corporations to other types of business organizations.

One clear place in which this issue ought to be considered is in connection to proposals to amend the Constitution to overturn the Court's decision in *Citizens United*. As discussed above, a popular amendment proposal, the Democracy for All Amendment, distinguishes natural persons from "artificial entities."[66] This language is typical, although some proposed amendments further specify that "artificial entities" include not just corporations but also LLCs.[67] In connection to proposals such as these, this Article has sought to make two points. The first is general: The scope of post-*Citizens United* reforms should not be defined by ontological notions regarding whether a legal organization rightfully constitutes a distinct "entity," but rather by more functionalist concerns grounded in the

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[64] 479 U.S. 238, 255 (1986); *see* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 805 (1978) (White, J., dissenting) ("[T]here are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed *as merely a means of achieving effective self-expression*." (emphasis added)).

[65] Margaret Blair and Elizabeth Pollman have developed a framework distinguishing "derivative" rights (rights derived from some group of natural persons) and "instrumental" rights (rights granted to a corporation to protect the rights of parties outside the corporation) that further illuminates the different ways in which a corporation might be found to have a protected right to engage in political activities because of the implicated interests of natural persons. *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1677 (2015). Although this Article uses the terms "derivative" and "instrumental," it does not use them in the same way Blair and Pollman do. All of the rights discussed in this Article would be considered "derivative" within their framework.

[66] H.J. Res. 1, 117th Cong. (2021).

[67] *See, e.g.*, H.J. Res. 48, 116th Cong. § 1 (2019).

way that a corporation or other firm has rights or protections that differ from other means by which persons can associate. The second is more specific: Due to the absence of a right to dissociate at will, certain types of organizations cannot meaningfully be identified with a voluntary association of persons, thus providing a rationale for drawing a line distinguishing certain types of organizational forms, such as partnerships, from others, such as corporations.

But by identifying this relationship between the corporate form and the right of free association, this Article has identified only one concern that may guide those pursuing constitutional reform. There may well be other concerns motivating and shaping those reform efforts and that dictate the drawing of different lines. There are certainly additional issues that demand further study as scholars, legislators, and the public continues to grapple with the issue of corporate rights. Nevertheless, liquidation protection offers a clear and focused means of defining corporate rights to political speech and, as such, a promising route for future reform.