Northwestern University School of Law
Public Law and Legal Theory Papers

Year 2003 *Paper* 28

Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters

Robert H. Sitkoff*

*Northwestern University School of Law, rsitkoff@law.harvard.edu

Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters

Robert H. Sitkoff

Abstract

This article explores the policy bases for, and the political economy of, the law's long-standing discrimination against corporate political speech. This Article also explores the relevance of state law regulation of corporate political speech to the competition between the states for corporate charters. In the process, implications for the current political debate over soft money and the current academic debates over enacting an optional federal corporate takeover law regime and creating a securities law regulatory competition are noted. The underlying aim of this Article is to bring to bear on the relevant policy debates a shift in focus from the shareholder/manager agency relationship to the agency relationship between lawmakers and society. The Article draws on the contractarian view of the firm, the economic theory of regulation, and the study of public choice.

69 *University of Chicago Law Review* 1103 (2002)

Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters

Robert H. Sitkoff†

This Article explores the policy bases for, and the political economy of, the law's long-standing discrimination against corporate political speech. This Article also explores the relevance of state law regulation of corporate political speech to the competition between the states for corporate charters. The underlying aim of this Article is to bring to bear on the relevant policy debates a shift in focus from the shareholder/manager agency relationship to the agency relationship between lawmakers and society. The Article draws on the contractarian view of the firm, the economic theory of regulation, and the study of public choice.

INTRODUCTION

With the passage of the Tillman Act[1] in 1907, Congress made it a crime for corporations to make financial contributions to candidates for federal office. In its present form, 2 USC § 441b, the Act bars not only direct corporate "contributions" to the campaigns of federal political candidates, but also corporate "independent expenditures" on their behalf.[2] Analogous restrictions appear in the election codes of about thirty states,[3]

---

† Assistant Professor of Law, Northwestern University. The author thanks Lucian Bebchuk, William Carney, Jill Fisch, Israel Friedman, Elizabeth Garrett, Douglas Ginsburg, Jeffrey Gordon, Philip Hamburger, Marcel Kahan, Ehud Kamar, Daniel Klerman, Andrew Kopans, John Lott, Paul Mahoney, Fred McChesney, Alan Meese, Thomas Merrill, Eric Miller, Mindy Nagorsky, Richard Painter, Randy Picker, Richard Posner, Marty Redish, Larry Ribstein, Roberta Romano, David Ruder, Tamara Scheinfeld, Henry Smith, Leo Strine, Adam Winkler, Timothy Wu, Omri Yadlin, workshop participants at the law schools at the University of Michigan, the University of Illinois, and Northwestern, the participants in the Symposium on Management and Control of the Modern Business Corporation at The University of Chicago Law School, the Dirksen Building Paper Group, and the members of the Spring 2002 Legal Scholarship Seminar at The University of Chicago Law School for helpful comments and suggestions. The author also thanks Andrew Kopans for superb research assistance, the Pritzker Library Research Fellows and Pegeen Bassett for additional research support, and the Olin Foundation and the Northwestern University School of Law Summer Faculty Research Program for financial support.

1 Pub L No 59-36, 34 Stat 864, ch 420 (1907).

2 2 USC § 441b (1997). "Independent expenditures" is a campaign finance term of art that refers to the act of funding speech that, although advocating the election or defeat of a specific candidate, is nevertheless uncoordinated with any specific candidate's campaign. See *Buckley v Valeo*, 424 US 1, 19–23 (1976) (per curiam) (explaining the difference between "contributions" and "independent expenditures"). By focusing on direct contributions and independent expenditures, these restrictions relate only to "hard money." The practice of donating money to political parties, which is in contrast commonly called "soft money," remains largely unregulated. See *Mariani v United States*, 212 F3d 761, 767–69 (3d Cir 2000) (en banc); Note, *Soft Money: The Current Rules and the Case for Reform*, 111 Harv L Rev 1323, 1324–26 (1998). See also Part IV.A.

3 See Edward D. Feigenbaum and James A. Palmer, *Campaign Finance Law 2000: A Summary of State Campaign Finance Laws with Quick Reference Charts* Chart 2-A (2000), available online at

and these state statutes have a similarly venerable historical pedigree.[4] The vintage of this regulation of corporate political speech distinguishes it from most modern campaign finance regulation, which for the most part traces its roots to the Watergate era.[5] The regulation of corporate political speech is also distinguished by its severity. Since *Buckley v Valeo*,[6] the Supreme Court has struck down every limitation on independent expenditures that it has reviewed except for one: the absolute ban contained in section 441b.[7]

This Article explores the underlying policy bases for, and the political economy of, the law's ongoing discrimination against corporate political speech. This Article also explores the relevance of the state law discrimination against corporate political speech for the corporate regulatory competition debate. Putting the First Amendment policy issues to one side,[8] the un-

---

<http://www.fec.gov/pages/cfll00chart2A.htm> (visited Aug 14, 2001). See also Susan L. Ross, Note, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U Ill L Rev 445, 470–72 (1985). An examination of Feigenbaum and Palmer's Chart 2-A reveals that a substantial number of states continues to regulate corporate political speech more severely than that of individuals.

4 Earl R. Sikes, *State and Federal Corrupt Practices Legislation* 279–83 (Duke 1928) (listing states that prohibited corporate contributions near the turn of the century).

5 See Robert E. Mutch, *Campaigns, Congress, and the Courts: The Making of Federal Campaign Finance Law* xvii (Praeger 1988) (calling the Tillman Act the "first federal campaign finance law").

6 424 US 1 (1976) (per curiam).

7 Although the Court has not reviewed the constitutionality of 2 USC § 441b as applied to business corporations, it has upheld a state law modeled on section 441b, *Austin v Michigan Chamber of Commerce*, 494 US 652, 655 n 1 (1990), and there is no reason to suppose that section 441b would be treated any differently. See *Beaumont v FEC*, 278 F3d 261, 278 (4th Cir 2002) (declining to find section 441b facially unconstitutional); *Mariani v United States*, 212 F3d 761, 772–73 (3d Cir 2000) (en banc) (rejecting a constitutional challenge to section 441b). See also *Athens Lumber Co v FEC*, 718 F2d 363, 363 (11th Cir 1983) (en banc) (per curiam) (finding section 441b constitutional). But see *Montana Chamber of Commerce v Argenbright*, 226 F3d 1049, 1057–58 (9th Cir 2000) (finding that a Montana initiative prohibiting direct corporate expenditures in ballot initiative campaigns violated the First Amendment).

8 See, for example, Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash U L Q 1 (2001); Martin H. Redish, *Money Talks* 63–114 (NYU 2001); Adam Winkler, *The Corporation in Election Law*, 32 Loyola LA L Rev 1243 (1999); Martin H. Redish and Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo Wash L Rev 235 (1998); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 Iowa L Rev 995 (1998); Henry N. Butler and Larry E. Ribstein, *The Corporation and the Constitution* 59–78 (AEI 1995); Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgement of Expression?*, 2 Wm & Mary Bill Rts J 305 (1993); Larry E. Ribstein, *Corporate Political Speech*, 49 Wash & Lee L Rev 109 (1992); Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 Cap U L Rev 381 (1992); Nicole Bremner Casarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 Neb L Rev 689 (1991); Miriam Cytryn, Comment, *Defining the Specter of Corruption:* Austin v. Michigan State Chamber of Commerce, 57 Brooklyn L Rev 903 (1991); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm & Mary L Rev 587 (1991); David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const L Q 541 (1991); Michael J. Merrick, *The Saga Continues—Corporate Political Free Speech and the Constitutionality of Campaign Finance Reform:* Austin v. Michigan Chamber of Commerce, 24 Creighton L Rev 195 (1990); Ross, Note, 1985 U Ill L Rev 445 (cited in note 3); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Re-*

derlying aim of this Article is to shift the focus of the relevant policy debates from the shareholder/manager agency relationship to the society/lawmaker agency relationship,[9] analysis of the latter being informed by the study of public choice.[10] Specifically, this Article advances four claims in its four Parts. The latter three represent the Article's more original contributions to the existing literature.

In Part I, drawing on the contractarian approach to the study of corporate governance,[11] this Article contends that the conventional justifications for discriminating against corporate political speech are generally unpersuasive. To the extent that they depend on a significant divergence of interests between shareholders and managers (and most do), the conventional justifications are vulnerable on that ground. There is nothing special about the agency problem associated with managerial control over corporate political speech that distinguishes it from any other area of managerial discretion. Hence, there is no obvious reason to abandon the usual tools of corporate governance in favor of a mandatory rule and criminalization.

The only argument growing out of the conventional approaches to this issue that does not depend on significant shareholder/manager agency costs is the fear of managerial lobbying for redistributive legislation—that is, corporate rent seeking. This concern has purchase because redistributive corporate rent seeking is socially undesirable and yet rational investors might favor it. Drawing on the relevant collective action dynamics and the economic theory of regulation,[12] this Article contends that the only plausible part of the conventional justification for discriminating against corporate

---

dish's The Value of Free Speech, 130 U Pa L Rev 646 (1982); Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 Yale L J 235 (1981); John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz L Rev 373 (1980); Loren A. Smith, *Business, Buck$ & Bull: The Corporation, the First Amendment & the Corrupt Practices Law*, 4 Del J Corp L 39 (1978); David A. Grossberg, Comment, *The Constitutionality of the Federal Ban on Corporate and Union Campaign Contributions and Expenditures*, 42 U Chi L Rev 148 (1974); Jeremiah D. Lambert, *Corporate Political Spending and Campaign Finance*, 40 NYU L Rev 1033 (1965); Edwin M. Epstein, *Corporations, Contributions, and Political Campaigns: Federal Regulation in Perspective* (Berkeley 1958).

9 Agency is used here as an economic rather than a legal term of art. See, for example, Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J Fin Econ 305, 308 (1976) (setting forth an economic definition of agency and defining "agency costs" as the sum of the various losses that stem from the misalignment of interests between principal and agent).

10 See generally Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12–37 (Chicago 1991) (examining the public choice literature on interest groups and lawmakers).

11 The classic exposition is Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard 1991).

12 See James Buchanan and Gordon Tullock, *The Calculus of Consent* (Michigan 1962); Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard 1965); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J L & Econ 211 (1976); Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q J Econ 371 (1983).

political speech is that doing so might represent an appropriate response to the competitive advantages provided by the corporate form in the market for legislation. It is an argument, in other words, that corporations might be particularly pernicious rent seekers. This possibly might justify discriminating against corporate political speech. Crucially, the basis of this concern is not the agency between managers and shareholders, but rather a public choice view of the agency between lawmakers and society.

Part II offers a political economy story for the Tillman Act's enactment that is consistent with the notion, advanced in Part I, that the corporate form might provide competitive advantages in the market for legislation. Part II contends that the statutes were probably *supported* by corporations, and this for two reasons. First, again drawing on the relevant collective action dynamics and the economic theory of regulation, Part II suggests that the statutes represent a solution to the collective action problem faced by individual corporations if the redistributive lobbying by corporations as a class for the most part victimized other corporations. For if corporate political activity represents both offensive and defensive lobbying anent redistributive legislation, then corporations as a class might do better with a flat ban on corporate campaign contributions. On this view, the statutes solve the collective action problem by enforcing concerted action.

Second, drawing on a fresh look at the historical record in view of the modern learning on the economic theory of regulation,[13] Part II contends that the statutes might lessen the ability of elected officials to extort corporations (and thus by extension shareholders), because they proscribe the most direct forms of support. That is, the statutes might weaken the ability of elected officials to extract campaign donations from corporations by threatening and then forbearing from legislative action that would be harmful to the interests of those corporations. Thus, even if these laws facilitate rather than frustrateattempts by large corporations to seek rents through redistributive legislation (by reducing corporate exposure to extortive ultimatums), the statutes may still be defended on the alternative ground that by preventing extortion they preserve the socially desirable incentive for innovation. The statutes ensure that the increased profits which stem from that innovation flow to shareholders rather than elected officials.

Part III assimilates the modern learning on the economic theory of regulation into the corporate regulatory competition debate and in the process further develops the existing literature's application of the traditional model. The aim of Part III is to offer a more nuanced approach to evaluat-

---

13 See Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* 12–13 (Harvard 1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J Legal Stud 101 (1987). See also Fred S. McChesney, *"Pay to Play" Politics Examined, with Lessons for Campaign-Finance Reform*, 6 Indep Rev 345 (2002). Compare David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum L Rev 1369, 1380–82 (1994); David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U Chi Legal F 141, 152–55.

ing the comparative advantage in the competition for corporate charters provided by Delaware's unique political economy. Specifically, Part III contends that the political economy of the Tillman Act and its state law analogues suggested in Part II is consistent with the fact that Delaware, the dominant state of incorporation for most large, publicly traded corporations, is among the minority of states that does not discriminate against corporate political speech. Part III also contends that, in view of the modern learning on the economic theory of regulation, Delaware's lack of any corporation-specific campaign finance regulation, coupled with certain unique institutional features of the Delaware corporate lawmaking process, gives additional traction to the "credible commitment" explanation for Delaware's ongoing dominance in the competition for corporate charters.[14]

Finally, Part IV discusses the implications of the foregoing analysis for three current policy debates. First, Part IV briefly discusses the current political debate over whether to ban corporate (and other) soft-money donations. Second, Part IV briefly discusses the burgeoning academic debate about issuer choice of law in securities regulation. Finally, Part IV ends with a comprehensive analysis of the pertinence of this Article to the current academic debate over the enactment of an optional federal corporate takeover law regime. This more comprehensive analysis may be viewed as a case study, as it were, in the application of this Article's analysis to other problems.

I. WHY DISCRIMINATE AGAINST CORPORATE POLITICAL SPEECH?

The usual policy justifications for section 441b and its state analogues, as adduced by legislators,[15] courts,[16] and commentators,[17] can be separated

---

[14] The "credible commitment" explanation is most closely associated with Roberta Romano. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J L, Econ, & Org 225 (1985); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 Cardozo L Rev 709, 721–24 (1987); Roberta Romano, *The Genius of American Corporate Law* 37–38 (AEI 1993) ("Delaware's preeminence in the corporate charter market results from its ability to resolve credibly the commitment problem in relational contracting.").

[15] Note the reference to "legislators," not "legislatures." The difference is important, because I do not wish to suggest that legislation is necessarily the product of a unified and public-regarding legislative effort. See generally William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 876 (1975) ("[P]ublic policy emerges from the struggle of interest groups."); Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 547 (1983) (claiming that legislatures do not have intents or designs); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223, 227–33 (1986) (describing how legislation is a product of interest group deals).

[16] The critical modern decisions are *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990); *FEC v Massachusetts Citizens for Life, Inc*, 479 US 238, 245–46, 255 (1986); *FEC v National Right to Work Committee*, 459 US 197, 201 (1982); *First National Bank of Boston v Bellotti*, 435 US 765, 776 (1977).

[17] See note 8. Perhaps the most influential commentator has been Professor Victor Brudney. See Brudney, 91 Yale L J 235 (cited in note 8) (discussing the regulation of corporate political speech). An *Austin* concurrence cited him authoritatively, see *Austin*, 494 US at 675 (Brennan concurring), citing

into two categories: first, that corporate donations produce bad politics, and second, that corporate donations harm shareholders. Hence the first is usually perceived as a political problem whereas the second is usually perceived as a problem of corporate governance. As we shall see, however, in a world without shareholder/manager agency costs much (though not all) of the distinction between the two strands collapses.[18] Still, there is pedagogical utility to the distinction, and it will be followed here.

A. Bad Politics

There are two variations on the argument that corporate political speech produces bad politics. The first depends on irrational investors and/or a gross misalignment of interests between shareholders and managers, whereas the second depends on a misalignment of interests between society and lawmakers. This Part contends that the second variant has far more cogency than the first. Indeed, except for a fear of the competitive advantages in rent seeking afforded by the corporate form (for in rent seeking the interests of shareholders and society diverge and one need not suppose irrational investors), the bad politics argument amounts to nothing more than a complaint that people with more money can buy more speech. But that is no reason to limit all corporate political speech. It is rather an argument either for limiting the political speech of all the wealthy, including people and other business associations in addition to corporations, or for subsidizing the political speech of the poor. This leaves only the fear of corporate rent seeking—and the society/lawmaker agency problem that animates it—as a plausible justification for discriminating against corporate political speech with a mandatory prohibition.

1. "Immense wealth" and "special advantages."

The first bad politics justification for discriminating against corporate political speech, to borrow the articulation of the Supreme Court in *Austin v Michigan Chamber of Commerce*,[19] is that the state endows corporations with "special advantages," such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," that when taken together permit corporations to amass "immense aggregations of wealth . . . that have little or no correlation to the public's support for the corporation's political ideas."[20] So restrictions on corporate speech, the the-

---

Brudney, 91 Yale L J at 247, and nearly all of the commentary addresses his views.

18 See generally Jensen and Meckling, 3 J Fin Econ at 309–10 (cited in note 9) (defining agency costs with respect to corporate law); Adolf A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (MacMillan 1932) (exploring the "separation of ownership and control" in large business corporations).

19 494 US 652 (1990).

20 Id at 658–59.

ory goes, offset the "unique state-conferred corporate structure that facilitates the amassing of large treasuries."[21] The implicit premise of this rationale is the idea that, without government regulation, corporations would in fact deploy their "large treasuries" in the political marketplace in such force as to become a "corrosive and distorting" influence on elections.[22]

But managers who divert corporate resources from profit-making activities towards funding political campaigns on such a grand level as to warrant the characterization "corrosive and distorting" will find their firm's "large treasuries" shrinking as the firm becomes less competitive in its product and the capital markets.[23] And perpetual life cuts in precisely the opposite direction than the Court supposed—it solves the "last period" problem. As a class, managers must always look forward to tomorrow's product and capital market competition.[24]

True, limited liability does help managers obtain capital. But it does so only by capping investors' personal liability to creditors of the corporation at the amount of the investors' investment. Limited liability does not shield the corporation itself from liability for its debts.[25] So to suppose that limited liability will help an incorporated firm amass a huge treasury for use in electoral campaigns is to suppose investor irrationality. Who would invest in a company that, rather than promising handsome returns, merely hands over the corporate treasury to political candidates? The answer is only those investors who prefer the corporation's political speech over larger dividends or stock price appreciation—unless, as discussed below, the political activity represents narrowly targeted rent seeking that increases the firm's profits, or unless the market is uninformed about campaign donations and so cannot police managers. Putting the former qualification to one side for the moment, the latter does not damage the thesis. That scenario, if it were accurate, at best argues for disclosure rather than dollar limitations as a legislative solution.[26] For in a thick capital market in which that information was known, the fact of the corporation's political donations would be im-

---

21 Id at 660. See also *FEC v Massachusetts Citizens for Life, Inc*, 479 US 238, 257–59 (1986); *FEC v National Right to Work Committee*, 459 US 197, 207–08 (1982); *Beaumont v FEC*, 278 F3d 261, 271–72 (4th Cir 2002).

22 *Austin*, 494 US at 660. See notes 67–68 and accompanying text.

23 Butler and Ribstein, *The Corporation and the Constitution* at 72–73 (cited in note 8).

24 Individual managers close to retirement, however, may not. But that is an agency problem. See Part II.B.

25 On limited liability, see Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability*, 52 U Chi L Rev 89, 89–90 (1985); Easterbrook and Fischel, *Economic Structure* at 40–41 (cited in note 11); Chester Rohrlich, *Organizing Corporate and Other Business Enterprises* § 5.02 at 175–76 (Matthew Bender 1999).

26 See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Responsibility*, 112 Harv L Rev 1197, 1199 (1999). Professor Williams suggests that corporate disclosure could be used to enforce corporate social responsibility. See id at 1310–11. Among other things, therefore, she suggests an explicit disclosure of corporate expenditures on political activity. See id.

pounded into the market price of its stock.[27] In other words, disclosure is all that is required to ensure that the size of the corporation's treasury available for political activity lines up with its investors' support for that activity.[28]

The point is not that the corporation's financial strength will match the numerical strength of its views within the general population, in an egalitarian-distribution-of-resources sense. But the same is true for any person, or unincorporated association of persons, of means. Egalitarianism is not a good reason for curtailing corporate political speech but not the political speech of wealthy individuals or other unincorporated business entities. Indeed, discriminating against corporate political speech might be anti-egalitarian, because it would take away from individuals the ability to organize in a form that would allow them to engage efficiently in collective action.[29]

At any rate, egalitarianism is not the policy that the Supreme Court invoked when it referred to "corrosive" corporate wealth. The Court's justification for singling out corporations was that managers could amass huge treasuries as a result of corporate economic activities and state-conferred advantages, treasuries that had little to do with the political support for the positions that managers might cause the corporation to take, and so managers could distort the nation's political discourse.[30] But, to repeat, assuming

---

27 See Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 Colum L Rev 1335, 1361 (1996) (concluding that the integrity of U.S. capital markets ensures that stock prices reflect managerial performance).

28 Disclosure and the ensuing disciplining force of the market dominate governance mechanisms such as the submission of specific expenditures to a shareholder vote. Compare Ian Ramsay, Geof Stapledon, and Joel Vernan, *Political Donations by Australian Companies* 4–5, 31–32, working paper (2001), available online at <http://papers.ssrn.com/id=286112> (visited Feb 15, 2002) (suggesting that corporations should disclose prior to contribution so investors may make informed decisions as to voting and investing); Victor Brudney and Allen Ferrell, *Corporate Charitable Giving*, 69 U Chi L Rev 1191, 1210, 1212 n 52 (2002). This is because at this level of specificity shareholder views are not single-peaked and thus invite the well-known voting pathologies of agenda manipulation and cycling. See Frank H. Easterbrook and Daniel R. Fischel, *Voting in Corporate Law*, 26 J L & Econ 395, 405–06 (1983); Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 Colum L Rev 1599, 1611–12 (1989).

29 See Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 Stan L Rev 923, 992–93 (1984) ("[P]luralism's organizational dimension [ ] sees a need for individuals to organize into groups" as a means of engaging in collective action, including individuals who have "ordered their affairs in business firms."). See also Butler and Ribstein, *The Corporation and the Constitution* at 66 n 49 (cited in note 8) ("Shareholders could, of course, form their own interest groups to oppose those of managers. But the shareholders' groups, unlike 'corporate' PACs, would have to bear their own organization costs. These costs, together with the free-rider problem inherent in collective action, would inhibit such efforts.").

30 See *Austin*, 494 US at 659 (internal quotation marks omitted), quoting *Massachusetts Citizens for Life*, 479 US at 258:

> Resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

disclosure, the only way managers of a large, publicly traded corporation could amass a huge treasury for political activities is if investors favored those activities. Publicly traded corporations—unlike individuals such as Ross Perot (who spent $63.5 million of his own money in his unsuccessful 1992 presidential campaign), Steve Forbes (who spent $38.7 million of his own money in his unsuccessful 2000 presidential campaign), Jon Corzine (who spent $63 million of his own money for one of New Jersey's two seats in the U.S. Senate), and Michael Bloomberg (who spent $68.9 million of his own money in 2001 to become Mayor of New York),[31] and unlike other unincorporated entities—are subject to the disciplining force of capital markets.

This is true even if the corporation holds a monopoly in its product market, perhaps because it holds all of the relevant patents. Corporations, after all, are artificial persons that are no more than a nexus or web of express, implied, and metaphorical contracts.[32] Shareholders are the marginal or residual claimants in this arrangement, so every additional dollar spent on political activities is a dollar less for the shareholders. If they tolerate such an arrangement, it must be because they are willing to tolerate the political activities of the corporation.

Against this it might be argued that market checks are effective only against large corporations, which means that smaller firms would still be free to distort the political marketplace. But private contractual solutions and shareholder monitoring are easier in smaller corporations.[33] What is more, smaller firms by definition do not have the resources to "distort." The more "immense" a corporation's "aggregation of wealth," and so the greater the potential for "corrosion," the stronger the market-based checks on its managers' behavior.

2. Corporate rent seeking.

The second variation on the bad politics rationale for section 441b is that it represents an appropriate response to corporate rent seeking via lobbying for redistributive legislation. There is much to be said for this second variation on the bad politics worry, because it does not require an assumption that investors are irrational.[34] Rational investors might happily tolerate

---

31 See Michael Cooper, *At $92.60 a Vote, Bloomberg Shatters an Election Record*, NY Times A1, A20 (Dec 4, 2001); Tom Hamburger, *Who Wants a Multimillionaire?: Democrats, to Help Win Senate*, Wall St J A28 (Oct 19, 2000).

32 See, for example, Frank H. Easterbrook and Daniel R. Fischel, *The Corporate Contract*, 89 Colum L Rev 1416, 1425–26 (1989); Jensen and Meckling, 3 J Fin Econ at 310–11 (cited in note 9); Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 Am Econ Rev 777, 787–789 (1972).

33 Compare Frank H. Easterbrook and Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 Stan L Rev 271, 280–83 (1986); Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 Wash U L Q 365, 378–83 (1992).

34 As a class, however, shareholders might prefer no lobbying at all. See text accompanying notes

managers' making campaign contributions and expenditures when the marginal return on those payments—the rents, that is, which come from the private interest governmental action that the spending purchases—exceeds the marginal return on directing that money to any other use.[35] Thus, rather than reckless corporate political spending, efficient markets should prompt what is, from the corporation's perspective, efficient rent seeking. Of course, from the perspective of society this is undesirable, because obtaining rents through redistributive regulation merely reallocates rather than increases social wealth. Worse, it comes at the cost of deadweight lobbying expenses and possibly the forgoing of other social-wealth-maximizing opportunities.[36] So this rationale for limiting corporate campaign expenditures has some purchase. Importantly, however, this rationale does not require a misalignment of interests between shareholders and managers. Instead, its basis is a public choice view of the agency relationship between society and lawmakers.

There is, moreover, a plausible argument that the corporate form furnishes a competitive advantage in the market for legislation. If correct, this would justify singling out corporations for special treatment. The argument runs as follows: The chief impediments to effective lobbying are the collective action and free rider problems that stem from the fact that regulation is something of a public good.[37] But the corporate form provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation.[38] And for an already existing corporation, the fixed costs of organizing into the corporate form are sunk.[39] Thus, if the corporate form does in fact provide a comparative advantage in the market for legislation, we should expect the deadweight losses associated with corporate rent seeking to be particularly large, which in turn justifies targeting corporation-specific rent seeking in particular. Put into the parlance of doctrinal analysis, this amounts to an argument that the state's interest in preventing corporations from seeking

55 and 86.

35 Compare Ribstein, 49 Wash & Lee L Rev at 148 (cited in note 8) (stating that for-profit firms will invest in nonpolitical activity if the "return from doing so exceeds that from investing in political activities").

36 See, for example, McChesney, *Money for Nothing* at 9–17 (cited in note 13) (outlining the traditional economic theory of regulation and discussing the social costs of rent seeking under it).

37 For a general discussion, see Buchanan and Tullock, *The Calculus of Consent* (cited in note 12); Olson, *The Logic of Collective Action* (cited in note 12).

38 See Meese, 2 Wm & Mary Bill Rts J at 318–20 (cited in note 8) (discussing factors that will hamper collective action). See also Romano, 36 Stan L Rev at 992–93 (cited in note 29).

39 Robert E. McCormick and Robert D. Tollison, *Politicians, Legislation, and the Economy: An Inquiry into the Interest-Group Theory of Government* 17 (Martinus Nijhoff 1981) (noting the comparative advantage of groups that have already organized); William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 52 (West 3d ed 2001) (same).

rents via lobbying for redistributive legislation is significantly stronger than its interest in preventing the seeking of similar rents by others, because the seeking of such rents through the corporate form is far more destructive. We shall return to this point later.[40]

B. Harming Shareholders

The second style of argument in favor of discriminating against corporate political speech is that doing so is necessary to protect shareholders from managerial opportunism—that is, these rules help police the agency problem between managers and shareholders. This Part contends that there is nothing special about the agency problem inherent in managers' control over corporate political speech that distinguishes it from any other area of managerial discretion so as to warrant a specialized mandatory rule and criminalization.

1. Election codes and the "internal affairs doctrine."

An initial and immediate objection to all the variations on the shareholder/manager agency costs rationale for discriminating against corporate political speech is that all state law corporation-specific campaign finance limitations are found in the election laws of the states, not in their corporate codes.[41] This creates an odd asymmetry whereby the shareholders of all corporations, wherever they might be incorporated, are "protected" against managers making corporate donations within a state that has enacted one of these statutes, but shareholders of firms incorporated in such a state are not necessarily protected against managers' political spending outside that state. Had these rules been included in the states' corporate codes, however, then by operation of the choice of law rule known as the "internal affairs doctrine"[42] the statutes would bar political spending by managers everywhere, not just within jurisdictions that had included such a ban in their election codes. The failure to include these provisions in state corporate codes therefore strongly suggests that they were not motivated by a worry about the efficacy of more traditional means of corporate governance to police this dimension of the agency between shareholders and managers.[43] The presence

---

40 See Part II.A.

41 It is also worth noting that the relevant portion of the Model Business Corporation Act expressly permits spending for political purposes. See MBCA § 3.02(15) official comment (1994) ("This clause, which is in addition to and independent of the power to make charitable and similar donations under section 3.02(13), permits contributions for purposes that may not be charitable, such as for political purposes or to influence elections.").

42 See, for example, *Hollis v Hill*, 232 F3d 460, 464–65 (5th Cir 2000) ("[T]he internal affairs of the foreign corporation . . . are governed by the laws of the jurisdiction of incorporation."); *Nagy v Riblet Products Corp*, 79 F3d 572, 576 (7th Cir 1996) (Easterbrook) (same).

43 Ribstein, 49 Wash & Lee L Rev at 143 (cited in note 8) ("The fact that the government has acted through election statutes rather than through corporation statutes indicates that the statutes are intended as direct speech restrictions rather than as shareholder protection that only indirectly impacts

of these provisions in state election rather than state corporate codes is, however, explainable by the political economy analysis offered later in this Article.[44]

2. Misappropriation.

The first commonly advanced shareholder protection rationale for section 441b is that it is essential to protect all shareholders from the theft—effectively the looting—of their assets. President Theodore Roosevelt, for example, urged in a 1905 message to Congress that "directors should not be permitted to use stockholders' money" for political purposes, and Members of Congress used words like "embezzle" to characterize such activity.[45] An initial response is simply to rehash many of the arguments previously urged, that the various markets within which managers operate—capital, product, and corporate control—will sufficiently align managers' interests with that of shareholders to ensure that managers will not spend money on speech contrary to the wishes of shareholders.[46]

Still, one could argue with some force that the various markets within which managers operate provide enough slack for them to get away with some political spending, a gap not closed by governance mechanisms because of their costs. In other words, we live in a world with agency costs. This argument, however, applies with equal force to any seemingly non-profit-maximizing activity undertaken by managers within this space. So it fails to explain why this particular form of managerial discretion—that is, why this particular dimension of the shareholder/manager agency problem—requires not only special legislation but also a mandatory rule and criminalization. The critical question, in other words, is whether there is any reason to suppose that the usual corporate governance checks on the shareholder/manager agency problem will be unusually ineffective in this context. There are four related points to be made here.

---

speech."); Meese, 2 Wm & Mary Bill Rts J at 315 n 83 (cited in note 8); Lowenstein, 21 Cap U L Rev at 408 (cited in note 8); Butler and Ribstein, *The Corporation and the Constitution* at 67 (cited in note 8).

44 See Part II.B.

45 *President's Annual Message*, 59th Cong, 1st Sess, in 40 Cong Rec S 96 (Dec 5, 1905); Bolton, 22 Ariz L Rev at 376–79 (cited in note 8) (recounting the congressional debate about and President Theodore Roosevelt's concern over protecting shareholders from managers' spending corporate funds for political purposes). For example, Congressman Williams said:

> [N]o board of directors of a corporation and no manager . . . has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund.

Hearings on Contributions to Political Committees in Presidential and Other Campaigns before the House Committee on the Election of the President, Vice-President, and Representatives in Congress, 59th Cong, 1st Sess 76 (1906).

46 See Meese, 2 Wm & Mary Bill Rts J at 309 (cited in note 8); Ribstein, 49 Wash & Lee L Rev at 138–40 (cited in note 8). See also Butler and Ribstein, *The Corporation and the Constitution* at 59–78 (cited in note 8).

First, the market must be aware of this slack, so stock prices should be discounted accordingly. Related, in the absence of a mandatory proscription, investors could have sought a private contractual solution such as a "no politics" charter provision. This is not a fanciful notion. A number of large corporations—including General Motors, Ford Motors, Monsanto, Time Warner, Dell, Cisco, and IBM—have announced a policy against giving soft-money donations, and this group is growing.[47] Given that soft-money donations were unregulated at the time of these announcements, this suggests that private contractual solutions are indeed viable.

Second, a mandatory proscription is serious business. No matter how sophisticated the shareholders and how much they might want to permit political spending by managers, the rule of section 441b and its state analogues is mandatory. A less drastic alternative would have been to ban corporate political donations in the absence of a specific charter provision authorizing them.[48] Something of a penalty default,[49] such a rule would have ensured clear notice of the potential for political spending without disabling such spending in all cases. Similarly, charter provisions could have been used to ensure the specific disclosure of political spending, thereby facilitating the impounding of that information into the stock price.[50]

Third, there are good reasons why rational shareholders might want to allow managers the freedom to make political donations. Hence a mandatory proscription possibly diminishes the aggregate welfare of shareholders as a class.[51] For example, in view of the possibility that the corporation will be the victim, as it were, of redistributive legislation sought by others, from

47 See Don Van Natta, Jr., *As Political Gifts Set a Record Pace, Some Quit Giving*, NY Times A1 (May 2, 2000) (citing General Motors, Monsanto, and Time Warner as having policies against giving soft-money donations); Paula Dwyer and Nicole St. Pierre, *Who's Giving All That Soft Money*, Bus Wk 171 (Nov 13, 2000) (citing IBM, Cisco, and Dell as having policies against giving soft-money donations); Deroy Murdock, *Reform-Minded CEOs Pledge to Shake Free of Political Shakedowns*, Wash Times 46 (Mar 20, 2000) (citing Allied Signal and Ameritech as having stopped giving soft-money donations). See also notes 207–11 and accompanying text; Edmund Sanders, *Many Businesses Root for Reform to Limit Political Contributions*, LA Times C1 (Apr 18, 2001).

48 A suggestion offered in Fisch, 32 Wm & Mary L Rev at 641–42 (cited in note 8) ("[Another] way to handle corporate political speech is through the charter as a corporate contract."). See also Butler and Ribstein, *The Corporation and the Constitution* at 64–65 (cited in note 8) (arguing that "parties to the corporation can invest in corporate governance devices that minimize divergence of interest" and that "contracts restricting managers' speech do not raise significant First Amendment concerns").

49 See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 91 (1989) (defining a "penalty default" as a rule "purposefully set at what the parties would not want" so as to "give at least one party . . . an incentive to contract around the [penalty] default rule").

50 See notes 26–28 and accompanying text.

51 Compare Ribstein, 49 Wash & Lee L Rev at 142–43 (cited in note 8):

> A campaign finance limit in a state corporation statute might be defended on contractual grounds as to shareholders who invest in corporations bound by the provision. . . . [But] the mandatory nature of the law would be unjustified if the laws imposed costs in excess of benefits in many of the situations in which they applied.

the shareholders' perspective it may be more efficient (owing to collective action and free rider problems) to have the corporation's managers engage in political activities than to do so themselves. Managers are more likely than shareholders to be aware of what legislation will benefit or harm the corporation. Thus, for all the same reasons that shareholders delegate decisionmaking authority regarding ordinary business judgments to managers, they might also want to delegate authority to make political interventions. "Casual empiricism" lends support to the view that corporate political interventions are indeed "vehicles for profit maximization."[52] An irony here is that the current mandatory proscription channels corporate political speech into other less direct forms—such as corporate PACs—that are not subject to the usual corporate governance checks that would have applied to the (now prohibited) direct use of corporate funds.[53]

Another possibility is that investors might believe that the corporate form facilitates the seeking of legislative rents. To them, spending on politics is sometimes a more profitable alternative to spending on, say, research and development. They want the corporation to invest in whichever has the higher marginal rate of return. On this view, as with corporate charitable giving—which no one seems eager to proscribe despite the existence of the very same agency problem—there may well be a corporate profit-maximizing and therefore pro-shareholder rationale for corporate political speech.[54] To be fair, however, it should be noted that well-diversified shareholders might not appreciate this approach to profit maximization. Well-diversified investors are equally as likely to be on the losing side as the winning side of a redistributive battle between incorporated firms, so on average they would be worse off because the transfer costs represent a deadweight loss.[55] Thus, from the shareholder perspective, the issue becomes an empirical question of whether the aggregate wealth transfers from unincorporated firms and society at large obtained by the rent seeking efforts of management exceed the deadweight loss of the transaction costs of wealth

52 See Romano, 36 Stan L Rev at 995 (cited in note 29) ("Casual empiricism supports the contention that corporate PACs and political expenditures are in fact vehicles for profit maximization."). Compare Anup Agrawal and Charles R. Knoeber, *Do Some Outside Directors Play a Political Role?*, 44 J L & Econ 179, 180, 197 (2001) (suggesting that empirical data support the conclusion that where politics plays an important role in profit maximization, some outside directors play a political role).

53 See Butler and Ribstein, *The Corporation and the Constitution* at 66 (cited in note 8).

54 For a general discussion on corporate charitable giving, see Brudney and Ferrell, 69 U Chi L Rev 1191 (cited in note 28); Richard W. Painter, *Commentary on Brudney and Ferrell*, 69 U Chi L Rev 1219 (2002); Henry N. Butler and Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 Cornell L Rev 1195 (1999); Henry G. Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 Va L Rev 708 (1973); David S. Ruder, *Public Obligations of Private Corporations*, 114 U Pa L Rev 209 (1965).

55 Butler and Ribstein, *The Corporation and the Constitution* at 64 (cited in note 8) ("Managers may want to advocate wealth transfers to their own firms from others, while shareholders would regard such transfers as shifting wealth within their portfolios while imposing dead-weight transfer costs.").

transfers between incorporated firms. At any rate, unincorporated entities seek legislative rents too, so well-diversified shareholders might rationally opt to delegate responsibility for opposing the rent seeking of others to management.

Fourth, there is some irony in the contrast between the law's treatment of charitable and political donations. Although the common law imposed some limits on managerial freedom to make charitable donations, requiring that they be reasonable and have some connection to a corporate benefit,[56] a number of states have by statute freed managers from even that requirement.[57] These states have therefore aggravated the very same agency problem, albeit in a different context, that has been suggested to be a justification for section 441b and its state law analogues. Of course, unlike most (but surely not all[58]) charitable spending, corporate efforts to obtain redistributive legislation or regulation, although possibly profit-maximizing, are nevertheless social welfare-reducing. Thus, if as suggested above the corporate form affords competitive advantages in the market for legislation, then that might be a reason to limit corporate political activity. But the basis for that ban would be to protect society from the purchase of special-interest regulation by corporations and their shareholders, not to protect shareholders. The basis for that ban, in other words, would be the society/lawmaker agency problem, not a divergence of interests between shareholders and managers.

---

56 *A.P. Smith Manufacturing Co v Barlow*, 13 NJ 145, 98 A2d 581, 590 (1953); James D. Cox, Thomas Lee Hazen, and F. Hodge O'Neal, 1 *Corporations* § 4.4 at 4.8–4.12 (Aspen 2002).

57 See, for example, Cal Corp Code § 207(e) (West 1990) (allowing managers to "[m]ake donations, regardless of specific corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes"); NY Bus Corp Law § 202(a)(12) (McKinney 1986) (permitting New York corporations to "make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof"). See generally R. Franklin Balotti and James J. Franks, *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 Bus Law 965, 970–78 (1999) (discussing state statutes).

58 For interesting examples of recent charitable giving with a rent-seeking (and possibly extortionate) overtone, see Frank Bruni, *Donors Flock to University Center Linked to Senate Majority Leader*, NY Times A1 (May 18, 1999) ("An academic center under construction at the University of Mississippi and named for Senator Trent Lott, the majority leader, is being endowed with million-dollar donations from companies with huge stakes in pending Congressional legislation."). See also Jason Zengerle, *Wingate Dispatch: At Home Abroad*, New Republic 18 (June 4, 2001):

> Helms himself has no official involvement with the [Jesse Helms Center, loosely affiliated with Wingate University], but his wife and daughter serve on its board, and the center's president used to raise money for Helms's political campaigns. So it's no surprise that people seeking to show their appreciation of—or to curry favor with—Helms have been extremely generous to the center that bears his name. Various tobacco companies have contributed more than $1 million; the textile magnate and ardent protectionist Roger Milliken has given $250,000; Jack Valenti has chipped in over $10,000.

3. The minority shareholder.

The second commonly offered shareholder protection rationale is the need to protect dissident shareholders—those who disagree with the views "expressed by management on behalf of the corporation."[59] This rationale differs from the more traditional form of the agency problem identified above in that it supposes authorization of the corporate speech by a majority of the shareholders. The focus here is on protecting the rights of the minority, who some think are compelled to fund speech with which they disagree in violation of their First Amendment right not to speak.[60] That right's application here assumes that shareholders are locked into their investment, and further that in the absence of regulation all corporations will engage in political speech.[61] But these assumptions depend on a paucity of investment opportunities and/or opaque securities markets. These assumptions are dubious, and not only because this risk is known and therefore assumed, which means that the stock should be priced accordingly.

Take the assumption that in the absence of a statutory prohibition no firm would swear off political activity. If there are resources held by prospective investors who are skittish about funding political speech (perhaps because they are a church or a university) but otherwise would be happy to invest in stock, then some firms would simply insert "no politics" clauses into their corporate charters, or mutual fund companies would create a "no politics" fund, to tap into this source of capital.[62] Consider the proliferation of "social responsibility" funds. These funds assure investors that their money will not be invested in corporations engaged in certain specific forms of behavior, such as the sale of alcohol or tobacco, military contracting, abortion-related services, and so on.[63] There is a fund for everyone: just as the Meyers Pride Value Fund avoids companies that lack stated policies against discrimination on the basis of sexual orientation, the Timothy Plan funds avoid companies that provide domestic partner benefits.[64] What is more, as noted earlier, a number of high-profile publicly traded corpora-

59 *First National Bank of Boston v Bellotti*, 435 US 765, 787 (1977).

60 See *Abood v Detroit Board of Education*, 431 US 209, 234–35 (1977); *West Virginia State Board of Education v Barnette*, 319 US 624, 634–35 (1943). Compare *Board of Regents of the University of Wisconsin System v Southworth*, 529 US 217, 229–31 (2000).

61 For the first assumption, see *Austin v Michigan Chamber of Commerce*, 494 US 663 (1990); *FEC v Massachusetts Citizens for Life, Inc*, 479 US 238, 260 (1986). For the second, see Brudney, 91 Yale L J at 235–37 (cited in note 8). See also notes 75–79 and accompanying text.

62 A point made in Grossberg, Comment, 42 U Chi L Rev at 157 (cited in note 8).

63 See Danny Hakim, *On Wall St., More Investors Push Social Goals*, NY Times A1 (Feb 11, 2001); Susan Sherriek, *A Conscience Doesn't Have to Make You Poor*, Bus Wk 204 (May 1, 2000). The relevance of the development of these funds has been misunderstood. For example, Joo, 79 Wash U L Q at 61 & n 364 (cited in note 8), cites these funds as evidence that some investors have nonpecuniary goals, yet ignores the probability that this would motivate some managers to eschew political speech in order to tap into that source of capital. See id at 70–75.

64 Hakim, *More Investors*, NY Times at A1 (cited in note 63).

tions have pledged to forbear from soft-money donations.[65] Since corporate soft-money donations were legal at the time of these pledges, the behavior of these corporations belies the assumption that without legal constraints all corporations would make political donations.

Alternatively, take the distinction between incorporated nonprofit political associations and for-profit business corporations that the *Austin* Court seized upon to justify exempting the former from section 441b.[66] According to the Court, shareholders or members of incorporated nonprofit political associations can easily dissociate themselves from the organization should they disagree with its political activity. In contrast, because shareholders of business corporations are "dependent" on the enterprise for income, there is an "economic disincentive" to dissociating.[67] But this analysis is backwards, for it is the nonprofit political corporation's minority members who have a powerful disincentive to dissociate. A profit-seeking investor's "economic disincentive" to dissociating is nonsense. The minority shareholder who invests in stock for income, which is the precondition to having an economic disincentive to dissociating, is by hypothesis indifferent between companies with comparable rates of return. He therefore has no reason not to sell his stock in the politically active company and then invest the proceeds in another company that is not politically active.[68] In contrast, the minority shareholder or member of the incorporated nonprofit political association often faces an incentive not to dissociate because of the shortage of alternatives. There is a thick market for corporate securities; the menu of prospective political associations is less robust.[69]

4. One-share/one-vote.

A third variation on the shareholder protection argument grows out of the observation that "[v]oting in large publicly held corporations is by the share, not by the person."[70] Thus, to borrow the words of Professor Victor Brudney, "the political power of individuals with large blocks of stock is magnified to the extent they can control, for political purposes, the use of the assets of minority shareholders that are held in corporate solution."[71] As a potential justification for section 441b, this is perhaps best thought of as a

---

65 See note 47 and accompanying text.

66 494 US at 662–65 (distinguishing the Michigan Chamber of Commerce from an incorporated nonprofit political association). See also *Beaumont v FEC*, 278 F3d 261, 273–74 (4th Cir 2002); *FEC v National Rifle Association of America*, 254 F3d 173, 188–92 (DC Cir 2001) (comparing the National Rifle Association to an incorporated nonprofit political association).

67 *Massachusetts Citizens for Life*, 479 US at 264.

68 See Ribstein, 49 Wash & Lee L Rev at 137 (cited in note 8).

69 Butler and Ribstein, *The Corporation and the Constitution* at 74–75 (cited in note 8) (discussing the difficulties a member of an ideological group faces in exiting, as opposed to the shareholders in an corporation).

70 Brudney, 91 Yale L J at 258 (cited in note 8).

71 Id at 258 & n 83.

subtle expansion of the minority shareholder protection rationale just discussed. The traditional understanding of the "minority" requiring protection is that it comprises those stockholders who disagree with the corporation's speech but who collectively own too few shares to prevail in a proxy fight. Because the usual rules of corporate elections call for voting in proportion to the number of shares that one owns, this "minority" might well represent a numerical majority (of owners, not shares) that, but for the one-share/one-vote rule, would control. This argument thus taps into the intuition that so far as politics are concerned, one-person/one-vote is the only fair allocation of decisionmaking authority.

But the objection to corporate political speech based on the traditional rule of one-share/one-vote misconceives the economic realities of corporate governance. As Frank Easterbrook and Daniel Fischel have shown, in a system with voting rights that are not proportional to the voter's stake in the enterprise, there will be a reduced incentive for voters to make optimal decisions, because the gains or losses stemming from these decisions will not be internalized at a level corresponding to the influence of one's vote. Therefore any rule other than one-share/one-vote wastefully increases the agency costs associated with the corporate form.[72]

To be sure, this means that a single person, by virtue of a 51 percent ownership stake in a corporation, will be able to control 100 percent of the corporation's resources. And that, in turn, makes possible a scenario in which this single person's voice will be made louder at the expense of the perhaps thousands of minority shareholders.[73] But this hypothetical reveals this objection for what it really is: either a mere restatement of the notion that minority shareholders (who here happen to constitute a numerical majority) need protection; an argument that the majority stakeholder will misappropriate the minority's funds; or an argument for doing something about the effects of an inegalitarian distribution of wealth.

As with the more straightforward protection of minority shareholders argument explored above, only an irrational investor—or a rational investor who supported the majority shareholder's views—would leave his money in such an arrangement without requiring a discount to reflect this risk. Putting this particular spin on why minority shareholders require protection does nothing to advance the substance of the argument. Similarly, the analysis above regarding the simple agency problem of managers' potential misappropriation also adequately replies to this more exotic misappropriation fear. Granted, minority shareholders cannot "fire" a majority holder. But that problem is solved by (and perhaps helps explain) the fiduciary duties that state corporate law imposes on dominant shareholders. In these cases dominant shareholders are held to all the same fiduciary standards

72 Easterbrook and Fischel, *Voting in Corporate Law*, 26 J L & Econ at 405–09 (cited in note 28).
73 See Brudney, 91 Yale L J at 258 (cited in note 8).

that ordinarily apply to management.[74] Finally, if this argument is merely a masked complaint about the distribution of wealth in society, then the problem is not with the corporate form as much as it is with the allocation of resources in a capitalist economy. And that does not justify singling out incorporated firms while leaving individuals and other business associations untouched.

5. Lowering the cost of capital.

The final twist on this line of argument is that section 441b lowers the cost of capital.[75] The argument takes the form of a syllogism beginning with the premise that "most companies would 'bundle' the power to make political and economic decisions."[76] So in the absence of a proscription on contributions or at least a requirement of stockholder consent, individuals looking to invest their money would have no choice but to "relinquish full control of their resources for making political speech."[77] As a result, some people might be deterred from investing. This bundling of decisionmaking power would therefore be "inefficient by conventional economic analysis" if the premium investors seek as compensation for their loss of political control outweighed the savings from avoiding the added transaction costs of a corporation's having to raise money for its business and political enterprises independently.[78]

The problem with this syllogism is its premise. Although managers as a class might hold a monopoly position in a loose sense, there is enormous competition within that class. This argument assumes, in effect, that managers, if not a cartel, will behave like one, the final result of their conscious parallelism being that all managers will offer only stock that bundles business with politics. But there are far too many managers competing with each other in both the market for corporate control and the capital market (in which, of course, managers compete not only with each other but with nonstock alternatives as well) for this to make any sense.[79] If there are in-

---

74 See, for example, *Sinclair Oil Corp v Levien*, 280 A2d 717 (Del 1971); *Zahn v Transamerica Corp*, 162 F2d 36 (3d Cir 1947); American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* § 5.11 at 334 (1994); Cox, Hazen, and O'Neal, *Corporations* § 11.10 at 11.53 (cited in note 56) ("The basis for the controlling stockholder's fiduciary obligation is the sound policy that, just as directors are bound by certain fiduciary obligations, one who has the potential to control the board's actions should be subject to an obligation as rigorous as those applied to the directors.").

75 See Brudney, 91 Yale L J at 264–65 (cited in note 8) ("Allowing capital to be raised on the condition that its contributors permit management to use it for political purposes, without providing them a meaningful choice as to the particular political or noncommercial use, may increase the cost of capital.").

76 Id at 270 (citation omitted).

77 Id.

78 Id at 264–65. See also *Austin v Michigan Chamber of Commerce*, 494 US 663, 675–78 & n 8 (Brennan concurring).

79 See Meese, 2 Wm & Mary Bill Rts J at 309, 338 (cited in note 8) (arguing that "[n]o firm possesses economic power in capital markets sufficient to 'coerce' prospective shareholders into accepting

vestors who are willing to make their capital available at lower cost to managers who promise to forbear from political activity, then some managers would make that promise in order to tap into that cheaper capital. After all, as noted earlier, a number of high-profile corporations have announced a flat policy against the giving of then-legal soft-money donations, and investment funds often cater to the idiosyncratic policy preferences of investors.

* * * * *

At bottom, most of the conventional justifications for section 441b and its state analogues suppose investor irrationality and thus are vulnerable on that ground. What is left, then, are the arguments that it is inherently unfair that people with more money can spend more on political speech and that the corporate form provides competitive advantages in the market for legislation. Of these, the first is a normative judgment for which the foregoing analysis can do little except expose it as such. The second argument, however, is something to which further analysis can speak.

II. THE POLITICAL ECONOMY OF REGULATING CORPORATE POLITICAL SPEECH

This Part explores the political economy of the longstanding discrimination against corporate political speech. Part II.A revisits the question of rent seeking by corporations and explores its relationship to the regulation of corporate political speech. Drawing on the traditional economic theory of regulation and the relevant collective action dynamics, Part II.B offers a partial explanation for why corporations might favor discrimination against corporate political speech consistent with the fact that the state-level regulation of corporate political speech is located in state election rather than state corporate codes. Part II.C briefly outlines the "new" economic theory of regulation, most closely associated with Fred McChesney, and its relationship to the traditional approach, often associated with George Stigler.[80] Finally, informed by the McChesney economic model of regulation, Part II.D explores the underlying political economy of the 1907 Tillman Act in light of a fresh look at the historical record.

A. Corporate Rent Seeking

The analysis above suggested that the corporate form might provide an especially effective vehicle for overcoming the collective action and free rider problems that are the principal barriers to success in the market for legislation.[81] The idea was that incorporation captures in the form of stock

---

an unwanted bundling arrangement[,]" and that "[a]bsent a massive conspiracy among major corporations, no firm has economic power over potential shareholders") (citation omitted).

80 See also Omri Yadlin, *Commentary on Sitkoff*, 69 U Chi L Rev 1167 (2002).

81 See Part I.A.2.

the group's (shareholders') stake in the leaders' (managers') lobbying efforts. Moreover, in contrast to the costs of organizing a new group, for an already existing corporation the fixed costs of organization are sunk.[82] So the argument in favor of the statutes is that they offset these advantages by raising the price to corporations of rent seeking by making more cumbersome the methods through which regulation might be purchased.[83] Taxes place a drag on direct donations funneled through managers via an increased compensation package, because managers will have to report that additional compensation as income. And because a candidate cannot internalize fully the benefits of a donation to her party (a "soft-money" donation) as compared to a donation directly to her personal campaign fund, she will require a larger donation before supporting legislation favorable to the donor. Other indirect means are similarly more costly. Therefore, because an increase in price leads to a decrease in consumption (assuming some elasticity of demand), perhaps this represents a social welfare justification for restricting corporate political donations. On this view the statutes will reduce the total amount of socially undesirable corporate lobbying for legislative rents.

Even if we assume that on balance corporate political activity is socially undesirable, however, it is not clear that these statutes will ameliorate that problem. For if in ascertaining price we consider not only the size of the donation but also the cost to the corporation of exposure to the risk of extortive threats—after all, there is no reason to treat legislators and regulators as merely passive participants in the market for legislation and regulation[84]—then these statutes might actually reduce the cost of redistributive legislation. Just as a candidate cannot fully internalize the benefits of a donation to her party that is prompted by her promise to support legislation favorable to the donor, she cannot fully internalize the benefits of a donation to her party prompted by an extortive ultimatum. Similarly, the cumbersome means of funneling a donation through a manager in the form of increased compensation and the drag imposed by the tax consequences of such an approach would provide an excuse for the inability to respond swiftly and fully to an extortive ultimatum. Thus, if the net effect of these statutes is to make extortion more difficult, then these laws might encourage rather than discourage undesirable participation in the market for legislation. This would be true if the value of the statutes' extortion-protection

---

82 See note 39 and accompanying text.

83 Direct donations are the most straightforward form of support. See McChesney, *Money for Nothing* at 46–50 (cited in note 13) ("The most obvious form of compensating legislators is to give money to them personally or to their campaigns.").

84 "We all know that politicians need and actively seek out both votes and campaign contributions; economists can hardly ignore, therefore, the possibility that politicians seek out, or otherwise create, opportunities to use the legislative process in fulfillment of those needs." Douglas Ginsburg, *A New Economic Theory of Regulation: Rent Extraction Rather than Rent Creation*, 97 Mich L Rev 1771, 1773 (1999), reviewing McChesney, *Money for Nothing* (cited in note 13). See also Part II.C.

function exceeds the increased price for the legislation or regulation that is caused by its proscription on direct donations.

B. Collective Action and the "Internal Affairs Doctrine"

One pro-corporation view of the statutes—a view both consistent with the traditional economic theory of regulation and complementary to the extortion thesis advanced later in this Part—is that the statutes represent a solution to the collective action problem faced by the managers of a specific corporation if the redistributive lobbying by corporations as a class, for the most part, victimized other corporations. For if corporate political activity represents both offensive and defensive lobbying anent redistributive legislation, then corporations as a class might do better with a flat ban on corporate campaign contributions. Yet the managers of a single corporation could not risk acting unilaterally.[85] From the perspective of well-diversified shareholders, moreover, wealth transfers between incorporated firms via legislative action represent nothing more than a deadweight loss in the amount of the transfer costs, so shareholders might do better with a total ban (unless the aggregate value of transfers from society at large exceeds the transaction costs of the transfers between incorporated firms).[86] On this view, the statutes solve the collective action problem because they enforce concerted action. And indeed the statutes were passed, as we shall see in a moment, in the wake of systematic assessments in which political leaders took advantage of just this collective action problem. Consider that solicitation letters often noted the pledges of competitors.[87]

This collective action dynamic may also explain why on the state level corporate political speech is regulated by state election rather than state corporate codes. As noted above,[88] had the regulations been included in state corporate codes, then by operation of the internal affairs doctrine they would regulate donations made anywhere by corporations incorporated in that state. Instead, because they are located in the election codes, these state laws govern the donations of all corporations, regardless of their state of incorporation, with regard only to elections in the state that enacted the given statute. Hence, the statutes are responsive to the collective action problem on both ends—in and out of state. With respect to in-state elections, they disarm all corporations regardless of their state of incorporation. But with respect to out-of-state elections, corporations incorporated in-state are not

---

85 See Butler and Ribstein, *The Corporation and the Constitution* at 76 (cited in note 8) ("All corporations might come out ahead if none participated in political activity. Yet individual firms cannot afford to refuse to participate in the game, because they may lose more wealth transfers to participating firms than they would save in rent-seeking costs.").

86 See text accompanying note 55.

87 See notes 118, 210 and accompanying text. There is evidence that this collective action problem has purchase in the analogous debate today over whether to ban soft money. See Part IV.A.

88 See Part I.B.1.

unilaterally disarmed, so they are not placed at a disadvantage out-of-state when competing for regulation in jurisdictions without a comparable statute. Although inconsistent with the agency costs shareholder protection rationale discussed earlier, the placement of these statutory provisions in state election rather than state corporate codes is fully consistent with the notion that these rules are beneficial to corporations. In light of the collective action dynamic identified here, this is a reform that on the state level had to be enacted by and applied within one state at a time.[89]

C. The "New" Economic Theory of Regulation

The idea that the statutes solve a collective action problem is premised on the notion that corporations as a class do better in a world in which direct donations are prohibited. And indeed that might be true given the deadweight transfer costs of simple firm-to-firm wealth transfers. A richer account of why corporations as a class might do better with a donation ban, however, may be developed by viewing legislators as active participants in the market for legislation and conceiving of the statutes as extortion-protection devices. Building on the traditional economic theory of regulation, which assumed that there is a demand and a supply for regulation in the same way that there is for any other commodity,[90] modern learning on the economic theory of regulation posits a model that includes a more sophisticated conception of the behavior of individual legislators. This update to the economic theory of regulation, most closely associated with Fred McChesney,[91] replaces the earlier conception of lawmakers as passive suppliers of regulation to the highest bidders with a model in which lawmakers are active participants who seek out opportunities to extract donations and other forms of support.

> The model extends the [traditional] economic theory of regulation to include the gains available to politician-maximizers from alleviating costs threatened or actually imposed on private actors by legislators themselves and by specialized bureaucratic agencies. Status as a legislator confers a property right not only to create political rents but also to impose costs that would destroy private rents. In order to protect these returns, private owners have an incentive to strike bargains with

89 Omri Yadlin helped me sort out the analysis of this paragraph.

90 Typified by George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J L & Econ 211 (1976); Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q J Econ 371 (1983). See also Jonathan R. Macey and Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex L Rev 469 (1987), which applies the classical economic theory of regulation to explain Delaware's corporate law prominence.

91 See generally McChesney, *Money for Nothing* (cited in note 13); McChesney, 16 J Legal Stud 101 (cited in note 13). See also McChesney, 6 Indep Rev 345 (cited in note 13).

legislators, as long as the side payments to politicians are lower than the losses expected from the law threatened.[92]

It is in this light that we can better understand the political economy of the Tillman Act and its state law analogues, for it is in this light that a fresh look at the historical record, both the legislative history and contemporaneous news accounts, reveals a coherent story. The story, as detailed in the next Part, is one of systematic shakedowns of corporations at the turn of the century leading to the passage of the Tillman Act.[93] Thus, even if these laws facilitate rather than frustrate efforts by large corporations to seek rents through redistributive legislation (by reducing corporate exposure to extortive ultimatums), the statutes may still be defended on the alternative ground that by preventing extortion they preserve the socially desirable incentive for innovation. The statutes ensure that the increased profits which stem from that innovation flow to shareholders rather than elected officials.[94]

D. The Tillman Act

1. Political entrepreneurship.[95]

The passage of the 1907 Tillman Act (and its state law analogues[96]) is usually explained as a product of political entrepreneurship by opportunistic politicians who capitalized on the Progressive Era's distrust of large corporations generally and a few salient corporate campaign finance scandals in particular.[97] As one commentator expressed it, "To save democracy from

---

92 McChesney, *Money for Nothing* at 41 (cited in note 13). See also Strauss, 94 Colum L Rev at 1380–82 (cited in note 13); Strauss, 1995 U Chi Legal F at 152–55 (cited in note 13).

93 This view of the Tillman Act, as an anti-extortion device, is noted though not explored in detail in Butler and Ribstein, *The Corporation and the Constitution* at 76 (cited in note 8), and Ribstein, 49 Wash & Lee L Rev at 154–55 (cited in note 8).

94 See McChesney, *Money for Nothing* at 32–34 (cited in note 13).

95 On political entrepreneurs, see, for example, William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 Fordham L Rev 57, 129–31 (1999); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J L, Econ, & Org 59, 65–70 (1992).

96 Most of the comparable state statutes are of a similar historical pedigree. See Sikes, *State and Federal Corrupt Practices Legislation* at 279–83 (cited in note 4) (listing states that prohibited corporate contributions near the turn of the century).

97 See, for example, George Thayer, *Who Shakes the Money Tree?: American Campaign Financing Practices from 1789 to the Present* 53–54 (Simon & Schuster 1973) (summarizing a few of the reasons for the passage of the Tillman Act); Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* 23–24 (Princeton 2001) (citing a New York legislative investigation into insurance companies' large donations to national politicians as an important factor in leading to the passage of the Tillman Act); Epstein, *Corporations, Contributions, and Political Campaigns* at 11–12 (cited in note 8) (arguing that "[t]he presidential election of 1904 was the catalyst that brought about the federal legislation regulating corporate campaign contributions" and explaining congressional action in enacting the Tillman Act); Sikes, *State and Federal Corrupt-Practices Legislation* at 188–92 (cited in note 4) (recounting corporations' contributions and active support of the Republican Party in the election of 1896, President Theodore Roosevelt's disdain for these actions, and Congress's passage of the Tillman Act); Winkler, 32 Loyola LA L Rev at 1246–47 (cited in note 8) ("The Tillman Act was justified by many on

oligarchic capital, electoral reformers organized to 'purify the politics' of American government."[98]

Certainly the idea that political entrepreneurship played a role in the passage of the Tillman Act finds support in the historical record. The presidential election of 1904, in particular, was marked by numerous appeals to voters in which the candidates spoke of the evils stemming from the "corruptive" influence of large corporations.[99] According to contemporaneous media accounts, "the collection and acceptance of contributions from Trusts and corporations [was] the dominant issue of the campaign,"[100] and in the wake of the 1904 election, charges of improper fundraising abounded.[101] Many specifically criticized President Roosevelt for appointing a former cabinet Secretary as chairman of the Republican National Convention.[102] This criticism prompted Roosevelt to call for election reform in his 1905 message to Congress,[103] and that message has since been credited with hav-

---

equality grounds to restrict the corrupting influence of corporations in politics."); Mutch, *Campaigns, Congress, and the Courts* 1–8 (cited in note 5) (citing corporations' contributions to the Republican Party during the 1904 presidential campaign as the reason for Congress's passage of the Tillman Act). The national market for corporate charters was at the time just beginning, which aggravated the already poor public estimation of large corporations. See *Liggett Co v Lee*, 288 US 517, 567 (1933) (Brandeis dissenting) (criticizing this development and the "Frankenstein monster" corporation it engendered); Butler and Ribstein, *The Corporation and the Constitution* at 72 (cited in note 8) (mentioning that corporate speech restrictions arose "in the early part of the twentieth century, during a time of general distrust of large institutions that fueled the Populist and Progressive movements").

98 Winkler, 32 Loyola LA L Rev at 1246 (cited in note 8).

99 See Mutch, *Campaigns, Congress, and the Courts* at 1–2 (cited in note 5) (explaining how Democrats and Republicans accused each other of unethically accepting significant contributions from corporations); Bolton, 22 Ariz L Rev at 377 & n 18 (cited in note 8) (describing the outrage of 1904 presidential candidate Alton B. Parker and Congress at the excessive corporate contributions to political candidates).

100 *The Dominant Issue—"Buying the President"*, NY Times 8 (Nov 7, 1904). Commentators have since agreed. See James K. Pollock, Jr., *Party Campaign Funds* 9 (Knopf 1926) (recounting how the Democratic candidate for the presidency during the 1904 election, Judge Alton B. Parker, "charged that corporations were supplying funds for the Republican campaign in order to buy influence with the Administration").

101 See Epstein, *Corporations, Contributions, and Political Campaigns* at 11–12 (cited in note 8) (discussing the accusations of improper corporate contributions to political parties heard by Congress). Contemporaneous examples include *Thunder of Cheers Greets Judge Parker*, NY Times 1 (Nov 1, 1904); *Judge Parker's Great Service to the Country*, NY Times 8 (Nov 7, 1904); *Demand for Cortelyou in Insurance Inquiry*, NY Times 2 (Dec 3, 1905); *To Bar Corporation Cash in Campaigns*, NY Times 1 (Jan 22, 1907); 41 Cong Rec H 1452 (Jan 21, 1907) (Representative Robinson) ("[I]t is an undisputed fact to-day that some of the great corporations of this country, in order to corrupt the electorates of this Republic, took from their treasuries in the last national campaign many thousands of dollars.").

102 See, for example, *Buying the President*, NY Times 8 (Oct 1, 1904) (arguing that President Roosevelt's appointment of a former cabinet secretary was "scandalous"). This charge is explored more fully below. See notes 124–27 and accompanying text.

103 *President's Annual Message*, 40 Cong Rec S at 96 (cited in note 45) (quoting President Roosevelt's 1905 message to Congress and his call for federal election campaign contribution reform). See Mutch, *Campaigns, Congress, and the Courts* at 3–4 (cited in note 5) (discussing President Roosevelt's meeting with advisors about the issue of corporate contributions to election campaigns and his ultimate decision to call for election reform).

ing set in motion the enactment of the 1907 Tillman Act.[104] For although Senator William E. Chandler had introduced a similar measure in 1901, it was only when the issue achieved popular salience after the 1904 election scandals that the proposal got anywhere.[105] Two months after Roosevelt's speech, Senator Benjamin R. "Pitchfork Ben" Tillman, for whom the 1907 Act is named, seized on Chandler's initiative and assumed sponsorship of the legislation. Tillman did so because it would cause "some uneasiness" for various Republican legislators while at the same time would attract public attention to him and give him a measure of control over the new Congress's legislative agenda.[106] Thus, "In the election year 1906, Republicans might have allowed the bill to expire quietly in committee had not Tillman kept the issue alive with his resolution."[107]

When one adds the supposition that labor probably supported the Tillman Act in order to lessen the influence of capital, the Act's lineage seems to come together. Certainly cabining the ability of management to purchase legislation would be advantageous to labor. But for one mediocre and one compelling reason this simple account of the enactment of the Tillman Act, without more, is not satisfactory. First, in the 1940s the Tillman Act was amended to apply with equal force to unions.[108] Yet if labor

104 Mutch, *Campaigns, Congress, and the Courts* at 4 (cited in note 5) ("President Roosevelt's 1905 message to Congress is generally regarded as having initiated the series of actions ending in the 1907 enactment of a prohibition on corporate political contributions."); Sikes, *State and Federal Corrupt-Practices Legislation* at 190–91 (cited in note 4) (mentioning that shortly after President Roosevelt addressed Congress about his proposals for election reform, Congress enacted a statute reflecting his proposals). When introducing the bill only two months after the speech, *Contributions by Corporations in Political Campaigns*, 59th Cong, 1st Sess, in 40 Cong Rec S 2642 (Feb 19, 1906), Tillman quoted "copiously from the president's message." Mutch, *Campaigns, Congress, and the Courts* at 6 (cited in note 5). And in the debates in the House the following year, Roosevelt's remarks were referred to on several occasions. See, for example, 41 Cong Rec H at 1452 (Representative Rucker) (cited in note 101) (noting that reform was "strongly indorsed by the President . . . in his annual message"); id at 1453 (Representative Hardwick) ("The President of the United States . . . has himself recommended its passage in his message to the Congress.").

105 See Mutch, *Campaigns, Congress, and the Courts* at 4–6 (cited in note 5) (describing how the press ignored Chandler's proposal until after the 1904 election campaign finance scandals and the New York Armstrong Committee investigation).

106 Id at 5–6 (explaining Senator Tillman's efforts to keep his bill for election reform alive). See 40 Cong Rec S at 2642 (cited in note 104) (quoting congressional debate on the proposed Tillman Act). See generally Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 Am J Polit Sci 186 (1995) (analyzing the conditions under which senators will sponsor legislation).

107 Mutch, *Campaigns, Congress, and the Courts* at 6 (cited in note 5) ("Tillman's persistence might have been intended to keep his bill in the public eye.").

108 Labor Management Relations Act of 1947 ("Taft-Hartley Act"), Pub L No 100, 61 Stat 136, 159, codified at 29 USC §§ 151–66 (1947). See also *United States v International Union Automobile Workers*, 352 US 567, 582–83 (1956) (noting that the Labor Management Relations Act of 1947 was amended to apply also to unions). See Epstein, *Corporations, Contributions, and Political Campaigns* at 13–14 (cited in note 8) (noting that Congress restricted union campaign contributions in § 304 of the Labor Management Relations Act of 1947); Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U Pa L Rev 386, 393–94 (1977) (same); Larry J. Sabato, *PAC Power: Inside the World of Political Action Committees* 5–6 (Norton 1984) (same).

had been the driving force behind limiting corporate political speech, and if the Tillman Act had truly lessened corporate influence, we would have expected corporate limits to be ratcheted up, not the subsequent establishment of limitations on unions.[109] And anyway, at the time of the Tillman Act's passage, labor for the most part had not yet organized.[110]

Second, and this is the more compelling argument against the notion that political entrepreneurship satisfactorily explains the Tillman Act, there is an alternative though somewhat complementary political economy story that is equally if not more consistent with the historical record—a record that is devoid of clear evidence of strong opposition by corporations. This complementary explanation is also consistent with modern learning on the economic theory of regulation. Simply put, corporations probably supported the enactment of the Tillman Act as a means of protecting themselves from extortive threats by political leaders seeking campaign contributions.

2. Political extortion.

To begin with, the Tillman Act should be placed in its specific campaign finance historical context. The public controversy regarding the role of corporate money in the 1904 election, to which we shall return more comprehensively shortly, represented the natural escalation of a process begun in the campaigns of the late 1800s.[111] For it was in the elections of the late 1880s and the 1890s that the national parties began shouldering a larger

---

109 The fact that the historical record contains strong evidence that unions opposed the later extension of the statute to cover them, see William S. White, *Veto Tactic Delays Senate Labor Vote: Foes Assail Bill to Set Case for Rejection—Tell Truman Signing Means '48 Defeat*, NY Times 1 (June 6, 1947) (noting union demonstrations against the provision); Joseph A. Loftus, *AFL Calls Illegal Two Points in Law: Will Advise Unions to Violate Ban on Political Spending and Red Disclaimer*, NY Times 1 (June 29, 1947) ("American Federation of Labor lawyers put their fingers today on at least two provisions of the Taft-Hartley Law which they regard as so clearly unconstitutional that they will advise their unions to violate them."); Louis Stark, *Unions Widen Attacks on Taft-Hartley Law: Defiance of Ban against Political Funds Is Now Major Challenge*, NY Times B7 (Aug 17, 1947) (detailing the challenges unions mounted against the Taft-Hartley Act), does not undercut the contention that corporations supported or at least did not seriously oppose the 1907 enactment. First, that there is compelling evidence of union opposition to this extension bolsters the inference that there was no similar systematic corporate opposition to the 1907 enactment, because there is a lack of comparable good evidence of opposition by corporations to the original 1907 enactment. Second, the extension of the Act to unions came in the wake of a similar provision in the 1943 War Labor Disputes Act ("Smith-Connally Act"), 57 Stat 163, 167–68 (prohibiting political contributions by labor organizations), repealed by 62 Stat 683, 862 (1948), rather than, as explored below, in the wake of massive "assessments" by political leaders. Third, as a practical matter, it would be more difficult for unions to evade the limitation by funneling donations through union leaders in the form of increased compensation, because the practical ceiling on union leader compensation is lower than that on corporate executive compensation.

110 Lambert, 40 NYU L Rev at 1035 (cited in note 8) (explaining that "during the latter part of the nineteenth century and the beginning of the twentieth[,] [l]abor was still largely unorganized").

111 See Smith, *Unfree Speech* at 21–22 (cited in note 97); Sikes, *State and Federal Corrupt-Practices Legislation* at 188–89 (cited in note 4); Epstein, *Corporations, Contributions, and Political Campaigns* at 10–11 (cited in note 8); Adam Winkler, *"Other People's Money": Corporate Contribution Bans and the Separation of Ownership and Control* 11–13, working paper (2001) (on file with author).

share of the burden.[112] This meant that the then "customary method of voluntary contribution, helped out by a little dunning of the protected manufacturers, was wholly insufficient."[113] So the national political parties for the first time deployed sophisticated and systematic procedures for demanding contributions for their candidates from corporations in particular. Not coincidentally, this occurred soon after the Pendleton Act of 1883 banned contributions, often extorted, from civil servants.[114]

In the 1896 election, the first of two in which William McKinley defeated William Jennings Bryan, the dominant issue was monetary policy. So Mark Hanna, the Republican party leader who was ultimately responsible for raising money for McKinley, focused his fundraising efforts on New York financiers and large corporations.[115] Standard Oil was taxed, as it were, $250,000, and under Hanna's stewardship the Republican National Committee assessed banks at one-quarter of one percent of their capital.[116] As his biographer put it, Hanna "did his best to convert the practice from a matter of political begging on the one side and donating on the other into a matter of systematic assessment according to the means of the individual

---

112 See Sikes, *State and Federal Corrupt-Practices Legislation* at 188 (cited in note 4); Thomas E. Felt, *The Rise of Mark Hanna* 342, unpublished Michigan State University Ph.D. dissertation (1961); Fred C. Shoemaker, *Mark Hanna and the Transformation of the Republican Party* 209, unpublished Ohio State University Ph.D. dissertation (1992). See also Shoemaker, *Mark Hanna and the Transformation of the Republican Party* at 226; Thayer, *Who Shakes the Money Tree* at 48 (cited in note 97).

113 Herbert Croly, *Marcus Alonzo Hanna: His Life and Work* 213–19 (Macmillan 1912). See also Sikes, *State and Federal Corrupt-Practices Legislation* at 188–89 (cited in note 4); Thayer, *Who Shakes the Money Tree* at 49 (cited in note 97).

114 See Smith, *Unfree Speech* at 20 (cited in note 97) (observing that the Pendleton Act, which limited "the ability of officeholders to extract contributions from those they appointed to office," is often considered to have been the first campaign finance law); Thayer, *Who Shakes the Money Tree* at 38–40 (cited in note 97) ("Business became a prime source of campaign funds after the passage of the Pendleton Act of 1883, a law that banned contributions from civil servants.").

115 Croly, *Marcus Alonzo Hanna* at 219–20 (cited in note 113); Sikes, *State and Federal Corrupt-Practices Legislation* at 189 (cited in note 4) ("Hanna converted the practice of soliciting contributions from a matter of political beginning into a matter of systematic assessment according to the means of the individual and institution. . . . Standard Oil Company contributed $250,000 to be used by Mr. Hanna in the campaign."). See also Clarence A. Stern, *Resurgent Republicanism: The Handiwork of Hanna* 25–26 (Edwards Brothers 1963) ("[Hanna] overcame the initial reluctance of Wall Street financiers to making generous campaign contributions, and he gave the major portion of his time to the collection of funds in New York."); Felt, *Rise of Mark Hanna* at 342–46 (cited in note 112); Smith, *Unfree Speech* at 22 (cited in note 97) ("Hanna methodically 'assessed' the nation's leading businesses for campaign cash.").

116 Winkler, 32 Loyola LA L Rev at 1247 (cited in note 8) (noting that Standard Oil "was required to contribute $250,000 to the 1896 Republican presidential campaign"); Thayer, *Who Shakes the Money Tree* at 50 (cited in note 97) ("Banks . . . were assessed one quarter of one percent of their capital; Standard Oil contributed about a quarter of a million dollars, and large insurance companies slightly less."); Croly, *Marcus Alonzo Hanna* at 220 (cited in note 113) (stating that Standard Oil Company gave $250,000, and that the Republican National Committee assessed banks at a rate "of one-quarter of one per cent of their capital"). See also Lambert, 40 NYU L Rev at 1035 (cited in note 8) ("Hanna supervised the collection and expenditure of perhaps as much as $16 million, an enormous sum for [1896], by systemizing contributions from the business community, particularly the larger corporations."); Felt, *The Rise of Mark Hanna* at 347 (cited in note 112).

and institution."[117] No doubt designed to take advantage of the collective action problem facing those being leaned on, solicitation letters often included the names of competitors who had made pledges and the amounts of those pledges.[118] Party affiliation did not matter; members of both parties were simply assessed their shares by Hanna and his staff.[119]

In this extortion-colored light, consider the remark of Representative Williams during the House debate on its version of the Tillman Act with respect to a donation by Democratic managers of New York Life to a Republican campaign: the episode, said Williams, represented "all the more sad a commentary, because it shows that even Democrats, when identified with great corporations, are compelled to contribute Democratic money to Republican campaign funds in order to expect justice from a Republican Administration."[120] With this comment Williams articulated precisely the change in the turn-of-the-century forms of campaign finance. Indeed, for McKinley's 1900 reelection campaign, Hanna "further [ ] systematize[d] the work of collection,"[121] and "[w]ith his customary efficiency, Hanna shook down the business world for $2.5 million."[122] Contribution levels were assessed by party leaders, and contributions above and below these assessments were returned![123]

Returning now to the 1904 election controversy, in which, as noted earlier, charges of improper fundraising abounded—which charges prompted Roosevelt's 1905 call for reform and ultimately the 1907 Act—it is worth considering the specific content of those allegations. Many of the

---

117 Croly, *Marcus Alonzo Hanna* at 220, 222 (cited in note 113). See also Thayer, *Who Shakes the Money Tree* at 49 (cited in note 97) ("But he did systematize the collection of funds and, for better or for worse, raised the level of the entire financial operation of campaigns out of the trough of blackmail and bribery."); Felt, *Rise of Mark Hanna* at 370 (cited in note 112) ("He had raised and spent unprecedented campaign funds, not merely by discreet begging but by systematic demands on banks and other businesses benefited by his candidate's tariff and currency policies."). Croly had access to Hanna's private papers, which have since been destroyed. Thus the Croly biography, which is said to "sketch[ ] a full portrait of Hanna's public and private life," is regarded as "the single best authority of Hanna's private life, including many of his private and political arrangements." Shoemaker, *Mark Hanna* at 5 (cited in note 112).

118 Sikes, *State and Federal Corrupt-Practices Legislation* at 189–90 (cited in note 4) (describing the campaign letters the National Bankers' Association sent to all its bankers in light of the political campaign of 1896).

119 Croly, *Marcus Alonzo Hanna* at 220, 222 (cited in note 113) ("[A]ppeals were made to banks and business men, irrespective of party affiliations.").

120 41 Cong Rec H at 1454 (cited in note 101).

121 Croly, *Marcus Alonzo Hanna* at 325 (cited in note 113); Felt, *The Rise of Mark Hanna* at 351–52 (cited in note 112).

122 Thayer, *Who Shakes the Money Tree* at 51 (cited in note 97).

123 Croly, *Marcus Alonzo Hanna* at 325 (cited in note 113) ("In case an exceptionally opulent corporation or business firm contributed decidedly less than was considered its fair proportion, the checque might be returned. . . . On the other hand, an excessively liberal subscription might also be sent back in part."). See also Thayer, *Who Shakes the Money Tree* at 50 (cited in note 97) ("If a company sent in a check Hanna believed to be too small, it was returned; if a company paid too much, a refund was sent out.").

complaints charged in particular that it was improper for Roosevelt to have appointed former Secretary of Commerce and Labor George Cortelyou to head the Republican National Committee,[124] because the Department of Commerce and Labor's Bureau of Corporations had the authority to investigate corporations doing interstate business. Thus, *The New York Times* alleged wrongdoing "when the chief of the Department which has become the custodian of corporation secrets is put at the head of the partisan committee whose principal function is to collect campaign contributions which come chiefly from great corporations."[125] Although there was no proof of actual wrongdoing by Cortelyou, the commonly held belief was that in a typical fundraising visit,

> Chairman Cortelyou goes to one of the officers of a large corporation and informs him that the Republican National Committee expects a substantial contribution from his company. The officer in question is surprised; he is not of Mr. Roosevelt's party, neither he nor his corporation has been accustomed to meddle with politics; he asks for time to think it over. In the solitude of his office his thoughts run in this wise: I do not want to give money to the Republican National Committee. But I am trustee of the interests of the stockholders of this corporation. I may soon have to appear before this man as a representative of my corporation in a matter affecting its business, as to which he will have, if not official discretion, at least very great personal and official influence, which I would dislike to have used against me. I cannot let my personal disinclinations stand in the way of the company's interests. I will make this forced contribution to Mr. Cortelyou's fund.[126]

This hypothetical account does not appear to be hyperbolic. In September of 1905, for example, it was reported that during a Bureau of Corporations investigation into certain Chicago packing companies, "a demand was made upon them for $50,000."[127]

---

124 It was also thought to be improper for Cortelyou to have been rewarded with a plum political appointment afterward. See 41 Cong Rec H at 1453 (cited in note 101) (Representative Robinson) (in the House debate on the Tillman Act, referring to the "fact that the chairman of the last national Republican committee who received these funds has been promoted in office"). Cortelyou was made Secretary of the Treasury.

125 *Buying the President*, NY Times at 8 (cited in note 102). See also *Publicity for National and State Campaign Funds*, 49 Harper's Weekly 1767 (Nov 25, 1905) ("It is not certain that Mr. Cortelyou, by accepting and using the contributions of the corporations referred to, made himself a party to an embezzlement, or, in other words, to the diversion of funds whereof the pretended donors were only trustees, without the consent of the real owners."); *Thunder of Cheers Greets Judge Parker*, NY Times at 1 (cited in note 101); *Judge Parker's Great Service to the Country*, NY Times at 8 (cited in note 101); *Demand for Cortelyou in Insurance Inquiry*, NY Times at 2 (cited in note 101); *To Bar Corporation Cash in Campaigns*, NY Times 1 (June 22, 1907) (referring to an allegation of "Cortelyou's holding up various corporations").

126 Id. See also *Demand for Cortelyou in Insurance Inquiry*, NY Times at 2 (cited in note 101).

127 *Cash from the Packers: Story of a Republican Demand While the Beef Inquiry Was On*, NY

The reports of the time, moreover, are replete in particular with interventions by insurance companies, to the tune of tens of thousands of dollars,[128] which is similarly consistent with an extortion story. Because they are subject to so much governmental oversight, insurance companies are especially vulnerable to extortive threats. Thus it should come as no surprise that many of the turn-of-the-century allegations of extortion and other election funding improprieties as reported in both contemporaneous news accounts and a high-profile 1905 New York legislative investigation involved insurance companies.[129] These various insurance scandals figure significantly in the legislative history of the Tillman Act,[130] and the investigation gave salience to the issue.[131]

On this view the exorbitant corporate campaign contributions of the late 1800s and early 1900s did represent inefficient redistribution—only the rents were being had by politicians at the expense of shareholders. This is not to say that these corporations were not engaged in socially undesirable rent seeking. Rather, the point is that legislators, as sellers, play as active a role in the market for legislation as potential buyers such as corporations. To the extent that they will therefore actively raise funds through threats and other means, acquiescing in a ban on direct corporate contributions would be a rational corporate response.

Not surprisingly, corporate leaders embraced the Tillman Act for precisely that reason. As a Republican State Committee member observed of corporate leaders: They are "entranced with happiness. . . . [T]hey are now in a position to toe us unceremoniously out of the door if we ask them for a penny . . . . They mean to take advantage of the laws forbidding them to give money for political purposes."[132] Indeed, consider this reaction of a

---

Times 2 (Sept 17, 1905).

128 *Parker on Corporate Corruption of Parties*, NY Times 1 (Sept 18, 1905) (discussing New York Life's $50,000 contribution). See also Mutch, *Campaigns, Congress, and the Courts* at 2 (cited in note 5) ("The political power wielded by insurance companies in New York State, particularly by the 'big three' of New York, Mutual, and Equitable Life, had been the subject of rumor and suspicion for decades before the appointment of a joint state legislative committee to investigate the industry in 1905.").

129 For more on the Armstrong Committee investigation, see Mutch, *Campaigns, Congress, and the Courts* at 2–3 (cited in note 5); Sikes, *State and Federal Corrupt-Practices Legislation* at 108–10 (cited in note 4) (discussing evidence uncovered by the Armstrong Committee). For news accounts, see, for example, *Parkers Friends Asked for Money*, NY Times 1 (Sept 21, 1905) (stating that the president of a New York insurance company declared on the stand during the Armstrong Committee investigation "that the Democratic candidates, including ex-Judge Parker and the Chairman of the Democratic National and State Committees, were 'chasing' him for money in last Fall's campaign."); *Demand for Cortelyou in Insurance Inquiry*, NY Times at 2 (cited in note 101); *Mr. Perkins's Position*, NY Times 8 (Mar 9, 1907) (condemning the Republican National Committee for taking excessive corporate contributions).

130 See, for example, 41 Cong Rec H at 1451–55 (cited in note 101) (recounting House debate on the Tillman Act, which contains numerous references to the contributions).

131 See Winkler, *"Other People's Money"* at 16–24 (cited in note 111). Winkler argues that it was the Armstrong Committee hearings that prompted the enactment of these statutes and that the statutes' primary motivation was the protection of shareholders.

132 *Happy Corporations*, NY Times 8 (June 17, 1906).

"great financial authority" to the Senate's passage of the statute,[133] which was reported in an editorial entitled *Happy Corporations*: "[We] welcome [ ] this legislation with very much the same emotions with which a serf would his liberation from a tyrannous autocrat.[134]"

In this extortion-colored light, moreover, not only do these reported responses of corporate leaders to the statute's passage make sense, but so does the statute's limited scope. The Tillman Act left intact donations other than direct contributions or independent expenditures on behalf of specific candidates, and thus the Act would not touch donations funneled through managers in the form of increased compensation.[135] This porousness was not an oversight. Congress rejected more restrictive proposals[136] even though the porousness of the Tillman Act's proscriptions was widely known at the time of its enactment,[137] and even though the 1905 presidential mes-

---

133 40 Cong Rec S 8163 (June 9, 1906) (reporting the passage of the Tillman Act). For contemporaneous coverage, see *Election Funds Will Suffer*, NY Times 3 (June 10, 1906) (reporting that the Senate passed a bill prohibiting money gift s by corporations to election campaigns). After the midterm elections Representative Joseph Gaines introduced the legislation in the House. 41 Cong Rec H at 1451 (Representative Gaines) (cited in note 101) (introducing legislation "to prohibit corporations from making money contributions in connection with political elections").

134 *Happy Corporations*, NY Times at 8 (cited in note 132).

135 Details and examples are given in Epstein, *Corporations, Contributions, and Political Campaigns* at 59–78 (cited in note 8). See also 93 Cong Rec S 1604 (June 6, 1947) (Senator Kilgore) ("Every one knows the way they get around the prohibition against corporate contributions, by simply declaring bonuses to certain officials, which can be used for political purposes."); 93 Cong Rec H 3522 (Apr 16, 1947) (Representative Miller) (detailing specific examples); Sabato, *PAC Power* at 4 (cited in note 108). See also Smith, *Unfree Speech* at 24 (cited in note 97) ("Although the Tillman Act may have reduced corporate participation in politics it hardly served to eliminate it" because some managers "made large personal contributions with the knowledge that they would be reimbursed by their corporate employers.").

136 "The 1909 Congress witnessed unsuccessful attempts to amend the [Tillman] Act to proscribe the contribution of anything of value and to extend its application to the election of state legislatures." *United States v International Union Automobile Workers*, 352 US 567, 575 (1956). See 42 Cong Rec H 696–703 (Jan 14, 1908) (recounting the congressional debate about extending the application of the Tillman Act to the election of state legislatures and proscribing corporate contributions of anything of value and the congressional opposition to these proposed amendments); 44 Cong Rec H 4595 (July 23, 1909) (reporting the congressional debate about amending the Tillman Act to prohibit "Congress and the courts from receiving valuable gifts, employment, or compensation of any kind from public-service corporations, trusts, and persons engaged in interstate commerce, or having an interest in legislation" and the tabling of that debate and, thus, that proposed amendment). See also Mutch, *Campaigns, Congress, and the Courts* at 8–16 (cited in note 5) (giving an account of congressional opposition to proposed amendments that would increase the reach of the Tillman Act).

137 See, for example, 41 Cong Rec H at 1454 (Representative Grosvenor) (cited in note 101) ("[The Tillman Act] does not go far enough. If you want to purify the politics of this country by an assurance that there shall be no corrupting of the voters at the polls, you must go further than to suppress national corporations."); *Tribute from Corporations*, NY Times 2 (Aug 19, 1908); *Happy Corporations*, NY Times at 8 (cited in note 132) (explaining that the Tillman Act was porous because it was foreseeable that corporations that were restricted from donating to national political campaigns would contribute to state political campaigns). See also 66 Cong Rec H 3664 (Feb 13, 1925) (criticizing the current election law of 1925 because "reports [were] made by political committees just before and immediately after elections. The public [had] no knowledge of contributions made in the meantime."); 41 Cong Rec H at 1452 (Representative Robinson) (cited in note 101) (arguing that the Tillman Act "does not go far enough. We ought to include all corporations engaged in interstate commerce, and we ought also to pro-

sage to Congress that had set in motion the passage of the Act called for a total ban on donations by corporations "for any political purpose."[138] Thus, after the Tillman Act's enactment, corporations could still purchase legislation through many remaining indirect means, albeit at a higher price. But the cumbersomeness and increased costs of the remaining methods—consider the tax consequences and time delay of funneling a donation through managers as increased compensation—would provide an excuse for the inability to respond swiftly and fully to an extortive ultimatum. True, "soft-money" donations are relatively easy to make and were not covered by the statute. But this fact does not undercut the foregoing analysis of the statute's enactment and durability as the soft-money donation was largely unknown until 1988.[139] Indeed, as will be explored in greater detail below,[140] a similar confluence of factors—the innovation of a new fundraising technique followed several election cycles later by rampant corporate donations, political entrepreneurship, and anecdotal evidence of extortion—may be found in the current debate over banning soft-money donations.

Returning to 1907, the point that the limited scope of the statute would allow corporations to continue to purchase desired legislation (in the Stigler model) while reducing exposure to extortive ultimatums (in the McChesney model) did not go unnoticed by contemporary observers. Consider the analysis of the *Times* upon the Act's passage in the Senate:

> [The Act] will lessen a very mean and sordid practice of blackmail. The beneficiaries of [regulation] will still find methods of furnishing the sinews of war to the party that controls their favors, but the great number of corporations that have suffered extortion through weakness and cowardice will have their backbones stiffened, and parties will be put to it to fill their coffers by really voluntary contributions.[141]

---

vide an effective means for discovering violations of the law and for the enforcement of its provisions."). Compare 89 Cong Rec S 5781 (June 12, 1943) (Senator Bone) (objecting to subjecting certain corporations to more regulatory restrictions). See also Winkler, 32 Loyola LA L Rev at 1251–52 (cited in note 8) ("Many legislators who supported the corporate contribution ban in 1907 would not be surprised by the law's ineffectiveness."); Epstein, *Corporations, Contributions, and Political Campaigns* at 59–60 (cited in note 8) (noting that "the inherent limitations of [campaign election contribution reform] legislation were recognized shortly after the Tillman Act of 1907 was passed"); note 135.

138 *President's Annual Message*, 40 Cong Rec S at 96 (cited in note 45).

139 See Alison Mitchell, *Fearing Limits on Soft Money, Parties Fill Coffers*, NY Times A1, A16 (Feb 11, 2002) ("[I]n 1988, the parties began taking soft money donations."); Jill Abramson, *The Hard Business of Soft Money*, NY Times § 4 at 3 (Mar 26, 2000) (discussing the fundraisers behind the start of soft-money contributions in 1988); Christine Gorman, *The Price of Power*, Time 44 (Oct 31, 1988) (recounting how the Dukakis-Bush presidential race marked the beginning of soft-money fundraising); Research and Policy Committee of the Committee for Economic Development, *Investing in the People's Business: A Business Proposal for Campaign Finance Reform* 23–25 (CED 1999) (detailing the origins and growth of soft-money fundraising).

140 See Part IV.A.

141 *Happy Corporations*, NY Times at 8 (cited in note 132).

To the extortion thesis one might reply that it does not provide a total explanation for the Tillman Act's enactment. Admittedly there must have been some political entrepreneurship at work, and this is consistent with the evidence adduced in Part II.D.1. Indeed, accepting a role for political entrepreneurship is necessary to explain why legislators, who had been the principal beneficiaries of the rent extraction discussed above, did in fact enact the Tillman Act. Senator Tillman and the Act's other supporters capitalized on the political opportunity created by the level of political extortion having reached something of a popular "outrage constraint"[142] after the presidential election of 1904. Still, the anti-extortion account does fill some important gaps in the traditional political entrepreneurship view. Most notably, the extortion thesis helps explain the porousness of these laws. It is one thing for corporate leaders to acquiesce in the closing of the most obvious avenues of political extortion in the wake of systematic assessments and rampant political interventions. It would have been quite another to expect them to stand by if the statutes would have closed corporations off from the market for legislation entirely.

* * * * *

The foregoing analysis of the political economy of the longstanding discrimination against corporate political speech suggests that despite the incoherence of most of the conventional justifications for section 441b and its state counterparts, these statutes may well be grounded in sound policy concerns. As Fred McChesney has explained, "Even if politicians eventually allow themselves to be bought off, their minatory presence reduces the expected value of entrepreneurial ability and specific-capital investments."[143] This, however, raises a new question: if the statutes do indeed serve a function that is consistent with maximizing shareholder welfare, what is the pertinence of Delaware's not having one?

III. CORPORATE POLITICAL SPEECH AND DELAWARE

This Part explores the relevance of the state law analogues of section 441b—and the fact that Delaware is among the minority of states that does not discriminate against corporate political speech[144]—for the debate over the wisdom of corporate law federalism. Although section 441b applies to all state-chartered corporations, regardless of their state of incorporation, it does so only with regard to their participation in federal elections.[145] The

---

142 Compare Lucian Arye Bebchuk, Jesse M. Fried, and David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U Chi L Rev 751 (2002).

143 McChesney, *Money for Nothing* at 33 (cited in note 13).

144 See note 169.

145 2 USC § 441b.

participation of state-chartered corporations in state elections is regulated only by the local election law of the relevant state. Thus, even though the law of the state in which the donation is made rather than the law of the state in which the corporation is chartered governs the legality of state-level corporate donations,[146] state election law may nonetheless have an effect on the decision where to incorporate. The local regulation of corporate political speech is a relevant consideration in reckoning the responsiveness of local legislators to corporate needs.

Part III.A outlines the history of the perennial debate over corporate regulatory competition and situates the analysis of this Article within that debate. Part III.B then assimilates into the corporate regulatory competition debate the McChesney economic model of regulation as applied in this Article to the question of corporate political speech. More specifically, Part III.B contends that the political economy of the ongoing discrimination against corporate political speech and the plausible public interest justifications for that discrimination offered above are consistent with Delaware's not discriminating against corporate political speech. Part III.B also suggests that this analysis supplements the traditional "credible commitment" explanation for the durability of Delaware's dominance in the market for corporate charters. Finally, Part III.C contends that the unique institutional features of the political economy of Delaware identified in Part III.B result in a total social welfare gain.

A. The Incorporation Debate

There is a rich literature exploring the question of why most large firms incorporate in Delaware.[147] The early view, championed most promi-

---

> It is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

146 For the reasons discussed in Part II.B, any state that attempted to constrain the out-of-state political speech of firms incorporated within it would be disadvantaged in the competition for corporate charters.

147 See, for example, Romano, 8 Cardozo L Rev 709 (cited in note 14); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 Harv L Rev 1437 (1992); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del J Corp L 885, 903 (1990); Romano, 1 J L, Econ, & Org 225 (cited in note 14); Melvin Aron Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U Miami L Rev 187 (1983); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporate Law*, 76 Nw U L Rev 913 (1982); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J Legal Stud 251 (1977); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L J 663 (1974).

nently by Professor William Cary, was that the competition between the states to grant corporate charters led to a "race to the bottom" in state corporate law. In the end, the argument goes, because Delaware offered managers the corporate law most conducive to exploiting investors, managers incorporated in Delaware in order to facilitate the transfer of value from shareholders to themselves. In return, Delaware reaped the benefits of increased tax and licensing revenues.[148]

Shortly thereafter, market-oriented scholars beginning with then-Professor Ralph Winter challenged the intellectual underpinnings of Cary's vision.[149] As Frank Easterbrook and Daniel Fischel put it, "how could states' competition to please managers be the only well-functioning market?"[150] Managers also compete in the market for corporate control and the market for capital. Their success in both will, in significant measure, be determined by their ability to navigate the firm successfully in the market in which the firm sells its products. Therefore, to keep the cost of capital down, which facilitates the firm's competitiveness in the product market, and to keep the firm's stock price high, which facilitates the managers' competitiveness in the market for corporate control, managers would choose to incorporate in the state that provided the optimal bundle of shareholder protective law. In other words, the demand function for corporate law represents the aggregation of shareholder rather than managerial preferences. So the fact that most large publicly traded corporations chose Delaware meant that Delaware provided the most efficient corporate law.

To say that competitive forces will result in optimal state law is a strong thesis, however—one that has been embarrassed somewhat by the proliferation of state antitakeover laws.[151] But the thesis of the "race to the top" scholars may be recharacterized as suggesting that the competition between states for incorporations pushes the states towards law that benefits

---

148 Cary, 83 Yale L J 663 (cited in note 147).

149 Winter, 6 J Legal Stud 251 (cited in note 147).

150 Easterbrook and Fischel, *Economic Structure of Corporate Law* at 213 (cited in note 11).

151 See Lucian Arye Bebchuk and Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 Va L Rev 111, 118 (2001) (noting the increase in state laws that permit use of defensive tactics by incumbent management to stymie takeovers); Lucian Arye Bebchuk and Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 Colum L Rev 1168, 1187 (1999); Romano, 8 Cardozo L Rev at 726–28 (cited in note 14); Romano, 1 J L, Econ, & Org at 265–66 (cited in note 14). Still, Delaware's sluggish adoption of a considerably weaker statute than average suggests that the competition between the states does push towards shareholder-beneficial law. Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 Theor Inq in L 387, 529–37 (2001); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 Fordham L Rev 843, 855–59 (1993); Romano, 8 Cardozo L Rev at 730–31 (cited in note 14); Daniel R. Fischel, *From* MITE *to* CTS*: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading*, 1987 S Ct Rev 47, 68–71; Roberta Romano, *The Political Economy of Takeover Statutes*, 73 Va L Rev 111, 141 (1987). Consider also the story of how institutional investors in large Pennsylvania corporations forced widespread opting-out of Pennsylvania's rigid antitakeover law. Romano, 2 Theor Inq in L at 535–37; Romano, 61 Fordham L Rev at 858–59; Leslie Wayne, *Many Companies in Pennsylvania Reject State's Takeover Protection*, NY Times A1 (July 20, 1990).

shareholders.[152] In that formulation, as a matter of theory, the advocates of the race to the top appear to be the winners.[153] To borrow Judge Winter's articulation, if the competition between the states for corporate charters has not led to a "race" for the top, then it has at least led to "a leisurely walk" in that direction.[154] Moreover, so far as any of this is empirically verifiable, "The data are . . . most consistent with Winter's hypothesis of the efficacy of competition."[155] Delaware corporate law appears to improve firm value.[156]

Still, the market for corporate charters, like virtually all markets, is imperfect, and not only because of the agency between managers and shareholders that has been the principal focus of most of the first generation of regulatory competition scholarship.[157] Regardless of one's take on the Cary/Winter debate about how well market forces align managers' and shareholders' interests, Delaware's durable corporate law leadership is not fully explainable by the attractiveness of its law to managers one way or the other. Put another way, whether managers select Delaware because its law permits them to transfer value from shareholders to themselves, or because its law favors shareholders and therefore reduces the cost of capital, there must be other reasons apart from the content of its code that explain Delaware's continuing dominance. For other states have attempted to mimic Delaware's corporate code,[158] and although they have attracted a nontrivial number of reincorporations, they have not substantially lessened Delaware's preeminence.[159] So various commentators have pointed to Dela-

---

152 Fischel, 1987 S Ct Rev at 70 (cited in note 151) (suggesting that "competition among states creates a powerful tendency for states to enact laws that operate to the benefit of investors").

153 Even Lucian Bebchuk has conceded that "state competition produces a race for the top with respect to some corporate issues." Bebchuk, 105 Harv L Rev at 1440 (cited in note 147). See also id at 1457; Macey and Miller, 65 Tex L Rev at 481 (cited in note 90) ("[T]he corporate federalists convincingly refute the implicit assumption of the reformist theory that legal rules which enhance the discretion of managers inevitably harm the welfare of shareholders.").

154 Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 Colum L Rev 1526, 1529 (1989) ("In fact, the history of state antitakeover statutes may support the view that the race to the top is a leisurely walk.").

155 Romano, 61 Fordham L Rev at 848–49 (cited in note 151). See also Romano, 2 Theor Inq in L at 494–507 (cited in note 151); Romano, 8 Cardozo L Rev at 732–37 (cited in note 14).

156 See generally Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J Fin Econ 525 (2001).

157 See, for example, Romano, 8 Cardozo L Rev at 752–53 (cited in note 14).

158 See, for example, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U Cin L Rev 1061, 1067–68 (2000); Macey and Miller, 65 Tex L Rev at 488 (cited in note 90); Romano, 1 J L, Econ, & Org at 246 (cited in note 14) (referring to Nevada as the "Delaware of the West").

159 See Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 Del J Corp L 965, 1011 (1995) ("Delaware remains the preeminent state for incorporation."). See also <http://www.state.de.us/corp/index.htm> (visited Sept 25, 2001) ("More than 308,000 companies are incorporated in Delaware including 60 percent of the Fortune 500 and 50 percent of the companies listed on the New York Stock Exchange."); Lucian Arye Bebchuk and Alma Cohen, *Imperfect Competition and Agency Problems in the Market for Corporate Law* table 2, working paper (2001), available online at <http://www.law.uchicago.edu/lawecon/index.html> (visited May 5, 2002). But see Marcel Kahan

ware's credible commitment to continue to service corporate needs,[160] its proficient judiciary,[161] the learning and network externalities growing out of the accumulation of experience with Delaware law,[162] and the disincentive for other jurisdictions to innovate stemming from the ease with which Delaware could copy that innovation.[163] Both the learning and network externalities phenomenon and the ability of Delaware to copy other states' innovations, in particular, have been urged as bases for imperfection in the market for corporate charters.[164] In this search for additional reasons for Delaware's persistent prominence, however, scholars have not explored Delaware's regulation of corporate political speech and the comparatively weaker position of its legislators to issue extortive threats as an integral component of its credible commitment to continue serving corporate needs.

B. Corporate Political Speech and the Credible Commitment

The traditional account of Delaware's credible commitment, which is most closely associated with Professor Roberta Romano, focuses on Delaware's relative dependence on franchise tax revenue as well as its extensive

---

and Ehud Kamar, *The Myth of State Competition in Corp orate Law*, working paper (2002), available online at <http://www.law.berkeley.edu/institutes/law_econ/workingpapers/PDFpapers/kamar_spr02.pdf> (visited May 3, 2002) (suggesting that what exists in reality is a far cry from the vigorous state competition that the literature depicts). On managerial perceptions of differences (or lack thereof) across jurisdictions, see Romano, 1 J L, Econ, & Org at 269–70, 278 (cited in note 14).

160 Romano, *Genius of American Corporate Law* at 37–38 (cited in note 14) ("Delaware's preeminence in the corporate charter market results from its ability to resolve credibly the commitment problem in relational contracting."); Romano, 1 J L, Econ, & Org at 273–81 (cited in note 14); Romano, 8 Cardozo L Rev at 721–24 (cited in note 14).

161 Romano, 1 J L, Econ, & Org at 276–78 (cited in note 14). See also Fisch, 68 U Cin L Rev 1061 (cited in note 158); Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw U L Rev 542, 590 (1990). This is usually a reference to the Delaware Chancery Court, 75 percent of whose docket consists of corporate law cases. Alva, 15 Del J Corp L at 903 (cited in note 147).

162 See Marcel Kahan and Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 Va L Rev 713, 763–64 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 Va L Rev 757, 841–47 (1995).

163 Bebchuk and Ferrell, 87 Va L Rev at 154–55 (cited in note 151). Delaware is quick to copy successful innovations, William J. Carney, *The Production of Corporate Law*, 71 S Cal L Rev 715, 741–42 (1998) ("Delaware is not the first mover on most corporate law changes, but a quick follower of successful innovations."), though not innovations that stymie takeovers, Romano, 2 Theor Inq in L at 531–32 (cited in note 151) ("[I]n contrast to its position as an innovator of corporation code provisions, Delaware has persistently been a laggard behind other states in the takeover statute context.").

164 On the latter, see Bebchuk and Ferrell, 87 Va L Rev at 154–55 (cited in note 151):

> Consider the decision of Montana whether to make a major commitment to developing a better takeover regime with the attendant judicial and legal infrastructure that would be a necessary prerequisite. Montana might reason that if it develops such a regime and makes the necessary investments, then Delaware might just match these developments.

For a general discussion of the former, see Marcel Kahan and Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 Cornell L Rev 1205 (2001); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum L Rev 1908 (1998). But see Romano, 2 Theor Inq in L at 507–26 (cited in note 151).

and sunk investment in legal and judicial capital.[165] The idea is that this dependence and investment is pledged as a hostage, as it were, to signal a serious commitment to maintain a high-quality corporate code.[166] But this account represents an oversimplification of the political process. Individual legislators cannot fully internalize the benefits of increased tax revenues, which are in effect a public good,[167] and this is true even if the state is small and increasing revenue without a corresponding increase in local taxes tends to favor the reelection of incumbents. Yet much of the existing literature simply assumes that the behavior of the relevant individual lawmakers will be shaped by the collective state interest in attracting incorporations.[168] This section assimilates the McChesney economic model of regulation into the corporate regulatory competition debate. In so doing, this section further develops the existing literature's application of the traditional model. The aim is to offer a more nuanced approach to evaluating the comparative advantage in the competition for corporate charters provided by Delaware's unique political economy.

The starting point is the observation that the extortion-based political economy of the Tillman Act and its state analogues offered earlier is consistent with Delaware's not similarly discriminating against corporate political speech.[169] Extortive threats by Delaware legislators against firms with their

---

165 See Romano, 1 J L, Econ, & Org at 273–81 (cited in note 14); Romano, 8 Cardozo L Rev at 721–24 (cited in note 14); Romano, *Genius of American Corporate Law* at 37–44 (cited in note 14).

166 Romano, 1 J L, Econ, & Org at 235–36, 240–41 (cited in note 14) (stating that "these states are hostages to their own success" and producing data to support this proposition); Romano, *Genius of American Corporate Law* at 38–39 (cited in note 14). For a general discussion, see Oliver E. Williamson, *The Economic Institutions of Capitalism* 163–205 (Free Press 1985).

167 See Fischel, 1987 S Ct Rev at 69 (cited in note 151) ("From the perspective of individual state legislators, increased revenue from franchise taxes is something of a public good."); William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J Legal Stud 303, 308 (1997) ("Legislators will face a trade-off between increasing franchise fee revenues by attracting and retaining corporate chartering revenues with a low-cost statute free of interest group deals, on the one hand, and increasing political support from interest groups, on the other.").

168 Professor Fischel has made this observation about the literature generally, see Fischel, 1987 S Ct Rev at 69 (cited in note 151), and Professor Coffee has made a similar observation regarding Professor Romano in particular, John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend toward De Facto Federal Minimum Standards*, 8 Cardozo L Rev 759, 761–62 (1987), though elsewhere Romano has embraced an interest-group-based approach. See, for example, Romano, 2 Theor Inq in L at 533–34 (cited in note 151); Romano, 73 Va L Rev at 122–37 (cited in note 151). Still, the assumption animates much of the literature, see, for example, Bebchuk, 105 Harv L Rev at 1454 (cited in note 147) ("[T]he appropriate assumption is that a state's interest in attracting incorporations shapes the behavior of the individuals actually involved in the state's lawmaking process."), though not all of it, see, for example, Carney, 26 J Legal Stud 303 (cited in note 167).

169 Note, however, that to say that there is no discrimination against corporations is not to say that there are no limits on them. The same contribution and expenditure rules that apply to anyone else in Delaware apply to corporations as well. See 15 Del Code Ann § 8023 (1999) (governing independent expenditures); 15 Del Code Ann § 8010 (1999) (governing contributions to candidates). See also note 3. So it would perhaps be better to say that in Delaware, corporations face a more even playing field than, say, on the federal level. Corporations in Delaware, like natural persons, need only identify themselves as the sponsor of an independent expenditure; and corporations may make contributions to political campaigns in the same amounts as natural persons. In contrast, corporations may make no contributions

physical assets elsewhere but that are incorporated in Delaware are less credible than similar extortive threats by legislators in other states. Credible extortive threats require independent alternative consumers of legislation,[170] and with respect to corporate law, Delaware legislators have few alternative interest group sponsors.[171] On the federal level and in most other states, in contrast, there are numerous interest groups that regularly compete with managers on corporate law issues, perhaps most importantly labor.[172] Thus, just as the lack of competing lobbies in Delaware means that investors and managers need not fear efforts by others to obtain legislative rents at their expense through the enactment of private interest provisions in the corporate code (the traditional economic model of regulation),[173] the lack of competing lobbies in Delaware means that investors and managers need not worry about extortive ultimatums by Delaware politicians either (the McChesney model). In New York, however, not only is there exposure to rent seeking by labor unions in the form of, say, large-shareholder statutory liability for employee wages,[174] but there is also exposure to rent extraction by politicians in the form of threats to enact such provisions.[175] All else being equal, Delaware therefore offers a friendlier environment. Managers may directly agitate for amendments to the corporate code without exposure to either traditional rent seeking by other lobbies or McChesney-style rent extraction by politicians.

In reply one might argue that if Delaware legislators have nowhere else to turn, they will focus their rent extraction on corporations. But such efforts would be hampered by the lack of leverage stemming from the absence of alternative interest group patrons. This contrary story is also incon-

---

or even independent expenditures in connection with federal elections. 2 USC § 441b (1994). The relative effect of the generally applicable contribution limit in Delaware contained in 15 Del Code Ann § 8010(a), moreover, is tempered by 15 Del Code Ann § 8010(b), which imposes relatively narrow caps on the ability of political parties to aid Delaware candidates. The only other relevant provision in Delaware is 15 Del Code § 8012(e) (1999), which is something of a veil-piercing rule. Corporate donations will be charged against the individual contribution limits of any shareholder owning in excess of 50 percent of the company's stock.

170 See McChesney, *Money for Nothing* at 38–41 (cited in note 13) (discussing different forms of political credibility and political opportunism).

171 See Coffee, 8 Cardozo L Rev at 762–63 (cited in note 168) ("Another distinctive fact about Delaware as a jurisdiction is the relative absence of countervailing lobbies."); Macey and Miller, 65 Tex L Rev at 490 (cited in note 90).

172 As Professor Yadlin observes, the popular voting power of the members of these lobbies adds to their power and to the credibility of a legislative threat to align with their interests. Yadlin, 69 U Chi L Rev at 1174–76 (cited in note 80).

173 See Coffee, 8 Cardozo L Rev at 762–63 (cited in note 168); Carney, 26 J Legal Stud at 308 (cited in note 167).

174 NY Bus Corp L § 630 (McKinney 1986). See Coffee, 8 Cardozo L Rev at 762–63 (cited in note 168).

175 That the movement to restrict direct corporate campaign contributions first began in New York and on the federal level—and that it was in these jurisdictions that corporate interventions at the turn of the century were at their most massive—lends further support to the anti-extortion basis for the statutes suggested in Part II.

sistent with Romano's hostage analysis. Once again the traditional and McChesney economic models of regulation converge with mirror-image analyses. Just as Delaware lawmakers "risk[ ] killing the proverbial goose that laid the golden egg" by adopting too much private interest law,[176] they would similarly risk the incorporation business by engaging in extortive ultimatums—and Delaware lawmakers take a uniquely long-term perspective on the necessity of preserving the state's incorporation business.[177] Moreover, even if corporate law scholars and sophisticated investors can articulate good reasons for Delaware's continued corporate law dominance, Delaware nevertheless faces an ongoing potential popular legitimacy problem. A Delaware campaign donation frenzy—whether sparked by traditional interest group rent seeking or by McChesney-style political rent extraction—risks giving popular salience to the question of the propriety of Delaware's ongoing corporate law hegemony and thus risks a consequent increased possibility of federalization.[178]

Alternatively, against this one might argue that there are competing interests in Delaware, such as its legal community.[179] But the core interest of the Delaware bar is in preserving Delaware as the dominant place of incorporation.[180] Institutional investors, too, are powerful. But their interest in Delaware legislation is similarly tied to the ability of Delaware lawmakers to keep large corporations incorporated there, and the selling of their shares will often be a sounder strategy towards change than lobbying a state legislature. In short, "satellite industries" cannot provide extortive leverage, because their Delaware orbit is a function of the strength of Delaware's gravitational pull on out-of-state firms.[181]

---

176 Macey and Miller, 65 Tex L Rev at 505 (cited in note 90) (noting this constraint on Delaware in the related context of its willingness to placate the lawyer lobby). See also Carney, 26 J Legal Stud at 308 (cited in note 167) ("Delaware faces high elasticity of demand for efficient corporate laws and relatively low elasticity of demand for private benefits, except from corporate lawyers. Under these conditions, Delaware will attempt to maximize the chartering of foreign enterprises, subject to provision of some benefits to corporate lawyers."); Coffee, 8 Cardozo L Rev at 764 (cited in note 168) (observing that private-interest lawmaking in Delaware is "subject to the obvious limitation that, if the Delaware law were made unattractive to corporations, the corporate migration to Delaware will end").

177 See, for example, Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough?: A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 Cornell L Rev 1257, 1268–71 (2001).

178 Compare Coffee, 8 Cardozo L Rev at 764 (cited in note 168) (observing that in the 1970s, when federal intervention "was a real prospect," Delaware lawmakers responded accordingly). See also Fischel, 76 Nw U L Rev at 923–45 (cited in note 147) (suggesting that the Delaware courts responded to Cary's original criticism of Delaware).

179 See Carney, 26 J Legal Stud at 306–07 (cited in note 167) ("Two interest groups have dominated the development of American corporate law—corporate lawyers and corporate managers.").

180 See Romano, 2 Theor Inq in L at 534 (cited in note 151); Macey and Miller, 65 Tex L Rev at 505 (cited in note 90); Coffee, 8 Cardozo L Rev at 764 (cited in note 168). See also Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 Del J Corp L 999, 1007–17 (1994).

181 Coffee, 8 Cardozo L Rev at 762–64 (cited in note 168).

In Delaware, moreover, with the possible exception of takeover statutes—it is home to both potential bidders and targets—corporate demand for legislation is more or less homogeneous in the weak sense that it is limited to an interest in corporate law. This is not to say that all managers of Delaware corporations want precisely identical law. In fact, we know that they do not, as evidenced by the move towards a highly enabling and permissive code full of default rules.[182] Rather, the point is that Delaware is not in the business of regulating the ongoing business activities of the firms it charters, so a Delaware legislator cannot pit one set of managers against another by threatening activity regulation.[183] Importantly, the overwhelming majority of firms incorporated in Delaware have their operating units and physical assets elsewhere. Hence their interest in Delaware lawmaking extends only to the extent of its corporate law, and the reach of Delaware with regard to these companies likewise extends only to the regulation of their internal affairs.[184] This means that Delaware is not a likely forum for lobbying by firms for legislation that transfers wealth between them. To repeat, Delaware's contact with most firms is limited to the provision of corporate law. In contrast, a federal legislator who sits on a committee that superintends, say, the telecommunications industry, could pit MCI against AT&T and hold up both for donations. Thus, even though in a typical jurisdiction from a corporate perspective the Tillman Act and its state law counterparts might be desirable because they partially shield corporations from rent seeking by competitors and rent extraction by politicians,[185] that dynamic is not present in the unique political environment of Delaware. Similar shielding in Delaware is therefore unnecessary. Moreover, in the absence of a political dynamic that requires shielding from the rent seeking of competitors and rent extraction by politicians, corporations do better without discrimination against corporate political speech. As discussed below, this facilitates lobbying for the occasional necessary amendment to the corporate code.[186]

Against this, Professor Omri Yadlin suggests that, even if Delaware is not in the business of activity regulation, the prior paragraph's weak assumption of homogeneity is false even within the demand for corporate law. Hence, Professor Yadlin suggests that Delaware legislators could attempt to "divide and conquer" by introducing amendments on divisive issues of corporate law.[187] But that threat is more hypothetical than real. There is a strong legislative norm in Delaware in favor of deference to the Corporate Law Section of the Bar Association,[188] and amendments to the Delaware General

---

182 Yadlin, 69 U Chi L Rev at 1179–80 (cited in note 80).

183 See McChesney, *Money for Nothing* at 55–66 (cited in note 13).

184 Compare Macey and Miller, 65 Tex L Rev at 490 (cited in note 90).

185 See Parts II.B and II.D.

186 See Part III.C.

187 Yadlin, 69 U Chi L Rev at 1176–80 (cited in note 80).

188 Alva, 15 Del J Corp L at 904–16 (cited in note 147); Andrew G.T. Moore, II, *State Competition*,

Corporation Law are recommended only "when there is a demonstrable consensus in the corporate community that such changes are advisable."[189] It is therefore likely that none of Professor Yadlin's hypothetical divide-and-conquer proposals would ever get before the legislature. In effect, issues of Delaware corporate law for which there is no strong consensus—the sort of issues that would invite rent seeking and political rent extraction—are punted to the Delaware courts. This further reduces the potential for both traditional rent seeking and McChesney-style political rent extraction.[190]

Moreover, the constitutional requirement in Delaware of a two-thirds vote of both houses of the legislature to amend the General Corporation Law also diminishes the credibility of extortive threats generally and the likelihood of a divide-and-conquer strategy in particular.[191] In conjunction with the strong norm of deference to the Corporate Law Council of the state bar, that requirement cuts the legs out from under an extortive threat made by an individual or by a small group of legislators, because it ensures that the status quo is relatively stable.[192] True, the two-thirds requirement might make more credible a threat to hold out once legislation is on the precipice of passage.[193] But such an ex post holdout threat is less likely than simple ex ante extortion, because the ex post threat is highly visible and subject to sanction in internal Delaware politics.[194] Furthermore, as an empirical matter, the ex post holdout problem has not materialized. Delaware has had no trouble making swift amendments to its corporate code.[195]

Panel Response, 8 Cardozo L Rev 779, 780–81 (1987). See also Romano, 2 Theor Inq in L at 534 (cited in note 151); Romano, 73 Va L Rev at 141 (cited in note 151).

189 Strine, 86 Cornell L Rev at 1268–70 (cited in note 177) ("In areas where a consensus emerges . . . Delaware's Corporate Law Council will generally draft and obtain swift passage of legislative amendments. When there is no consensus, however, they will not."). Indeed, this norm further curtails legislative avenues for extortion by reducing the likelihood of committee hearings and other legislative functions that facilitate shakedowns. Compare McChesney, *Money for Nothing* at 39–40 (cited in note 13).

190 Fisch, 68 U Cin L Rev at 1092–94 (cited in note 158); Macey and Miller, 65 Tex L Rev at 500–02 (cited in note 90). Of course, this requires a high level of trust in the quality of the Delaware judiciary, a point made by Professor Yadlin, 69 U Chi L Rev at 1186 (cited in note 80), and explored in greater detail by Professor Fisch, 68 U Cin L Rev at 1068 (noting Delaware's "specialized and expert judiciary which provides both rapid and high quality litigation decisions").

191 Del Const Art IX, § 1 ("No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly."). See Romano, 1 J L, Econ, & Org at 241–42, 273–79 (cited in note 14); Romano, 8 Cardozo L Rev at 721–22 (cited in note 14).

192 See Macey and Miller, 65 Tex L Rev at 489 (cited in note 90) ("[C]orporations need not fear that Delaware will change its perspective on corporate law whenever there are small changes in the political complexion of the state legislature.").

193 Yadlin, 69 U Chi L Rev at 1186 (cited in note 80).

194 Compare id at 1185 (cited in note 80) (stating that Delaware has "a large constituency whose main interest is in expanding the number of firms incorporated in Delaware").

195 See Carney, 71 S Cal L Rev at 741–42 (cited in note 163) (noting that Delaware is "a quick follower of successful innovations"); Macey and Miller, 65 Tex L Rev at 489 (cited in note 90) ("At the same time, a blocking minority is unlikely to develop to stop needed changes in response to unforeseen

That Delaware corporations might still be subject to political rent extraction by legislators in the jurisdictions in which the corporation locates its operating units does not undermine this analysis. The claim here is not that incorporation in Delaware somehow insulates the corporation from political rent extraction everywhere. Rather, the claim is that with respect to corporate law, Delaware is desirable because it does not discriminate against corporate political speech and yet extortive ultimatums concerning corporate lawmaking are unlikely. Thanks to the internal affairs doctrine, the decision where to incorporate need not be tied to the decision where to locate the physical assets of the firm. So firms make the decision where to locate their operating units independently of the decision where to incorporate. The potential for legislative rent extraction thus becomes one of many relevant factors in each separate decision. Delaware's responsive corporate lawmaking process and its reduced likelihood of political rent extraction regarding corporate law are relevant and attractive considerations in favor of Delaware when making the incorporation decision.

C. The Social Welfare Effect

The foregoing analysis reveals a positive social welfare consequence of corporate law federalism. Occasional amendments to the relevant governing corporate code (highly enabling and permissive though it may be) are a necessary input for firms that assume the corporate form. The combination of few competing bidders and the failure to discriminate against corporate political speech lowers the cost of that input, if not by increasing the avenues through which it might be purchased, then by offering a jurisdiction in which reform may be sought without exposure to extortionate demands. Put another way, Delaware's political dynamic not only protects corporations from extortive threats, but it also increases the odds of successfully agitating for legislative changes to Delaware's corporate law without triggering a cascade of rent extraction. This is an appealing characteristic of Delaware, because from time to time legislative amendment to the corporate code will improve shareholder welfare. For an illustration, one need only think of *Smith v Van Gorkom* and section 102(b)(7) of the Delaware code.[196] In a sense, the debate over campaign finance laws may be viewed as an empirical question about the scope of rent extraction versus the informative value of lobbying activity. In Delaware, the informative value of lobbying activity appears to outweigh the potential costs of rent extraction.

---

conditions. The supermajority rules have not obstructed Delaware's ability to alter its law in response to changing circumstances."); Romano, 1 J L, Econ, & Org at 233–42 (cited in note 14). See also Strine, 86 Cornell L Rev at 1268–70 (cited in note 177).

[196] 488 A2d 858 (Del 1985); 8 Del Code Ann § 102(b)(7) (2001). See Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 29 Emory L J 1155, 1160 (1990).

True, the magnitude of this effect may be diminished by the practice of deference to the bar in corporate law matters, because that practice lessens the need to lobby the legislature directly. And as Professor Yadlin observes, the constitutional requirement of a two-thirds majority to amend the Delaware General Corporation Law might provide a countervailing force towards an increased price for legislative amendments.[197] But it remains true that initiating a revision to the Delaware General Corporation Law does not invite extortive ultimatums in the same way that it would in New York or in other more populous jurisdictions. Moreover, as a practical matter, the likelihood of Delaware legislators using the two-thirds requirement as leverage to increase the price of corporate legislation is small. When there is "demonstrable consensus in the corporate community" in favor of an amendment, it is recommended by the bar and swiftly enacted.[198]

The more troublesome objection to this analysis is that in light of the shareholder/manager agency problem, Delaware's unique setup might facilitate management's ability to obtain law detrimental to shareholder welfare. An apposite analogy would be to lowering the price of burglary tools by making that market more efficient. There are, however, at least three problems with this argument. First, to premise a social welfare analysis on the assumption that regulatory competition results in law that harms shareholders is to assume significant failure in the capital markets and runs contrary to the empirical studies showing otherwise. As Professor Robert Daines has recently shown, Delaware law improves firm value.[199] There remain, of course, arguments against accepting this implication of Daines's and related empirical studies—for example, the argument that incorporating in Delaware might improve firm value because of network effects or other factors unrelated to Delaware's code.[200] But none "refute[s] the empirical findings that Delaware law and, hence, competition for charters have provided shareholders with economic benefits."[201]

Second, the ability of managers to make direct donations to Delaware legislators without exposure to extortive ultimatums has not, as a historical matter, led to managerial hijacking of Delaware's legislative process to the detriment of shareholders. Takeover statutes provide a good case study, because those dubious of regulatory competition are especially fearful about excessive takeover protection.[202] In contrast to states like Connecticut, Massachusetts, and North Carolina, each of which enacted specific statutory

197 Yadlin, 69 U Chi L Rev at 1185 (cited in note 80).

198 Strine, 86 Cornell L Rev at 1268–70 (cited in note 177). See also text accompanying notes 188–89.

199 See Daines, 62 J Fin Econ at 555 (cited in note 156). See also Romano, 2 Theor Inq in L at 494–507 (cited in note 151).

200 See, for example, Bebchuk and Ferrell, 87 Va L Rev at 138–39 (cited in note 151); Kahan and Kamar, 86 Cornell L Rev at 1229 & n 104 (cited in note 164).

201 Romano, 2 Theor Inq in L at 507 (cited in note 151).

202 See text accompanying notes 235–237.

takeover impediments at the behest of the managers of a single local company,[203] there has been no comparable enactment in Delaware. In fact, with regard to statutory takeover protection generally, "Delaware has persistently been a laggard behind other states."[204] Thus the disciplining force of capital markets, the diversity of opinion on the takeover issue, the unwillingness of the Delaware bar to recommend amendments without "demonstrable consensus," and/or some confluence of these and other elements of Delaware's political economy appear not to have facilitated a deluge of pro-management legislation in Delaware,[205] and this despite the lack of discrimination against corporate political speech. The analogy to lowering the price of burglary tools, in other words, does not hold up. The experience thus far in Delaware suggests that its political economy—including the lack of discrimination against corporate political speech coupled with the unlikely prospect of political rent extraction—is amenable to swift enactment of amendments that promote shareholder welfare, but not to enactment of legislation designed to benefit management at the expense of shareholders.

Finally, even if competition between the states did push towards law detrimental to shareholder welfare (though both rigorous and casual empiricism regarding the Delaware experience suggests the contrary), it would still be in shareholders' best interests for the purchase of that law to be free from minatory legislators. Legislative extortion would only exacerbate the problem, because at some level the demand for corporate law is inelastic—it is necessary for any firm wishing to incorporate. No good comes from introducing a second set of faithless agents to the transaction. That would simply double the potential sources of agency costs to be borne by shareholders.

---

203 Robert M. Daines, *Do Classified Boards Affect Firm Value?: Takeover Defenses after the Poison Pill* at 10–12, working paper (2001) (on file with author) (Massachusetts: Norton Company); *First Union Is Seeking Change in State Law over Wachovia Deal*, Wall St J A10 (June 14, 2001) (North Carolina: First Union and Wachovia); Carrick Mollenkamp, *First Union Added by North Carolina with Fast New Law*, Wall St J B2 (June 14, 2001) (same); Floyd Norris, *Southern Levitation: Battling Banks' Shares Keep Rising*, NY Times C1 (July 27, 2001) (same); Romano, 73 Va L Rev at 122–37 (cited in note 151) (Connecticut: Aetna Insurance). For a general discussion, see Henry N. Butler, *Corporation-Specific Antitakeover Statutes and the Market for Corporate Charters*, 1988 Wis L Rev 365.

204 Romano, 2 Theor Inq in L at 531–32 (cited in note 151). As Vice Chancellor Strine has observed:

> [L]awyers from several states are presently marketing the fact that their state corporation laws allow "bulletpoof" antitakeover defensive measures, whereas Delaware's does not. Why has Delaware not responded in kind? . . . I would suggest that Delaware has not responded because self-interested Delawareans believe that a more balanced approach is essential to maintain their competitive advantage.

Strine, 86 Cornell L Rev at 1269 (cited in note 177) (footnote omitted).

205 See Romano, 2 Theor Inq in L at 533–34 (cited in note 151).

IV. EXTENSIONS AND IMPLICATIONS

This Part discusses the implications for three current policy debates of shifting the focus over corporate political speech from the shareholder/manager agency problem to the society/lawmaker agency problem. First, Part IV.A briefly discusses the current political debate about banning corporate (and other) soft-money donations.[206] Second, Part IV.B briefly discusses the current academic debate about issuer choice of law in securities regulation. Third, Part IV.C offers a comprehensive analysis of the current academic debate over whether to enact an optional federal corporate takeover law. This more comprehensive analysis may be viewed as a case study, as it were, in the application of this Article's analysis to other problems.

A. Soft-money Bans

The foregoing analysis suggests at least two related points for the current political debate about whether to ban corporate soft-money donations. First, protecting shareholders from managerial disloyalty is not a good policy justification for banning soft-money donations. The debate should focus instead on the impact, if any, of a soft-money ban on corporate rent seeking and political rent extraction.

Second, the foregoing analysis may help explain the counterintuitive recent endorsement by numerous corporate executives of a ban on corporate soft-money donations.[207] It may also help explain the similarly counterintui-

---

[206] Such a ban is at the core of the McCain-Feingold bill as well as the recently enacted Shays-Meehan bill. See Bipartisan Campaign Reform Act of 2001 ("McCain-Feingold"), S 27, 107th Cong, 1st Sess (Jan 22, 2001), in 147 Cong Rec S 2630–56 (Mar 21, 2001); Bipartisan Campaign Reform Act of 2001 ("Shays-Meehan"), HR 2356, 107th Cong, 2d Sess (June 28, 2001), in 148 Cong Rec H 369–411 (Feb 13, 2002). The House passed the Shays-Meehan bill by a 240-189 vote. See 148 Cong Rec H 465–66 (Feb 13, 2002). The Senate passed the Shays-Meehan bill by a 60-40 vote. See 148 Cong Rec S 2161 (Mar 20, 2002).

[207] See Sanders, *Many Businesses Root for Reform*, LA Times at C1 (cited in note 47) ("[P]rivately, many corporations and their lobbyists—even if they now donate millions a year—are rooting for the McCain-Feingold bill" that they hope will "rescue them from an aspect of the fund-raising treadmill that they particularly resent: 'soft-money' donations to political parties."); Don Van Natta, Jr., *Executives Press for Political Finance Change*, NY Times A1 (Sept 1, 1999) (reporting that Senator Mitch McConnell, "one of the Senate's most ardent opponents of a bill that would overhaul the campaign finance system," was conducting a letter-writing campaign to business executives who supported the bill to attack their views); Don Van Natta, Jr., *Executives Seeking Caps on Donations Stand Strong*, NY Times A22 (Oct 5, 1999) (explaining that Senator McConnell's letter-writing campaign against business executives who support campaign finance reform legislation backfired and, instead, stirred support in the business community for this legislation); John B. Judis, *Whatever Happened to Noblesse Oblige?*, New Republic 17 (Mar 27, 2000) (discussing business executives' support of Senator McCain's proposal for ending soft-money contributions to political campaigns). Research and Policy Committee of the Committee for Economic Development, *Investing in the People's Business* at 4, 33–35 (cited in note 139), urges this reform, and it has been endorsed by a nontrivial group of corporate executives. See Committee for Economic Development, *Campaign Finance Reform: Investing in the People's Business*, available online at <http://www.ced.org/projects/cfr.htm> (visited May 5, 2002) (recommending an elimination of soft money); Committee for Economic Development, *Endorsers of the CED Cam-*

tive announcement by a number of large corporations, including General Motors, Ford Motors, Monsanto, Time Warner, Dell, Cisco, and IBM, that they will forbear from making soft-money donations.[208] Massive soft-money donations were largely unknown before the 1988 Bush-Dukakis presidential election.[209] Hence, it is not surprising that, several election cycles later, managers are beginning to push towards having them banned and the argument includes an anti-extortion component. Indeed, there are strong parallels between the movement to ban soft-money today and the 1907 enactment of the Tillman Act. As detailed earlier, the Tillman Act was enacted in a burst of political entrepreneurship in the wake of publicly salient and rampant corporate interventions in the presidential election of 1904. These interventions represented an exaggerated application of a fundraising technique developed less than twenty years earlier. Similarly, McCain-Feingold and Shays-Meehan owe their passage in large part to political entrepreneurship in the wake of publicly salient and rampant corporate soft-money donations that represent an exaggerated application of a fundraising technique more or less invented in 1988.

Both the collective action dynamic identified in Part II.B and the extortion dynamic identified in Part II.D are discernible in the rhetoric of today's soft-money debate. Evidence of the former includes statements by managers that "[m]ost business today would prefer not to give. But there's not going to be unilateral disarmament."[210] With regard to the latter, consider the following excerpt from an editorial by Edward Kangas, then the Global Chairman of Deloitte Touche Tohmatsu, published in 1999 by the *New York Times*:

> What has been called legalized bribery looks like extortion to us. . . . I know from personal experience and from other executives that it's not easy saying no to appeals for cash from powerful members of Congress or their operatives. Congress can have a major impact on businesses. . . . The threat may be veiled, but the message is clear: failing to donate could hurt your company.[211]

---

paign Finance Reform Proposal, available online at <http://www.ced.org/docs/endorsers.pdf> (visited May 5, 2002) (listing 313 DEC trustees and their colleagues who endorsed the CED's Business Proposal for Campaign Finance Reform).

208 See sources cited in note 47.

209 See sources cited in note 139. See also Eskridge, Frickey, and Garrett, *Legislation* at 248–49 (cited in note 39) (detailing soft-money spending in recent elections).

210 T. Christian Miller, *Business Efforts to Ban 'Soft Money' Turn Squishy Politics; The Movement to Stop Unregulated Contributions to Political Parties Falters*, LA Times A4 (Oct 16, 2000). See also Edward A. Kangas, *Soft Money and Hard Bargains*, NY Times A27 (Oct 22, 1999) ("Increasingly, fundraisers also make sure you know that your competitors have contributed, implying that you should pay . . . to stay competitive.").

211 Kangas, *Soft Money*, NY Times at A27 (cited in note 210). See also Richard S. Dunham, *Campaign Finance Reform: Can Business Break the Logjam?*, Bus Wk 49 (Apr 5, 1999) (quoting Sara Lee CEO John H. Bryan as calling political fundraising "legal bribery").

Kangas's argument strongly implies that an extortion dynamic similar to that which helped prompt the Tillman Act is at work today. More generally, when evaluating modern proposals for campaign finance reform as remedies for the society/lawmaker agency problem, not only should the proposals' predicted effects on rent seeking (in the classic model) be considered, but so should the predicted effects on political rent extraction (in the McChesney model). Additional insight is available, in other words, from drawing on both traditional and modern learning on the economic theory of regulation.[212] Putting the effect, if any, of banning soft-money on rent seeking by interest groups to one side, the analysis of Part II suggests that an additional argument in favor of a corporate soft-money ban is that it would enhance shareholder welfare by making more difficult the extraction by legislators of large corporate soft-money donations. This argument, of course, is not a show-stopper. The market will eventually find a way to clear,[213] and the substituted approach may be even less desirable. Consider that the use of corporate PACs to evade the Tillman Act means that many corporate donations today are subject to fewer corporate governance checks than they would have been without the Tillman Act.[214] Still, analysis of the political economy of the venerable discrimination against corporate political speech helps illuminate additional considerations relevant to the current debate about whether to enact a ban on corporate soft-money donations.

B. Issuer Choice in Securities Regulation

There is a burgeoning scholarly debate over issuer choice of law in securities regulation.[215] In particular, several scholars have proposed changing the choice of law rule for securities transactions so that the parties could

---

212 Compare Strauss, 94 Colum L Rev at 1380–82 (cited in note 13); Strauss, 1995 U Chi Legal F at 152–55 (cited in note 13).

213 See McChesney, 6 Indep Rev at 359–61 (cited in note 13).

214 See text accompanying note 53.

215 See, for example, Romano, 2 Theor Inq in L 387 (cited in note 151); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L J 2359 (1998); Stephen J. Choi and Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S Cal L Rev 903 (1998); Stephen J. Choi and Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw J Intl L & Bus 207 (1996); Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 Cal L Rev 279 (2000); Merritt B. Fox, *The Issuer Choice Debate*, 2 Theor Inq in L 563 (2001); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 Va L Rev 1335 (1999); Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 Mich L Rev 696 (1998); Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 Mich L Rev 2498 (1997); Paul G. Mahoney, *The Exchange as Regulator*, 83 Va L Rev 1453 (1997); Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 Colum Bus L Rev 1; James D. Cox, *Regulatory Duopoly in U.S. Securities Markets*, 99 Colum L Rev 1200 (1999); Amir N. Lict, *Genie in a Bottle?: Assessing Managerial Opportunism in International Securities Transactions*, 2000 Colum Bus L Rev 51; *Sokol Colloquium: The Privatization of Securities Laws*, 41 Va J Intl L 517 (2001).

choose the law that would govern their transaction.[216] The basic idea, most clearly evident in Professor Roberta Romano's proposal, is to engender a securities law regulatory competition similar to that for corporate law. The underlying theory is that, just as shareholders have benefited from corporate law regulatory competition, investors would similarly benefit from a securities law regulatory competition.[217] Indeed, Romano has self-consciously embraced the analogy,

> because the interests and incentives in the two settings are similar: the object of protection of both regimes is the financial interest of investors, and under competition, investors' preferences will dictate the choice of regulator because insiders who require investment capital will bear the higher capital cost of an investor-unfriendly regime choice.[218]

Without getting embroiled in the details of the various proposals, there is an important insight for this debate to be found in Part III. For a securities law regulatory competition experiment completely to replicate the success of the corporate law experience, more will be needed than just a mandatory federal rule compelling a securities law equivalent to the internal affairs doctrine.[219] A state, presumably Delaware, will need to replicate the various institutional features of Delaware's corporate lawmaking process that ensure the rapid enactment of needed reforms without vulnerability either to classic rent seeking or to McChesney-style political rent extraction. Those features evolved over time, thanks to the natural competitive pressures of the market for corporate charters. The development of a similar market for securities regulation, however, was blocked by the 1933 and 1934 Acts.[220] So an important question is whether the institutional features of Delaware that keep many of the public choice legislative pathologies in check could develop in a securities law regulatory competition if one were initiated today.

This is not a trivial point. The high-stakes securities law equivalent of corporate takeover protection is class action securities fraud litigation. Therefore it should not be surprising that there is strong anecdotal evidence

---

216 Romano, 107 Yale L J at 2362–63, 2418–24 (cited in note 215); Choi and Guzman, 71 S Cal L Rev at 950 (cited in note 215). Professor Merritt Fox's proposal is nominally different, because his choice of law would depend on the nationality of the issuer. Fox, 97 Mich L Rev at 733 (cited in note 215). But the nationality of the issuer can be manipulated, so his proposal allows a "range of choice as well." Edmund W. Kitch, *Proposals for Reform of Securities Regulation: An Overview*, 41 Va J Intl L 629, 632–34 (2001).

217 See Romano, 107 Yale L J at 2361 (cited in note 215). See also Romano, 2 Theor Inq in L at 493 (cited in note 151).

218 Romano, 2 Theor Inq in L at 493 (cited in note 151).

219 Romano, 107 Yale L J at 2401–05 (cited in note 215).

220 Securities Act of 1933, Pub L No 22, 48 Stat 78, codified as amended at 15 USC §§ 77a et seq (1994); Securities Exchange Act of 1934, Pub L No 291, 48 Stat 881, codified as amended at 15 USC §§ 78a et seq (1994). See Kitch, 41 Va J Intl L at 637 (cited in note 216).

of substantial political rent extraction (in the McChesney model) and/or interest group rent seeking (in the traditional model) in connection with the most recent federal securities law reforms—the Securities Litigation Uniform Standards Act of 1998 and the Private Securities Litigation Reform Act of 1995.[221] It is similarly unsurprising that the same kind of evidence exists concerning California's contemporaneous Proposition 211, which would have revised California's blue sky laws.[222] Two points should be made here.

First, the potential upside to a securities law regulatory competition is substantial, not only because it may benefit investors for all the same reasons that corporate regulatory competition has benefited investors, but also because the public choice pathologies that Delaware has managed to minimize in corporate law appear to plague the current system of securities regulation. Opening the regulation of securities to jurisdictional competition creates the possibility of competitive forces pushing a jurisdiction towards the evolution of a political economy in which these pathologies are similarly minimized. Second, even though the potential benefits are high, the costs of the process by which the experiment would be put into place will likely be high as well. Consider the likely scope of the deadweight losses from the rent seeking and political rent extraction that would be prompted by any debate on the requisite federal implementing legislation. Because many of the relevant interest groups (such as the plaintiffs' bar and financial intermediaries) are now well organized, there is risk of their distorting any jurisdiction's efforts to replicate the salutary institutional features of Delaware's corporate lawmaking process—efforts that would be directed at stymieing their influence.

These problems need not be resolved here. The point is to flag them for future study. The benefits to shareholders of corporate regulatory competition are so clear as to make out a prima facie case for experimenting with a similar regulatory competition in securities law. But before moving

---

221 See Bill McAllister, *California Is Golden for Clinton; President Raises Money from High-Tech Industry, Rival Securities Lawyer*, Wash Post A29 (Sept 27, 1998); Leslie Eaton, *The Silicon Valley Gang*, NY Times D1 (June 11, 1998); Jeffrey Taylor, *Accountants' Campaign Contributions Are About to Pay Off in Legislation on Lawsuit Protection*, Wall St J A22 (Mar 8, 1995); Jeffrey Taylor, *Senate Clears Securities-Suit Curbs*, Wall St J A3 (June 29, 1995). On the reforms, see Securities Litigation Uniform Standards Act of 1998, Pub L No 105-353, 112 Stat 3227, codified in various sections of title 15 (2000); Private Securities Litigation Reform Act of 1995, Pub L No 104-67, 109 Stat 737, codified at 15 USC §§ 77a et seq (2000); Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 Cornell L Rev 1 (1998).

222 Bill Ainsworth, *Firms Chip in $500,000 to Beat 211*, Recorder 1 (Oct 4, 1996); Mark Simon, *How Tech Leaders Talk Politics*, SF Chronicle A19 (Nov 13, 1997); Elizabeth Corcoran, *High-Tech Executives Seek More Political Clout*, Wash Post G1 (July 4, 1997); Elizabeth Corcoran, *California Voters Reject Proposition 211; Silicon Valley Fought Measure Making Shareholder Fraud Suits Easier*, Wash Post D3 (Nov 7 1996). See also Painter, 84 Cornell L Rev at 38–39 (cited in note 221). On the proposition itself, see Retirement Savings and Consumer Protection Act, Prop 211, 1995-96 Reg Sess, 1996 Cal Legis Serv No 10, at A-20 (West) (defeated in general election of November 5, 1996).

towards that experiment, it will be worth giving attention to the political economy considerations relevant to the enactment of the requisite federal implementing legislation as well as the political economy of the underlying jurisdictional competition that would ensue.

C. Optional Federal Takeover Law

The foregoing analysis also sets up a strong criticism of Lucian Bebchuk and Allen Ferrell's recent proposal to enact a federal law of corporate takeovers.[223] This criticism holds even if the federal regime were optional, as they suggest it should be. The core of the Bebchuk and Ferrell proposal is an optional substantive federal takeover law coupled with a mandatory federal procedural law. Under the mandatory procedure, shareholders of all corporations could choose between the otherwise applicable substantive state takeover law regime and the optional substantive federal law. Making the substance of the federal law optional is ingenious, because the option answers the objection that a mandatory federal law would stifle innovation and more generally would preempt choice.[224] At the same time, making the shareholder choice procedure mandatory would in effect create a fifty-first regulatory regime that, at least so far as takeover law is concerned, would compete with the fifty states.[225] Hence, in Bebchuk and Ferrell's view, even if one were to disagree with their contention that their optional federal law is indeed superior to Delaware's, enactment of their proposal would be harmless. This last claim is their "so what?" defense: it allows them to reply with "so what?" to any argument that the substance of a federal regime will not be any better.[226]

The problem with their proposal is that it is accompanied by only "a brief look" at the relevant political economy considerations.[227] A closer look at those considerations as developed in this Article reveals a serious weakness in their analysis, one that answers their "so what?" claim. Despite the optional character of their proposal,[228] a closer look at the relevant political

223 Bebchuk and Ferrell, 87 Va L Rev at 113 (cited in note 151) ("[W]e identify a novel form of federal intervention in the regulation of takeovers—'choice-enhancing intervention'—that can address [the shortcomings of state takeover law].").

224 It does, however, open them to new criticisms other than those raised below, on which see Stephen J. Choi and Andrew T. Guzman, *Choice and Federal Intervention in Corporate Law*, 87 Va L Rev 961, 981–91 (2001).

225 The true number of competitors is of course much smaller, because the Model Business Corporation Act states share identical law. For a general discussion, see Carney, 71 S Cal L Rev 715 (cited in note 163) (detailing substantial corporate law uniformity across the states).

226 Bebchuk and Ferrell, 87 Va L Rev at 149–50 (cited in note 151) ("[C]hoice-enhancing intervention does not present the danger of imposing on shareholders arrangements even worse than those that state law currently mandates.").

227 Bebchuk and Ferrell, 87 Va L Rev at 117 (cited in note 151).

228 Professor Yadlin, 69 U Chi L Rev at 1188–90 (cited in note 80), argues that the proposal in effect is not optional.

economy considerations shows that there is still significant risk that it will diminish shareholder welfare.

Before addressing the weaknesses in their "brief look" at the relevant political economy considerations, however, it will be worthwhile first to consider more generally their rejection of the efficacy of state competition in general. "Whether state competition overall creates pressure to adopt good or bad regulation," write Bebchuk and Ferrell, "we would expect Delaware, the victorious state, to offer shareholders a somewhat better deal."[229] Thus, they write, "It might be that regulatory competition has pushed the states in a negative direction, with the victorious state, Delaware, being slightly better than the others."[230] What is more, they contend, no state has the proper incentives to compete with Delaware, because Delaware could easily copy any innovation.[231] Any state that tries will find itself merely serving as a stalking horse for improvements to Delaware law.

That Delaware law could be "slightly better than the others," however, is inconsistent with regulatory competition pushing "the states in a negative direction." Recall that the argument why competition between the states might lead to bad law is that the interests of the consumers of that law, managers, are not sufficiently aligned with the interests of their principals—shareholders.[232] Thus the suppliers of that law, the states (or, more accurately, the aggregation of all the individuals who are responsible for lawmaking within the state), would cater to the preferences of managers.[233] But if Delaware law is "slightly better than the others," then managers are choosing law that is in fact the best for shareholders of what is available. Why would Delaware offer managers law that is "slightly better" than that of the other states if managers did not in fact desire better law? To concede that Delaware's success is related to its offering law that is at least "slightly better than the others" is quite possibly to concede that there is at least a "leisurely walk" to the top.[234]

Of course Bebchuk and Ferrell would reply that they do not contend that there are no areas of corporate law in which regulatory competition pushes towards law that is beneficial for shareholders.[235] Rather, their argument is that in areas in which the divergence of interests between share-

---

229 Bebchuk and Ferrell, 87 Va L Rev at 138 (cited in note 151).

230 Id at 139.

231 See note 164.

232 See Part III.A.

233 Indeed, Bebchuk and Ferrell suggest that, "even if managers were to invest no resources in lobbying for favorable state takeover law, state takeover law would likely be attuned to their interests." Bebchuk and Ferrell, 87 Va L Rev at 158 (cited in note 151). See also Lucian Arye Bebchuk and Allen Ferrell, *Federal Intervention to Enhance Shareholder Choice*, 87 Va L Rev 993, 1003 (2001).

234 Compare Romano, 8 Cardozo L Rev at 752–53 (cited in note 14).

235 Bebchuk and Ferrell, 87 Va L Rev at 130–32 (cited in note 151). See also Bebchuk, 105 Harv L Rev at 1440, 1457 (cited in note 147) ("To be sure, because the interests of managers and shareholders are somewhat aligned, there are many corporate issues with respect to which managers seek, and states in turn have an incentive to provide, rules that enhance shareholder value.").

holder and managerial interest is especially acute—such as the law of takeovers and takeover defenses—regulatory competition pushes towards law beneficial for managers rather than shareholders. In these areas states will cater to managerial rather than shareholder preferences, because it is on this dimension of the competition between the states that managers rest their reincorporation decisions.[236] Thus, according to Bebchuk and Ferrell, the proliferation of antitakeover statutes and case law permissive towards defensive tactics such as the poison pill, far from being a temporary aberration, is in fact the natural consequence of regulatory competition.[237]

One might object to this analysis based on the fact that Delaware's takeover statute is significantly less restrictive than most.[238] One might also reply that recent scholarship suggests that the poison pill no longer makes much of a difference,[239] and anyway Bebchuk and Ferrell's discussion of the Delaware cases strangely omits important recent (and more restrictive) Delaware decisions regarding the poison pill.[240] The analysis here, however, will focus on a different point. Consider again the last two sentences of the prior paragraph, because they convey the ideas that form the basis for why in Bebchuk and Ferrell's view *federal* intervention is so desirable.

More than merely adding any old fifty-first regulatory regime to the competitive fray, their proposal would add a fifty-first competitor who by definition would be unresponsive to the reincorporation dynamic that in their view drives the states towards takeover defense permissiveness. Increased franchise tax revenues and the other benefits that flow to individual states from attracting incorporations would not accrue to the federal government upon the selection of its regime by the shareholders of a particular corporation. The federal government, in other words, has nothing to gain or lose from having its law chosen. Thus, Bebchuk and Ferrell contend, "the chances that federal officials would provide arrangements that are hospitable to takeovers are higher than the probability that state officials would unilaterally do so."[241] So why not offer a federal option that, if it is indeed

236 Bebchuk and Ferrell, 87 Va L Rev at 133–35, 158 (cited in note 151); Bebchuk and Ferrell, 99 Colum L Rev at 1197–99 (cited in note 151). See also Macey and Miller, 65 Tex L Rev at 470 (cited in note 90).

237 Bebchuk and Ferrell, 87 Va L Rev at 131–32 (cited in note 151).

238 Romano, 2 Theor Inq in L at 529–37 (cited in note 151).

239 See Marcel Kahan and Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U Chi L Rev 871 (2002). See also Romano, 2 Theor Inq in L at 534–35 (cited in note 151); Jeffrey N. Gordon, *Poison Pills and the European Case*, 54 U Miami L Rev 839, 841 (2000).

240 Their discussion of the Delaware cases, see Bebchuk and Ferrell, 87 Va L Rev at 118–21 (cited in note 151), omits *Paramount Communications, Inc v QVC Network, Inc*, 637 A2d 34 (Del 1994), the most recent authoritative statement of the Delaware Supreme Court, a statement that is less friendly to takeover defenses than their discussion allows. Also omitted in this context are *Carmody v Toll Brothers, Inc*, 723 A2d 1180, 1182 (Del Ch 1998) (invalidating a "dead hand" poison pill on both statutory and fiduciary duty grounds), and *Mentor Graphics Corp v Quickturn Design Systems, Inc*, 728 A2d 25, 25 (Del Ch 1998) (invalidating a "no hand" poison pill of limited duration on fiduciary duty grounds).

241 Bebchuk and Ferrell, 87 Va L Rev at 158–59 (cited in note 151). See also Bebchuk, 105 Harv L

more hospitable to takeovers than state law, shareholders can choose to opt into? If the federal option is not superior, then shareholders will simply demur (the "so what?" defense).[242]

The answer lies in the observation that Bebchuk and Ferrell fail to address the fact that a federal takeover statute would not magically leap from the pages of their article (or from the British City Code on Takeovers and Mergers) into the United States Code. Any federal takeover statute would instead go through the normal federal legislative process. This makes it necessary to compare the political economy of the federal government to that of Delaware. An astonishing assumption of Bebchuk and Ferrell's analysis is that the relevant individual federal lawmakers, in the absence of a collective federal interest in attracting opt-ins, will have no agenda in their lawmaking other than the public interest. That assumption is so crude as to call into question the validity of the conclusions that rest upon it. Bebchuk and Ferrell's conception of the national legislative process is therefore open to two related criticisms—they are related in that they both question the validity of assuming public-regarding federal legislators—though only the second, the one that is unique to this Article, clearly meets their "so what" claim.

First, and this has been observed elsewhere, the collective action asymmetry between shareholders and managers that affords managers an advantage in lobbying would not disappear by nationalizing the relevant lawmaking forum. In other words, the federal legislative process is hardly immune to the very same political failure that "is the linchpin of Bebchuk and Ferrell's critique of state competition."[243] Indeed, there is good reason to suppose that a federal statute would be worse, because with respect to takeovers the interests of labor converge with that of managers, and together they would present a formidable national lobby.[244] Still, this argument does not answer directly the Bebchuk and Ferrell response of, why not try? What have we to lose, they would say, if the substance of the federal law is optional?

Second, and this is the criticism that grows out of this Article's analysis, Delaware legislators are uniquely unable to issue extortive ultimatums, something that cannot be said for federal legislators, precisely because federal legislators, unlike their state counterparts, would be unresponsive to the

Rev at 1500–01 (cited in note 147) ("In evaluating the relative performance of the federal law process, the best starting point is the observation that this process does not suffer from the structural biases that afflict the performance of state competition.").

242 Bebchuk and Ferrell, 87 Va L Rev at 149–50 (cited in note 151).

243 Romano, 2 Theor Inq in L at 537–43 (cited in note 151). See also Choi and Guzman, 87 Va L Rev at 972–78 (cited in note 224); Roberta Romano, *The Future of Hostile Takeovers: Legislation and Public Opinion*, 57 U Cin L Rev 457, 468–85 (1988) (explaining why it would be a mistake to assume that national regulation would be an improvement).

244 Compare Coffee, 8 Cardozo L Rev at 762–63, 769–71 (cited in note 168) (discussing the likely influence of labor on takeover regulation).

reincorporation dynamic. Reincorporating in another state provides no escape from federal law. So the fear of reincorporation provides no check against extortive threats by federal legislators. For exactly the reason that Bebchuck and Ferrell suppose that federal officials are more likely than state officials to supply law that is hospitable to takeovers—the lack of revenue consequences for federal lawmakers from shareholders' opting in or out of the federal regime—federal officials could extort with impunity. And this is true, as we shall see in a moment, even if the statute's substantive provisions were optional. Thus, this criticism is an argument against even trying. It is an argument, in other words, that answers their "so what?" claim.

Before turning to that point, however, we should reconnect these two strands of criticism. The commonality between them is the insight from the study of public choice that the "federal government" does not generate law—aggregations of *individuals* do. Bebchuk and Ferrell's proposal strangely assumes that (i) these individuals have nothing personally to gain from federal takeover legislation and (ii) given this lack of personal interest, federal lawmakers will legislate in the public interest. These assumptions run counter to the classic economic theory of regulation and ignore the modern learning on that subject altogether.

Given the ineffectiveness of reincorporation as a check on the behavior of federal legislators, from the perspective of the modern economic theory of regulation, a takeover proposal would be a fantastic "milker" bill for the extortion of campaign contributions and other forms of support.[245] Casual empiricism confirms this worry: we have evidence of just this kind of political rent extraction from the 1980s takeover statute proposal. As Judge Douglas Ginsburg observed:

> As the Reagan Administration's monitor of this legislation, I could only conclude at the time that, while the bills may not have been conceived as milker bills, they were surely pursued as such once the members realized how lucrative they could be. Publicly traded corporations on both sides of the issue, which is to say tender offerors and takeover targets, began furiously throwing favors at the relevant Congressmen for at least a few years while the threat (or promise) of legislation seemed credible.[246]

---

245 Other terms besides "milker" that have been used include "cash cows," "juice bills," and "fetchers." McChesney, *Money for Nothing* at 29–32 (cited in note 13). See also McChesney, 6 Indep Rev at 354–55 (cited in note 13).

246 Ginsburg, 97 Mich L Rev at 1774–75 (cited in note 84). See also McChesney, *Money for Nothing* at 29–31 (cited in note 13) ("'Milker bills' is one term used by politicians to describe legislative proposals intended only to 'milk' private producers for payment not to pass the rent-extracting legislation."); Fred S. McChesney, *Ever the Twain Shall Meet*, 99 Mich L Rev 1348, 1357 (2001) (analogizing takeover proposals to threats to impose price control regulations on the health care industry and concluding that "[p]rivate parties surrender money to politicians rather than lose something of even greater

Moreover, the record of the federal government's legislative process in the closely related context of securities fraud regulation is equally poor. Both the Securities Litigation Uniform Standards Act of 1998 and the Private Securities Litigation Reform Act of 1995 were passed in the wake of rampant donations, by no means merely cost-effective (from the donor's perspective) rent seeking, by numerous interest groups.[247] The legislative process in Delaware, with its heavy reliance on the Corporate Law Section of the Delaware Bar Association, is by contrast especially ill-suited to shakedowns and unlikely to trigger campaign donation frenzies.

The Bebchuk and Ferrell proposal would be a "milker," moreover, even if the substance of the proposed rules were optional. This is an answer to their claim that federal choice-enhancing legislation would do no harm. Federal legislators could simply threaten to make the option mandatory. As Professors Choi and Guzman have shown, federal regulators would likely push for just that,[248] making the threat real. In contrast to Delaware, which requires a two-thirds legislative vote to enact corporate legislation and will consider such legislation only when it is put forward by the Bar Association based on demonstrable consensus, on the federal level a threat by a small group of legislators to amend the federal takeover statute would be more credible. Perversely, an optional statute might be worse than a mandatory one, because it would allow these legislators to threaten credibly to make it mandatory at a future time.

This claim should not be overread. It is not meant to suggest a tautological regress in which "mandatory rules are even worse than optional rules because legislators may threaten to turn them into optional rules (which are worse than mandatory rules)" and so on.[249] Rather, the claim has two components. First, an optional statute would double the number of jurisdictions whose takeover law could be relevant in a future takeover battle, so the lobbying efforts of all interested parties in the classic model would be doubled. If Bebchuk and Ferrell are correct that political failure on the state level leads to managerial lobbying for, and then legislative enactment of, takeover law that is detrimental to shareholder welfare, then all an optional federal regime would do is double the aggregate amount of these deadweight rent seeking efforts—and half of it would be doubly wasteful, because only one takeover law regime would apply at any given moment.

---

value").

[247] See note 221 and accompanying text.

[248] See Choi and Guzman, 87 Va L Rev at 977 (cited in note 224):

> Faced with a desire to attract incorporations, and recognizing that their professional success is heavily influenced by their ability to do so, federal administrators can be expected to use whatever powers they have to attract firms. Unlike the states, however, the federal government has the ability to make its rules mandatory.

[249] Yadlin, 69 U Chi L Rev at 1187 n 62 (cited in note 80).

Second, with an optional federal takeover statute in place, the threat to enact a mandatory one becomes more credible, not in the trivial sense of reducing the costs of drafting a mandatory proposal,[250] but rather because it puts the issue on the political agenda and gives it popular salience. Although it is undoubtedly correct in a theoretical sense that Bebchuk and Ferrell's optional takeover statute would not actually give legislators the power to do anything more than they could do in the absence of such legislation,[251] legislators do not act in a vacuum. At any given moment the confluence of innumerable political and other factors makes the threat of certain legislation more credible than others. For example, in the wake of the Enron scandal,[252] threats to increase SEC oversight of the accounting profession are more credible than they were immediately before the scandal. Similarly, threats to enact price controls on health care services were more credible when the Clinton Administration made a national health care program a political priority than they would be today.[253] The existence of an optional takeover statute would bring the federal government into the takeover law game, and once that happened, threats to enact a mandatory version would become more viable. Indeed, it is not difficult to imagine significant layoffs in the wake of a well publicized hostile takeover of a company whose shareholders had opted for state law prompting calls for making the federal statute both tougher and mandatory. In such an environment one would expect a rent seeking and political rent extraction frenzy similar to that of the 1980s takeover proposal and the 1995 and 1998 securities law reforms.

In the end, a federal takeover regime, optional or not, would probably not offer shareholders any improvement. Moreover, its existence would double the number of jurisdictions in which the corporation would need to engage in lobbying and the number in which it would be vulnerable to rent seeking by others and political rent extraction by legislators. Put more generally, Bebchuk and Ferrell's analysis focuses on the agency between managers and shareholders without careful enough attention to the agency between citizens and their legislators—and what the study of public choice teaches about the latter agency relationship. Delaware's political economy, in contrast to that of the federal government, is less conducive to transfers from shareholders to legislators. Unlike the agency between managers and shareholders, which is policed by the market in addition to fiduciary duties and elections, the agency between legislators and their constituents is checked only by imperfect elections.

---

250 Id at 1188 n 64.

251 Id at 1187–88.

252 For a general discussion, see Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U Chi L Rev 1237 (2002).

253 See McChesney, 99 Mich L Rev at 1357 (cited in note 246) (analogizing takeover proposals to threats to impose price control regulations on the health care industry).

CONCLUSION

The underlying aim of this Article has been to shift the focus of the policy debate over corporate political speech from the shareholder/manager agency relationship to the agency relationship between lawmakers and society. In view of that shifted focus, and drawing on a contractarian view of the firm, the economic theory of regulation, and the study of public choice, this Article explored the policy bases for, and the political economy of, the law's ongoing discrimination against corporate political speech. This Article also explored the relevance of the state law regulation of corporate political speech to the competition for corporate charters. Specifically, this Article advanced four points.

First, this Article showed that the conventional justifications for discriminating against corporate political speech are vulnerable to the extent that they depend on a divergence of interests between shareholders and managers. There is nothing special about managerial control over corporate political speech that warrants abandoning ordinary modes of corporate governance in favor of a mandatory rule and criminalization. Indeed, the only plausible argument growing out of the conventional justifications for discriminating against corporate political speech is a fear of corporate rent seeking. The corporate form may provide a comparative advantage in the market for legislation, and this might justify discriminating against corporate political speech. It is possible that corporations are especially pernicious seekers of rents through regulation.

Second, this Article suggested a political economy story for the law's ongoing and venerable discrimination against corporate political speech consistent with the prior claim that the corporate form might provide a comparative advantage in the market for legislation. This Article showed that the statutory regulation of corporate political speech was probably supported by corporations. To begin with, the statutes solve the collective action problem if corporations as a class do better without lobbying. More importantly, these statutes provide partial shielding against political rent extraction by legislators. Drawing on the relevant collective action dynamics, the economic theory of regulation (including the traditional and the modern learning on that subject), and a fresh look at the historical record, this Article adduced argument and evidence in support of this analysis.

Third, by assimilating the role of local campaign finance regulation into the corporate regulatory competition debate, this Article offered a more nuanced approach to evaluating the comparative advantages in the market for corporate charters provided by Delaware's unique political economy. This Article suggested that Delaware's lack of any corporation-specific campaign finance regulation, coupled with certain unique institutional features of Delaware's corporate lawmaking process, gives additional traction to the credible commitment explanation for Delaware's ongoing dominance in the market for corporate charters.

Finally, this Article discussed the implications of the foregoing analysis for three current policy debates. First, the Article briefly discussed the current political debate about banning corporate soft-money campaign donations. Second, the Article briefly noted several analogous political economy issues relevant to the burgeoning academic debate about issuer choice of law in securities regulation. Third, the Article comprehensively analyzed the pertinence of the foregoing analysis for the current academic debate regarding the enactment of an optional federal corporate takeover regime.