

21 Health Matrix 189, *

n5 130 S. Ct. 876 (2010).

n6 See, e.g., Arlen W. Langvardt, The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting, 37 AM. BUS. L.J. 587 (2000) (arguing that the Court has trended towards ever greater protection for commercial speech and that an intensification of that trend should be expected).

n7 See, e.g., Owen Fiss, What is Feminism?, 26 ARIZ. ST. L.J. 413, 422 (1994); Lorraine Schmall, Birth Control as a Labor Law Issue, 13 DUKE J. GENDER L. & POL'Y 139, 142-152 (2006).

n8 See David Yosifon, The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United, 89 N.C. L. REV. (forthcoming 2011) [hereinafter The Public Choice Problem in Corporate Law] (on file with author) (arguing that the public choice problems caused by corporate political speech undermines the social utility of the shareholder primacy norm in corporate governance).

n9 See P. Lieberman, On Human Speech, Syntax, and Language, 3 HUMAN EVOLUTION 3 (1988) (providing overview of importance of speech to the development of human societies).

n10 See Ronald Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937) (arguing that firms develop when the costs of organizing production by fiat are less than the costs of discovering prices and coordinating transactions in spot markets).

n11 See generally STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008) (explicating director primacy theory).

n12 Thus, it should be seen that the corporation is a nexus-of-contracts-a set of relationships-it is not an "entity," and it is not a single of piece of property that is "owned" by shareholders. See *id.* at 32-35.

n13 See generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATE AND PRIVATE PROPERTY (1932) (providing the seminal statement of the agency problem in corporate law).

n14 Space considerations preclude me from providing a comprehensive rehearsal of shareholder primacy theory. Nevertheless, the basic version recounted here should suffice as an introduction to the problem of corporate speech, which is the subject of this Article. The agency problem for shareholders is actually solved through three basic mechanisms: the law of fiduciary obligation, administrative regulation of securities trading, and the invisible, disciplining hand of the market. Many would argue that the market is the most crucial mechanism that solves the shareholders' agency problem. If a firm's stock price is low investors will sell or be loath to purchase new issues, thus threatening the job or status security of incumbent directors and officers. The shares of underperforming firms will be undervalued in the securities markets, creating opportunities for raiders (or "liberators," depending on your perspective) to purchase a controlling interest in the firm, install new management, and reap the rewards of superior performance. The threat of such raiding (or liberating) keeps incumbent directors working hard, which solves the agency problem for shareholders. Nevertheless, because corporate law allows directors to establish structural defenses against hostile takeovers, even to the extent that such efforts forestall the disciplining power of the market for control, the fiduciary obligation of directors to shareholders remains a pivotal element of shareholder protections. See BAINBRIDGE, *supra* note 11, at 105-53. For a fuller version, and more general critique, of shareholder primacy theory, see The Consumer Interest in Corporate Law, *supra* note 4, at 255-83 and The Public Choice Problem in Corporate Law, *supra* note 8.

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