

# A RIGHT FOR RETIREMENT: UNCONSCIONABLE CONTRACTS, THE RIGHT (NOT) TO ASSOCIATE, AND *CITIZENS UNITED*

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*The doctrine of unconscionable contracts is an equity doctrine. As such, it does not ask whether an agreement is or is not an enforceable contract; legality has no bearing. Rather, the doctrine asks whether it would be fit and proper . . . would it be fair . . . for a court to enforce such a contract. Using the doctrine, courts examine whether the price paid for a good or service far outstrips any benefit gained.*

*What if that price is the surrender of a basic right, the Right (Not) to Associate? The Supreme Court says that a violation of that right is “always demeaning.” Would that be a price, to quote Lord Chancellor Hardwicke, “such as no man in his senses would make, or as no honest man would come into”?*

*This Article is my latest collateral attack on Citizens United. The main ideas discussed are unconscionable contracts and the Right (Not) to Associate.*

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*A little bit of time is spent on the particulars of Delaware corporate law regarding the owner of record and the Employee Retirement Income Security Act (ERISA). Somehow, it ends up being about the unfairness of giving private corporations, and the officers that rule them, an exalted place in our political system.*

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## SETTING THE STAGE

I dislike the *Citizens United v. Federal Election Commission*<sup>1</sup> decision. The faults are many.<sup>2</sup> For example, it dismisses principles of stare decisis that its author, Justice Kennedy, promoted eighteen years earlier in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>3</sup> In doing so, Justice Kennedy demonstrates how to turn his principled stand in *Casey* into an exercise of judicial sophistry.<sup>4</sup> Further, Justice Kennedy cites as precedent opinions that are, in fact, concurrences and dissents—all in support of giving greater political voice to an already powerful group in the United States: private business corporations and the individuals that run them.<sup>5</sup>

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1. 558 U.S. 310 (2010).

2. *Id.* at 478–79 (Stevens, J., dissenting) (positing that the majority’s opinion elevates “broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality”).

3. 505 U.S. 833, 854–69 (1992). *Planned Parenthood of Southeastern Pennsylvania v. Casey* found that it could not overrule the nineteen-year-old decision of *Roe v. Wade*. *Id.* at 869; *Roe*, 410 U.S. 113, 164–66 (1973). This, despite the controversy the case created and the steady limitation of its rights in the ensuing years. *Casey*, 505 U.S. at 855, 860–61. Justice Kennedy did not find that stare decisis prevented the overruling of *Austin v. Michigan Chamber of Commerce*, a decision twenty years old at the time, by *Citizens United. Austin*, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 365. The reasons given for supporting *Roe* in *Casey*, that the legal regime created is working, that it is relied upon, and that overruling would create more burdens than sustaining, seem equally applicable to sustaining *Austin*. *Casey*, 505 U.S. at 857, 859–60, 864, 869.

4. *Citizens United*, 558 U.S. at 362–65. *Compare Casey*, 505 U.S. at 854–68 (setting out a deliberate set of criteria for evaluating stare decisis considerations), *with Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478–86 (2018) (following the same structure as *Casey*, stare decisis does not prevent overturning a forty-one-year-old precedent).

5. *Citizens United*, 558 U.S. at 338–39, 350–52, 363. Justice Kennedy’s use of dissents and concurrences to “blaze[] through our precedents” did not escape Justice Stevens’s notice in his dissent. *Id.* at 395. Some examples:

At 338, Justice Kennedy cites the dissent portion of his own *McConnell v. FEC* opinion for support that political action committees (PACs) are not a substitute for letting corporations speak directly. *Citizens United*, 558 U.S. at 338 (citing *McConnell v. FEC*, 540 U.S. 93, 331–32 (2003) (Kennedy, J., concurring in part and dissenting in part)).

At 339, Justice Kennedy cites the dissent portion of Justice Scalia’s *McConnell* opinion that the Court must invalidate any provision that can interfere with speech at any point. *Citizens United*, 558 U.S. at 339 (citing *McConnell*, 540 U.S. at 251 (Scalia, J., concurring in part and dissenting in part)).

At 350, Justice Kennedy cites Justice Scalia’s dissent in *Austin* to support that states cannot trade special advantages for speech rights. *Citizens United*, 558 U.S. at 350–51 (citing *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

At 351, Justice Kennedy cites his own dissent in *Austin* to support that it does not matter that corporations have excess money to bring to bear, a position counter to *Austin*’s

Yet I respect Justice Kennedy's ardent support of speech and can understand the indignation that drives his *Citizens United* opinion. "Speech is an essential mechanism of democracy . . . . [P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence."<sup>6</sup> I believe this passionate belief in free speech

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holding that it does matter. *Citizens United*, 558 U.S. at 351 (citing *Austin*, 494 U.S. at 707 (Kennedy, J., dissenting)).

At 351, Justice Kennedy cites Justice Thomas's dissent in *McConnell* to support that antidistortion principles would lead to regulation of the press. *Citizens United*, 558 U.S. at 351 (citing *McConnell*, 540 U.S. at 283 (Thomas, J., dissenting)). This, despite the fact that the law at issue in *Citizens United*, the Bipartisan Campaign Reform Act sections 431 and 434, specifically exempted media corporations from its corporate expenditure provisions to avoid just such a result. 52 U.S.C. §§ 30101, 30104 (2012).

At 352, Justice Kennedy cites Justice Scalia's dissent in *Austin* to support that media corporations do not have different rights than other corporations. *Citizens United*, 558 U.S. at 352 (citing *Austin*, 494 U.S. at 691 (Scalia, J., dissenting)). The *Austin* Court did just that, twenty years before *Citizens United*. *Austin*, 494 U.S. at 666–67.

At 352, Justice Kennedy cites Justice Brennan's dissent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* to support positions that media companies do not enjoy greater First Amendment protection. *Citizens United*, 558 U.S. at 352 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) (Brennan, J., dissenting)). This distorts the issue in *Dun & Bradstreet*. All opinions in the case agreed that the speech at issue was not an issue of public concern and did not require the highest degree of First Amendment protection. *Dun & Bradstreet*, 472 U.S. at 758–60, 772–73 (White, J., concurring), 775 (Brennan, J., dissenting).

Furthermore, Justice Brennan was quite precise that he was only addressing the First Amendment of media in the context of defamation law. *Id.* at 784. This is to say, the Court was examining remedies available to individuals in tort law, not areas of governmental regulation. *Dun & Bradstreet* is simply a poor choice to use when examining the issues of concern in *Citizens United*.

At 363, Justice Kennedy cites Justice Scalia's concurrence in *FEC v. Wisconsin Right to Life, Inc.* to support the position that stare decisis has not prevented the courts from overruling past decisions found to violate the First Amendment. *Citizens United*, 558 U.S. at 363 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 500 (2007) (Scalia, J., concurring)). Justice Scalia only cites one case to support his position, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). *Wis. Right to Life*, 551 U.S. at 500.

In fact, the Court hesitates a great deal to overturn past freedom of speech precedents. Prior to *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), even clearly political speech could be regulated (and punished). *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Abrams v. United States*, 250 U.S. 616 (1919). Only in retrospect were the great dissents of Justice Holmes and Justice Brandeis considered to be the correct view of the law. *See Brandenburg*, 395 U.S. at 451–52 (Douglas, J., concurring).

6. *Citizens United*, 558 U.S. at 339–40.

is part and parcel of the same principles of constitutional liberties that caused him to support reproductive and LGBTQ+ rights.<sup>7</sup>

I still sharply disagree with him. But since I do respect Justice Kennedy, I proceed on the assumption that he can be convinced by arguments, including those not considered in the decision, that demonstrate a different result should occur.<sup>8</sup>

In *Citizens United*, supporters of limiting corporate participation in political advocacy argued that such corporate participation forces shareholders to associate with whatever the corporation advocates.<sup>9</sup> In two paragraphs, Justice Kennedy dismisses this Right (Not) to Associate problem for shareholders.<sup>10</sup> He believes that any issues with the right are dealt with “through the procedures of corporate democracy.”<sup>11</sup> Unfortunately, as I wrote in 2012, Justice Kennedy’s understanding of corporate democracy is incorrect.<sup>12</sup>

7. *Casey*, 505 U.S. at 845–46; *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

8. My desire to convince Justice Kennedy, even though he no longer sits on the court, refers to a comment Justice Powell said after his retirement. Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST (Oct. 26, 1990), <https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b> [https://perma.cc/WL8E-46RD]. Justice Powell was asked if there was any decision about which he had second thoughts. *Id.* He said it was *Bowers v. Hardwick*, the case upholding anti-sodomy laws. *Id.*; *Bowers*, 478 U.S. 186, 190 (1986). While Justice Powell himself claimed that the case was “frivolous,” his second thoughts were a significant argument used by LGBTQ+ advocates to undercut the decision’s “moral force,” something Lawrence Tribe, who represented Hardwick, noted at the time. Marcus, *supra*.

9. *Citizens United*, 558 U.S. at 361.

10. *Id.* at 361–62. The Supreme Court has been inconsistent in the label for the “Right to Associate” and “Right (Not) to Associate.” “Freedom” is used more often in earlier decisions. Justice Brennan in *Roberts* used both “freedom” and “right.” Justice Alito preferred “compelled speech” in *Janus* but referred to “freedom of association” when describing earlier Court decisions. And the Court seldom capitalizes the name of a right.

This Article uses “Right (Not) to Associate” as an indirect way to indicate how flexible the Court is and always has been with First Amendment jurisprudence. For the sake of consistency, it capitalizes “Right to Associate.” There may be occasions where “Right of Association” may be used because “association” is a better grammatical fit than “associate.”

I beg the reader’s indulgence.

11. *Id.* at 362 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

12. Paul S. Miller, *Shareholder Rights: Citizens United and Delaware Corporate Governance Law*, 28 J.L. & POL. 51, 77–89 (2012) (hereinafter *Shareholder Rights*).

To summarize the article: corporate democracy, under Delaware corporate governance law, cannot perform the task *Citizens United* asks of it. *Id.* at 52. First, shareholders will be unable to ascertain what the specific activities of a corporation are.

This Article develops an additional Right of Association concern. My instrument will be a modest and seemingly unrelated doctrine: the doctrine of unconscionable contracts. Modest in its source: state

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*Id.* at 78–79. Corporations can hide the use of corporate funds for political advocacy through the mechanisms of shell companies and political action committees. *Id.* at 78. Such mechanisms prevent shareholders from forming a “credible basis” necessary for examining a corporate management’s political activities. *Id.* at 79 (citing *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 288 (Del. 2010) (en banc)).

Even if shareholders did learn of objectionable political activities, corporate management has near absolute control over the use of corporate assets. *Id.* at 79. The overarching principle of Delaware corporate governance law is to allow corporate management a free hand in allocation of corporate assets. *Id.* (citing *Kahn v. Sullivan*, 594 A.2d 48, 63 (Del. 1991) (holding that, so long as the factors that support a settlement are present, Delaware courts cannot use their own business judgment to evaluate the fairness of a settlement between a corporation and its shareholders). Any attempt by shareholders to limit a corporation’s activities through amendments to a corporation’s charter can only be submitted to shareholders with management approval. *Id.* at 80 (citing DEL. CODE ANN. tit. 8, § 242 (2021)). Furthermore, such amendments and bylaws, to get around section 242, can only concern the procedures management must engage in, not specific decisions. *Id.* at 80 (citing *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1029–30 (Del. Ch. 2004), *aff’d per curiam*, 872 A.2d 559 (Del. 2005)).

Should shareholders seek to change corporate management itself, the host of anti-takeover defenses available to corporate management, including the highly affective “poison pill,” would likely thwart any such attempt. *Id.* at 81–85. A “poison pill” is often officially titled a “shareholder rights plan.” *Id.* at 81 (quoting *Versata Enters., Inc. v. Selectica, Inc.* 5 A.3d 586, 594 (Del. 2010) (en banc)). It seeks to dilute the voting power of any party seeking to change corporate management by issuing new shares to all other shareholders, either for free or at a significant discount. *Id.* Such pills are “triggered” when a threatening party acquires a certain percentage of a corporation’s total shares. *Id.* The trigger level can be reached if corporate management can reasonably consider a group of shareholders to be acting in concert, even if not all members of the group are actually interested in taking over the company. *Id.* at 81, 83 (citing *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 343, 349–51 (Del. Ch. 2010), *aff’d*, 15 A.3d 218 (Del. 2011)). Furthermore, the trigger threshold can be quite low, even when the threatening party is not actually interested in taking over the company, if management deems the actions to be a threat to the company. *Id.* at 81, 84 (citing *Versata*, 5 A.3d at 600–01, 607).

Creating a “political” exception to a poison pill would likely thwart the very reasons Delaware courts allow it to exist: protecting the interests of the shareholders not engaged in a contest with corporate management. *Id.* at 85–88. Such harms can be a person taking over a company without paying the “control premium” to the remaining shareholders. *Id.* at 84 (citing *Yucaipa*, 1 A.3d at 351). It can also be a company’s competitor simply seeking to cause harm. *Id.* at 84 (citing *Versata*, 5 A.3d at 606). A political exception would allow parties to use any political activity of a corporation to prevent the triggering of the pill, irrespective of whether the threatening party had other, unstated, reason for wanting to replace corporate management. *Id.* at 86–87.

contract law. Modest in its scope: the unconscionable contracts remedy is a limited, reluctantly used equity exception to freedom of contract that underpins contract law.<sup>13</sup> And modest in its application: in and of itself, the unconscionable contract doctrine presents no basis for overturning *Citizens United*.

The doctrine of unconscionable contracts exists to allow a court to escape enforcing a contract that it finds unjust but does not find unlawful.<sup>14</sup> When seeking this escape, a court examines two aspects of a contract.<sup>15</sup> First, did a stronger party ask a price that far outstrips any benefit gained by a weaker party?<sup>16</sup> Second, when making a contract, did a stronger party take unfair advantage of a significantly disadvantaged weaker party?<sup>17</sup>

Through the lens of unconscionable contracts, I hope to demonstrate a consequence of *Citizens United*. The conflict is between Freedom of (Political) Speech for corporations and the Right (Not) to Associate for a heretofore unconsidered group: those who indirectly invest in corporations through individual retirement accounts.

The decision places the constitutional rights of one group, corporations, above the other. I think the wrong group receives the advantage. And I think the wrong branch of government made that decision.

There are two groups of contracts discussed in this Article. One group concerns contracts between an individual and a company administering a retirement fund. The provisions of such a contract heavily favor the investment company. In itself, this should raise no equity ire from a court; there is nothing wrong with an entity with superior bargaining power securing better terms against another party in a deal.<sup>18</sup>

But one aspect of such contracts might. An investment company participates in corporate democracy as the owner of record, not the plan members.<sup>19</sup> This means that the people who contribute to the

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13. 8 WILLISTON ON CONTRACTS § 18.1 (4th ed. 2020).

14. *Id.* § 18.17.

15. Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 64 VILLANOVA L. REV. 773, 787 (2020).

16. *James v. Nat'l Fin., LLC*, 132 A.3d 799, 815 (Del. Ch. 2016).

17. *Id.*

18. *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 657 (W. Va. 2012).

19. An oversimple primer: in corporate democracy, one share equals one vote. 8 DEL. CODE ANN. tit. 8, § 212 (2021). The power of any one individual or group in corporate democracy is directly related to number of shares owned. Thus, owning one

fund can end up supporting political positions with which they disagree. Supreme Court decisions hold that the constitutionally protected Right of Association is violated when the government *allows* a forced political association.<sup>20</sup> Once the Right of Association comes into play, the government must show a compelling government interest that cannot be met by means less onerous than the forced association.<sup>21</sup>

It is here that *Citizens United* makes unavoidable what was hitherto less of a concern. When Congress and other legislatures can police how much a corporation may directly participate in politics,<sup>22</sup> then the owner of record's ability to use his or her position to influence political policy is regulated as well. As such, limitations of corporate power served to mitigate potential Right of Association issues caused by the execution of national retirement planning policy: Congress was

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hundred shares gives a person one hundred votes. This approach finds justification in the idea that a particular shareholder's say in how corporate assets are used should be in direct proportion to that owner's risk.

The "owner of record" is the entity listed in the corporation's books as being the owner of shares on a particular date in a cycle of corporate voting. Adam Hayes, *Holder of Record*, INVESTOPEDIA (Aug. 4, 2021), <https://www.investopedia.com/terms/h/holderofrecord.asp> [<https://perma.cc/SNM2-E33M>]. Traditionally, there is no distinction between the owner of record and the "beneficial owner" whose assets are at risk. *Id.*; *Shareholder Voting*, INVESTOR.GOV, <https://www.investor.gov/what-registered-owner-what-beneficial-owner> [<https://perma.cc/3VYE-TTVN>]. Investment plans, however, bifurcate the two into separate entities. The investment plan is the owner of record because it is the plan that buys and holds a company's shares. Hayes, *supra*. However, the plan itself is not the beneficial owner; its own assets are often not invested in the company whose shares it is voting. James Chen, *Beneficial Owner*, INVESTOPEDIA (Nov. 17, 2020), <https://www.investopedia.com/terms/b/beneficial-owner.asp> [<https://perma.cc/Q38F-2Y5F>] ("A beneficial owner is a person who enjoys the benefits of ownership even though the title some form of property is in another name.").

20. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) (finding that a state legislature passing a law allowing mandatory agency fees in conjunction with the state being the employer agreeing to these fees amounted to the action of requiring the association), *overruled by* *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2479 (2018). *Janus's* approach to the Right of Association as a whole, however, may go against *Citizens United*, which found that a forced association may be resolved by the presence of a democratic process. *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010).

21. *Janus*, 138 S. Ct. at 2465.

22. Tim Lau, *How Congress Can Help Fix the Federal Election Commission*, BRENNAN CTR. FOR JUST. (Apr. 30, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-congress-can-help-fix-federal-election-commission> [<https://perma.cc/M4LR-Y65U>].



balancing First Amendment considerations with other important policy concerns.<sup>23</sup>

But *Citizens United* elevated a corporation's right to participate in political speech beyond the reach of federal (and it later proved, state) statutes.<sup>24</sup> Absent this regulatory oversight, retirement fund managers may use the power gained through beneficiaries' money to further their own political goals.

And the second group of contracts? That would be employment contracts. Many employers contribute matching funds to select retirement plans; these matching funds are a form of compensation that only occurs through participation in a plan.<sup>25</sup> Some go so far as to require mandatory contributions to a retirement plan.<sup>26</sup> Voluntary or not, these funds cannot otherwise be gained: to not invest in the plan is to leave money on the table.

What next? We are going to proceed through history, examining each legal facet of my argument from past to present, including examples of how each doctrine is currently applied. We will start with the doctrine of unconscionable contracts, first formulated in the mid-eighteenth century.<sup>27</sup> Next, we move to the Right of Association and cases involving mandatory employee contributions to unions. Then, a quick dip into the interaction of retirement plans and corporate

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23. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28–29 (2010) (Congress may balance potential First Amendment issues with “urgent objective[s] of the highest order,” provided that Congress makes specific findings that justify that restriction and can be subject to a court’s review); see also *Citizens United*, 558 U.S. at 447 (Stevens, J., dissenting) (discussing Congress’s legitimate interest in preventing corruption).

24. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 727–28, 736–39 (2011). Arizona had a scheme that would provide matching funds to a publicly funded candidate contest; if a candidate relied on private financing and exceeded the maximum expenditures that otherwise limit the publicly funded candidates, the state would award money on a roughly one-to-one basis for each dollar spent above the limit. *Id.* at 727–28. This indirectly restricted the speech of those with more money. The state matching funds scheme resulted in privately financed candidates shouldering the burden when choosing to exercise their First Amendment right to spend funds because it automatically awarded money to publicly funded candidates. *Id.* at 728.

25. Kat Tretina & Benjamin Curry, *What Is a 401(k) Match?*, FORBES ADVISOR (Dec. 15, 2020, 4:20 PM), <https://www.forbes.com/advisor/retirement/what-is-401k-match> [<https://perma.cc/Z2AX-KVXS>] (explaining that a 401(k) match is money that your employer wholly or partially matches to contribute to an employee’s personal 401(k)).

26. See LOYOLA UNIV. NEW ORLEANS, 2020 BENEFITS GUIDE 45 (2020), [http://finance.loyola.edu/sites/finance.loyola.edu/files/2020%20Loyola%20Benefits%20Guide\\_1.pdf](http://finance.loyola.edu/sites/finance.loyola.edu/files/2020%20Loyola%20Benefits%20Guide_1.pdf) [<https://perma.cc/2ZBQ-W65P>].

27. McCall, *supra* note 15, at 773.

governance law. Having shuffled my deck of cards, we shall see if I can combine all these topics to make this point: it would be best, from a First Amendment perspective, to return campaign finance regulation to Congress and state legislatures.

A final point before we continue: with this Article and others written and planned, I follow the example of Edmund Burke when assailing bad policy and the people behind it. In his May 5, 1789 speech before Parliament attacking Warren Hastings and the policies of the British East India Company, Burke did not rely on one single “knock-out” argument.<sup>28</sup> Instead, he brought multiple arguments to bear, trusting that the aggregate was more devastating than any one particular approach.<sup>29</sup> Similarly, I do not think any one argument is enough to convince those committed to the outcome of *Citizens United* and its absolutist approach to protecting speech. Instead, an array of arguments, in aggregate, may show that the consequences of *Citizens United* run counter to the ideals that drove Justice Kennedy.

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28. AMARTYA SEN, *THE IDEA OF JUSTICE* 1 (2009) (citing Edmund Burke, Speech to Parliament in London, England (May 5, 1789)).

29. *Id.* Burke’s language deserves to be quoted in full.

I impeach Warren Hastings, Esquire, of high crimes and misdemeanours.

I impeach him in the name of the Commons of Great Britain in Parliament assembled, whose Parliamentary trust he has betrayed.

I impeach him in the name of all the Commons of Great Britain, whose national character he has dishonoured.

I impeach him in the name of the people of India, whose laws, rights, and liberties he has subverted; whose properties he has destroyed, whose country he has laid waste and desolate.

I impeach him in the name and by virtue of those eternal laws of justice which he has violated.

I impeach him in the name of human nature itself, which he has cruelly outraged, injured, and oppressed, in both sexes, in every age, rank, situation, and condition of life.

*Id.* at 1–2.

The multiple argument approach finds a parallel with how unconscionable contracts approaches the problem. As we shall see, there are two areas that are examined: the substance of the contract and the procedures used to negotiate that contract. *James v. Nat’l Fin., LLC*, 132 A.3d 799, 815 (Del. Ch. 2016). Within those two areas are multiple elements. *Id.* If a court finds *any* of those elements, then that unconscionable component is met. *Id.* Further, the two areas do not have to be equally present or each cross a certain threshold for an unconscionable contract. *Id.* If one of the elements is overwhelmingly present, then a court may find that decides the matter. *Id.* A court may find unconscionability based upon the aggregation of all the elements, even when no one element standing on its own would lead to that finding. *Id.*

## I. THE DOCTRINE OF UNCONSCIONABLE CONTRACTS

Many a card trick first involve splitting the deck. Often, such proves necessary to orient the cards in such a fashion that facilitates the desired outcome. My performance shall follow that example—dividing up the whole of law into discrete parts to bring things together for a satisfying conclusion. Let us begin with a discussion of unconscionable contracts.

### A. *Common Law Origins or Another British Period Drama*

The doctrine of unconscionable contracts arose in the English courts. The first reported case is *Earl of Chesterfield et al. v. Sir Abraham Jansen*.<sup>30</sup> The circumstances would not be out of place in a Restoration comedy.<sup>31</sup> A by-then-deceased gentleman, John Spencer, needed money to pay off his debts.<sup>32</sup> Spencer was known to be the heir of the Duchess of Marlborough.<sup>33</sup> As such, he made a contract with Baronet

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30. (1750) 95 Eng. Rep. 621, 621–22 (KB). The cast of characters in this case on the Plaintiff side is chock-a-block of figures of English history. We shall start with the named plaintiff: the Earl of Chesterfield, Phillip Dormer Stanhope, was the fourth earl. He is most famous for his published letters “Letters to his Son” and “Letters to His Godson,” although the advice he gives is a touch on the cynical side. *Phillip Dormer Stanhope, 4<sup>th</sup> Earl of Chesterfield*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Philip-Dormer-Stanhope-4th-Earl-of-Chesterfield> [<https://perma.cc/J549-YUR2>]. The Earl was considered a paragon of wit and manners by contemporaries including Alexander Pope and Voltaire. *Id.* He was less well regarded by Samuel Johnson, who condemned the Earl in his letter attacking patrons. *Id.* He held important positions in the court of King George II and played a leading role in Britain adopting the Gregorian Calendar in 1752. *Id.*

31. Restoration Comedy was “the splendour of the Restoration theatre.” *English Literature, The Restoration, Major Genres and Major Authors of the Period, Drama by Dryden and Others*, ENCYC. BRITANNICA, <https://www.britannica.com/art/English-literature> [<https://perma.cc/2AGZ-M5KG>]. Later generations found restoration comedy scandalous because almost all the works have a “shared acceptance that the only credible virtues were intelligence and grace, together producing ‘wit’.” *Id.* After the Glorious Revolution, the works also brought in pointed political commentary on “questions . . . of contract, breach of promise and the nature of authority.” *Id.*

32. *Chesterfield*, 95 Eng. Rep. at 622.

33. *Chesterfield*, 95 Eng. Rep. at 622–23. Yes, THAT Duchess of Marlborough: Sarah Jennings Churchill, the confidant of Queen Anne, (recently fictionalized in *The Favorite* (2018)) and wife of John Churchill, Duke of Marlborough, victorious general in the battles of Blenheim, Ramillies, and Oudenarde during the War of Spanish Succession. *Sarah Jennings, Duchess of Marlborough*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Sarah-Jennings-Duchess-of-Marlborough>. The Duchess was Spencer’s grandmother, his father having married a daughter of the Duke and Duchess of Marlborough. *Charles Spencer, 3rd Earl of Sunderland*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Charles-Spencer-3rd-earl-of>

Jansen in which Spencer would give Jansen twice any amount loaned upon the death of the Duchess.<sup>34</sup> Circumstances were such that at the Duchess's demise (1744), Spencer could not or would not pay Jansen.<sup>35</sup> Instead Spencer convinced Jansen to enter into a new loan contract.<sup>36</sup> The second contract had the same terms, but without a specific time of repayment.<sup>37</sup> Spencer then followed the Duchess into the hereafter with the debt still unpaid (1746).<sup>38</sup> Jansen sued Spencer's estate, which was represented by the Earl of Chesterfield.<sup>39</sup>

As a matter of law, the first (and second) loan contracts were valid.<sup>40</sup> But as a matter of equity, it was a different story. Lord Chancellor Hardwicke believed that Jansen believed his actions honorable.<sup>41</sup> Nonetheless, Hardwicke ruled that "[k]nowingly or advisedly . . . tak[ing] advantage of a man's necessity is equally bad as to take advantage of his weakness or ignorance."<sup>42</sup> As such, the initial contract was subject to equitable objections and unenforceable.<sup>43</sup>

*B. Development in the United States: U.C.C. Article 2 Does More Than Goods*

In the United States, the doctrine of unconscionable contracts has been known at least since 1836—Joseph Story quoted the *Chesterfield* decision in *Commentaries on Equity Jurisprudence*.<sup>44</sup> Courts have followed

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Sunderland [<https://perma.cc/T8A2-YNS3>]. As his elder brother inherited the Earldom, Spencer was directly dependent upon the Duchess for support, as his inheritance was dependent upon Spencer getting married. *See Chesterfield*, 95 Eng. Rep. at 623. Spencer did not marry by the time he died in 1746 at age 38, and so did not have the income promised by the will of his grandfather, the Duke of Marlborough. *See id.*

34. *Chesterfield*, 95 Eng. Rep. at 622.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 624, 626.

41. *Id.* at 626–27.

42. *Id.*

43. *Id.* However, because Spencer made the second agreement with Jansen after he came into his inheritance, and thus was free of any necessity, *that* contract did not have any equitable objection and would be enforced, but only for the terms of the contract; Jansen would not be awarded the costs he might usually expect for having brought a successful case. *Id.*

44. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 188 (1836).

the doctrine since at least 1872.<sup>45</sup> That same year, the Supreme Court gave the doctrine its imprimatur in *Hume v. United States*.<sup>46</sup>

The doctrine moved to statutory law with the adoption of Uniform Commercial Code (U.C.C.) Article Two.<sup>47</sup> The U.C.C. addresses and formalizes the result from cases akin to *Campbell Soup Co. v. Wentz*.<sup>48</sup> U.C.C. section 2-302 specifically lays out unconscionability as one of the doctrines that courts should use to police contracts regarding the sale of goods:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it

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45. Greer v. Tweed, 13 Abb. Pr. (n.s.) 427, 429 (Ct. Com. Pl. N.Y. 1872). The defendant granted equitable relief was William M. Tweed, a.k.a. Boss Tweed. *Id.*; *Boss Tweed*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Boss-Tweed> [<https://perma.cc/ST3L-TB34>]. The facts of the cases are as colorful as one would expect from any story involving Tweed. *Id.* Tweed agreed to buy from Greer nine copies of a collection called “Universal Biography.” *Greer*, 13 Abb. Pr. (n.s.) at 427. Tweed also said he would write an autobiographic “sketch” and photograph to be included in the publications. *Id.* at 428. Tweed would provide the sketch within ten days. *Id.* at 427. The contract included a clause that Tweed would pay a penalty of the price of three of the volumes, or \$165, for each day after the ten that Tweed failed to provide the sketch. *Id.* at 428–29.

Tweed failed to provide the sketch and so it was not included in the publication. *Id.* at 428. When Greer sought payment for the nine volumes, Tweed refused to pay. *Id.* So Greer sued for the costs and for \$27,252 penalty for Tweed’s failure to provide the sketch (the amount owed at the time Greer sued). *Id.*

Given that Tweed had just been or was about to be arrested for a second time for Tammany Hall corruption when the contract was made, it is understandable that Tweed may have had other matters on his mind. BOSS TWEED, *supra*.

46. 132 U.S. 406, 415 (1889).

47. U.C.C. § 2 (AM. L. INST. & UNIF. L. COMM’N 2020).

48. 172 F.2d 80 (3d Cir. 1948). The plaintiff sued defendants for specific performance of a contract for defendants to sell plaintiffs carrots at a rate of \$23–30 per ton in June 1947. *Id.* at 81. However, conditions were such that the 1947–48 market for crops was a poor one, whereby only a third of the usual crop was harvested; the market price for the carrots in January 1948 was \$90 per ton. *Id.* (The court cases do not say explicitly state this fact; it is from illustration two from the Restatement (Second) of Contracts, section 208 comment C, where this fact is made clear). RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981). Plaintiffs then sued for specific performance of the contract. 172 F.2d at 81. The court noted that numerous provisions were in place to protect the plaintiff/buyer from surprise or unexpected conditions; but that there were no similar provisions to protect the defendant/sellers from a poor harvest. *See id.* at 83. The court noted that the plaintiff could drive as hard a bargain as it thought it could get from defendants; hard bargaining and unequal bargaining power do not make a contract illegal. *Id.* But, having driven a hard bargain, the plaintiff should not come to the courts for help enforcing it. *Id.* at 83–84.

may so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>49</sup>

The states adopted the U.C.C. throughout the 1950s and 1960s.<sup>50</sup>

Almost from the moment section 2-302 was written, courts applied its reasoning to contracts outside the sale of goods. The first move was to goods transferred by lease instead of sale.<sup>51</sup> Now, courts use the U.C.C. understanding of unconscionability to examine contracts involving market distribution,<sup>52</sup> insurance,<sup>53</sup> and contracts between banks and depositors.<sup>54</sup> Courts have even used section 2-302 to

49. U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2020). "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable." *Id.* at cmt. 1.

50. *Uniform Commercial Code*, UNIF. L. COMM'N, <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/6AZU-7A6U>]. The Code was first published in 1952. David M. Steingold, *What is the UCC?*, NOLO (Apr. 2013), <https://www.nolo.com/legal-encyclopedia/what-is-the-ucc.html> [<https://perma.cc/5VS2-PZVR>]. Article 2 on the sale of goods was adopted by most of the states between 1957 (Massachusetts, chapter 765) and 1967 (Idaho, chapter 161). MASS. GEN. LAWS ANN. ch. 106, § 2 (West 2021); IDAHO CODE § 28-2 (2021); Walter D. Malcolm, *Chapter 1 General Statement*, 1957 ANN. SURV. OF MASS. L. 3 (1957). The exception is the civil law land of Louisiana; it has adopted large parts of the U.C.C. since 1974, but only a small part of Article 2. Georgina Prieto, *Problems in the Adoption of the Uniform Commercial Code by a Civil Law Jurisdiction: The Louisiana Case*, ACADEMIA PUERTORRIQUENA DE JURISPRUDENCIA Y LEGISLACION, <https://www.academiajurisprudenciapr.org/problems-in-the-adoption-of-the-uniform-commercial-code> [<https://perma.cc/Y3DT-3EM8>].

51. *E.g.*, *Hertz Com. Leasing Corp. v. Transp. Credit Clearing House*, 298 N.Y.S.2d 392, 397 (Civ. Ct. 1969), *rev'd on other grounds*, 316 N.Y.S.2d 585 (App. Term 1970); *U.S. Leasing Corp. v. Franklin Plaza Apartments, Inc.*, 319 N.Y.S.2d 531, 535 (Civ. Ct. 1971).

The American Legal Institute recognized the validity of this move by adopting the unconscionability for lease contracts in section 2A-108. U.C.C. § 2A-108(1) (AM. L. INST. & UNIF. L. COMM'N 2020).

52. *E.g.*, *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 273 N.Y.S.2d 364, 365–66 (Sup. Ct. 1966); *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 275, 281 (7th Cir. 1992) (en banc).

53. *E.g.*, *Allstate Ins. Co. v. Royal Globe Ins. Co.*, 481 A.2d 298, 302 (N.J. Super. Ct. App. Div. 1984) (en banc) (provision limiting contract to people over the age of twenty-one was unduly restrictive and unenforceable); *Bishop v. Washington*, 480 A.2d 1088 (Pa. Super. Ct. 1984) (provision limiting damage liability was not unconscionable).

54. *Smith v. Idaho State Univ. Fed. Credit Union*, 760 P.2d 19, 24 (1988) ("[A] contract ought not be enforced against an unsuspecting spouse where the creditor (1) collusively prevents the unsuspecting spouse from learning that his or her spouse is pledging community property and dissipating the proceeds received therefrom, and (2) that the party in collusion (here the Credit Union) has extended loans way beyond the security, and entirely without the bounds of reason and good judgment. To

examine contracts well outside of the commercial sphere for unconscionability.<sup>55</sup> To summarize, section 2-302 is the touchstone for the jurisprudence of unconscionability.<sup>56</sup>

*C. Getting to Specifics: Substantive and Procedural Unconscionability*

In the United States, the guiding principle of contract law is freedom of contract.<sup>57</sup> Absent exceptional circumstances, courts do not pass judgment on “the adequacy or fairness of the consideration that adduces a promise or a transfer.”<sup>58</sup> As such, the doctrine of unconscionable contracts exists as a limited exception.<sup>59</sup> Exception, however, “has not precluded courts, on occasion, from striking down contracts or transfers in which inadequacy of price is coupled with some circumstance that amounts to inequitable or oppressive conduct.”<sup>60</sup> This quote, somewhat convolutedly, states the two aspects of an unconscionable contract: substantive unconscionability and procedural unconscionability.

Substantive unconscionability examines the contract itself. Courts look for a steep imbalance of benefits between the strong and weak parties.<sup>61</sup> The courts addressing such imbalances describe them as

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enforce a contract against the unsuspecting spouse in such circumstances would be unconscionable.”).

55. See *Eberle v. Eberle*, 766 N.W.2d 477, 487 (N.D. 2009) (finding that a separation agreement was unconscionable because it disproportionately distributed property); *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007) (en banc) (determining that by statute and public policy, prenuptial agreements regarding spousal maintenance are examined using the principles of unconscionable contracts at the time of enforcement); *Lewis v. Lewis*, 748 P.2d 1362, 1366 (Haw. 1988) (finding that premarital contracts are subject to the same analysis of one-sidedness and unfair surprise as other unconscionable contracts covered by U.C.C. § 2-302).

56. E.g., CAL. CIV. CODE § 1670.5 (West 1979) (adopting section 2-302 for all contracts in the state); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 830 (N.Y. 1988) (court examined contract under U.C.C. § 2-302 without comment, even though contract at issue was a loan agreement); see *Sinkoff Beverage Co.*, 273 N.Y.S.2d at 364; *Smith*, 760 P.2d at 19.

57. *James v. Nat'l Fin., LLC*, 132 A.3d 799, 812 (Del. Ch. 2016) (citing *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059–60 (Del. Ch. 2006)) (“There is . . . a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient.”).

58. *James*, 123 A.3d at 813 (citing *Ryan v. Weiner*, 610 A.2d 1377, 1381 (Del. Ch. 1992)).

59. *Id.* at 812.

60. *Ryan*, 610 A.2d at 1381.

61. *James*, 123 A.3d at 815.

being “unduly harsh and one-sided,”<sup>62</sup> “a totally one-sided transaction,”<sup>63</sup> or “grossly excessive.”<sup>64</sup> Such imbalances most obviously manifest themselves in price.<sup>65</sup> The price may be direct, such as the transfer of money, or indirect, such as a high interest rate for a loan.<sup>66</sup> But any benefit or liability to one party far greater than any comparable benefit or liability to another can indicate substantive unconscionability.<sup>67</sup>

Procedural unconscionability focuses on the situation leading to the formation of the contract. The courts examine the specific conditions present at a contract’s formation—something that indicates “oppression or surprise.”<sup>68</sup> Courts will assume that a negotiated contract represents a

62. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986).

63. *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503, 514 (Cal. 1985).

64. *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995).

65. *E.g.*, *Perdue*, 702 P.2d at 513 (two-thousand percent profit for clearing a check required court to inquire about unconscionable price); *Murphy v. McNamara*, 416 A.2d 170, 175 (Conn. Super. Ct. 1979) (purchase price of television set two and one-half times the regular retail sales price); *Toker v. Westerman*, 274 A.2d 78, 80 (D.N.J. 1970) (sale of refrigerator for two and one-half times its reasonable retail value); and *State by Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303, 320–21 (Sup. Ct. 1966) (agreement to purchase product at over two times its retail value).

66. *E.g.*, *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1015 (Cal. 2018) (high interest loan); *James*, 132 A.3d at 816 (high interest loan). And let’s not forget *Chesterfield et al. v. Jansen*, (1750) 95 Eng. Rep. 621, 626 (KB) (future loan agreement).

67. *See in re Porsche Cars N. Am.*, 880 F. Supp. 2d 801, 823 (S.D. Ohio, 2012) (citing *Carlson v. Gen. Motors, Corp.*, 883 F.3d 287, 296 (4th Cir. 1989)).

An example of the flexibility of how courts examine the benefits that may be too much can be seen in the cases where arbitration clauses have recently been found unconscionable as a remedy; these cases made the determination despite acknowledging that public policy favors arbitration. *E.g.*, *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014 (Wyo. 2017); *Gandee v. LDL Freedom Enters.*, 293 P.3d 1197, 1200–03 (Wash. 2013) (en banc) (finding three unconscionable provisions in an arbitration clause within a debt adjustment contract); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498, 503–05 (6th Cir. 2004) (applying Tennessee law to find that the adhesion contract was not unconscionable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (applying California law to hold an arbitration clause in an employment contract invalid on the basis of unconscionability).

68. *Cir. City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1106 (9th Cir. 2003) (quoting *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329 (Ct. App. 1999)); *De La Torre*, 422 P.3d at 1014; *Kindred HealthCare*, 403 P.3d at 1023.

An important issue is whether the party seeking relief is a business. If so, it’s over: courts view the contract formation process to involve parties of presumptively equally sophistication, even if highly unequal in bargaining positions. *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (“The doctrine of unconscionability cannot be invoked by so sophisticated a party as Continental in



true “meeting of the minds.”<sup>69</sup> Usually, unequal bargaining power may manifest in a form contract, often referred to as “contracts of adhesion”; such forms receive extra scrutiny from the courts.<sup>70</sup> When examining a form contract, it falls to the stronger party to prove that the agreement was an actual meeting of the minds.<sup>71</sup>

Oppression involves “an inequality of bargaining power which results in no real negotiation and ‘an absence of meaningful choice.’”<sup>72</sup> The more important variation, for our purposes, is surprise in “which the supposedly agreed-upon terms of the bargain are hidden in the . . . form drafted by the party seeking to enforce the disputed terms.”<sup>73</sup> Surprise “usually manifest[s] as a concealment of important facts.”<sup>74</sup> But surprise also occurs when there exists a “disparity in sophistication of parties, . . . and lack of opportunity to study the contract and inquire about contract terms.”<sup>75</sup>

The two elements do not need to be equally present; the greater the presence of one element reduces the threshold for the other.<sup>76</sup> Like

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reference to a contract so laboriously negotiated.”); *see also* Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 263, 281 (7th Cir. 1992) (“We do not understand the Sigels to be arguing that when they were negotiating for the franchise the Cookie Company took advantage of their ignorance or desperation to force unreasonable terms upon them. The Sigels are not vulnerable consumers or helpless workers. They are business people who bought a franchise . . .”). One might refer to this as the *scis quid vos es questus in* (you know what you are getting into) doctrine.

69. *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971).

70. *Ingle*, 328 F.3d at 1171–72.

71. *Weaver*, 276 N.E.2d at 148.

72. *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532 (Ct. App. 1997).

73. *Id.*

74. *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 296 (4th Cir. 1989) (quoting 8 WILLISTON ON CONTRACTS § 1763A (1972) (now § 18:13)).

75. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986) (ellipses in original) (applying Kansas state law); *see also* *Tillman v. Com. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008) (finding procedural unconscionability when the plaintiffs were relatively unsophisticated consumers and were rushed through the loan closings).

76. *E.g.*, *Ingle v. Cir. City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)) (applying California law to find that procedural and substantive unconscionability need not be present in the same degree).

Some courts even find that if one element is present, the other need not be looked for, either as a matter of course, *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013) (en banc), or when the substantive unconscionability is especially egregious, *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988).

other equity doctrines, “[u]nconscionability is a flexible doctrine designed to allow courts to directly consider numerous factors which may adulterate the contractual process.”<sup>77</sup> And there is there is no escaping the consequences of proposing a ruthless bargain: subsequent mitigating actions by the stronger party will not prevent clauses from being found unconscionable.<sup>78</sup>

*D. Application: James v. National Financial, LLC*

Having explained, let us apply. Our vehicle will be a case out of the Delaware Chancery Court: *James v. National Financial, LLC*.<sup>79</sup> This case involves as the stronger party a “payday loan” business, National Financial, LLC (“National” or defendant).<sup>80</sup> National specialized in “providing high interests loans to underprivileged consumers who are cash-constrained and lack alternative sources of credit.”<sup>81</sup>

The weaker party was the plaintiff, Gloria James.<sup>82</sup> James went to National for help paying her monthly bills.<sup>83</sup> James thought she agreed to pay \$30 interest per month for each \$100 borrowed; what National advertised as its “block rate.”<sup>84</sup> Her plan was to pay \$130 for each of two months.<sup>85</sup> She told the manager arranging the loan that was what she wanted to do.<sup>86</sup>

What James got, however, was something else entirely. The loan contract was for twenty-six months, not two.<sup>87</sup> The adjusted timeframe was to avoid falling under the recently enacted Delaware Payday Loan

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77. *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1013 (Cal. 2018) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 484 (Ct. App. 1982)).

78. *Gandee*, 293 P.3d at 1202.

79. 132 A.3d 799 (Del. Ch. 2016). I chose this case because (1) it is a fairly recent case that showcases all the elements discussed above, and (2) it is interesting to see an important case from Delaware not involving corporate law.

And I am going to provide additional comments about the case because every chance should be taken to attack these truly reprehensible businesses.

80. *Id.* at 805.

81. *Id.* at 829.

82. The court was at pains to point out that the term “weaker” was strictly legal definition. *Id.* at 814–15. A person who in the housekeeping department of a hotel, for low pay (just above the federal poverty line), and had been employed since the age of thirteen, cannot be described as weak. *Id.* at 803.

83. *Id.* at 805.

84. *Id.* at 806.

85. *Id.* at 806–07.

86. *Id.*

87. *Id.* at 807.

Law.<sup>88</sup> As written in the contract, the loan required twenty-seven payments of \$60, or \$1,620 in interest . . . on a loan of \$200, making the interest rate somewhere between 838.45% and 1,095%.<sup>89</sup>

After a tortuous path to trial, Vice Chancellor Laster announced his decision on March 14, 2016.<sup>90</sup> The court first found that all the factors indicating substantive unconscionability were present.<sup>91</sup> The price of an interest rate of (at minimum) 838.45% could not be justified either

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88. *Id.* at 806. Initially, payday loan companies like National had allowed initial two-week or one-month loans, meant to cover expenses until a borrower's next payday. *Id.* at 834. However, should the borrower not be able to pay off the loan, the principal and the interest were "rolled-over" into a new loan. *Id.* The rollovers could continue until all the principal and accumulated interest were paid off. *Id.*

To address this, the Delaware passed the "Payday Loan Law" in 2012. *Id.* at 834–35 (citing DEL. CODE ANN. tit. 5, §§ 2227(7), 2235A (West 2021)). The key component of the legislation is to limit the number of payday loans to five per twelve-month period, thus arresting the constant rollover (which were specifically designated in the statute as a new loan). *Id.* at 834. The loan included an anti-evasion section to keep the rollovers from being passed on to third parties after the five-loan limit was met. *Id.* at 835. But National's owner quickly spotted a way around the law; instead of setting up a perpetual rollover, it moved to seven-month installment plans, where the borrower would pay the interest for six months and the entire principal was due in the seventh month. *Id.* at 836. As a practical matter, all such a contract does is build the rollover into the initial instrument, sidestepping the five-loan limit by being only a single loan. *Id.*

89. *Id.* at 807. Outrageous as National's conduct was to that point, it missed no opportunity for greater profit. The day after she took out the loan, James broke her hand. *Id.* This resulted in her being unable to work. *Id.* When she went to National to try and get some relief, National employees suggested that she pay higher individual amounts over a longer period of time. *Id.* at 807–08. The judge concluded that, far from trying to help James, National sought to make even more money at a faster rate. *Id.* at 808.

90. *Id.* at 799. James opted out of an arbitration clause on June 14, 2013 and filed a federal action on July 1, 2013. *Id.* at 809. On September 20, 2013, after voluntary dismissal of the federal case, James filed a class action suit in Delaware. *Id.* Amazingly, National sought to compel arbitration in state court *even though* it argued that James's withdrawal from arbitration justified dismissing the federal case. *Id.* at 810. This resulted in sanctions against National. *Id.*

Sanctions did not stop National's bad behavior. It twice, *twice*, refused to follow discovery orders issued by the court. *Id.* In granting sanctions, the court found that National had violated the Federal Truth in Lending Act; its only relief from sanctions under the Act was if it could meet a statutory defense of bona fide error. *Id.* at 810, 838–39; 15 U.S.C. § 1601. Unsurprisingly, National could not and was sanctioned under the act: an actual award (\$3,237, plus interest) and a probably much more costly award of attorney fees. *James*, 132 A.3d at 839.

91. *Id.* at 837.

by prevailing market rates<sup>92</sup> or by the utility of the loan to the consumer, and therefore, it was fundamentally unfair.<sup>93</sup>

Furthermore, the contract contained jury waiver and arbitration clauses, denying borrowers' basic rights and remedies, contained particularly harsh penalties, and concealed that the loan was for twenty-six months.<sup>94</sup> These disadvantageous clauses were written in confusing language that obscured their effects.<sup>95</sup> Overall, the contract represented an imbalance of rights and obligations in favor of National.<sup>96</sup>

As impressive as National's contract was in meeting substantive factors, it paled in comparison to how thoroughly the company met procedural unconscionability. Regarding the respective bargaining power, one could hardly imagine two more mismatched negotiators. National was a veteran operator in the payday loan industry with a sophisticated legal department and employee training program.<sup>97</sup> James, on the other hand, had only herself and a desperate financial situation.<sup>98</sup>

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92. *Id.* at 819. National's own expert admitted that any interest rate over 400% was irrational, that his own studies could only justify an interest rate of 170%, and that the interest rates in the local market were much higher than he expected. *Id.* at 816–18.

93. *Id.* at 821. National's expert said high rates could be justified when a consumer is faced with a short-term crisis and uses a short-term loan. *Id.* at 819–20. However, such utility disappears when a consumer is forced into a term as long as James. *Id.* at 820–21.

94. *Id.* at 822, 826. In addition to the obligation to pay a late fee of five percent of any outstanding loan amount, National has the right to declare default after any late payment and require the borrower to pay expenses, including attorney's fees, to pursue payment. *Id.* at 822.

95. *Id.* at 823, 825. The language around the arbitration clause and penalties was inconsistent, making it impossible for James to actually understand what was being agreed to. *Id.* at 823. Furthermore, the court noted that the language allowed National to interpret clauses, particularly the credit card charge authorization, to its own benefit—interpretations it consistently acted upon to its own advantage. *Id.* at 824–25.

96. *Id.* at 826. The judge noted that the contract devoted nearly two-thirds of its length to the onerous passages and that the skillfulness of the contract drafting ensured that it would be nearly impossible to pursue a class action against National. *Id.*

97. *Id.* at 829–30.

98. *Id.* at 830–31. Regarding her financial unsophistication, the court supported its conclusions by examining James's lack of understanding of her bank account, a student loan, and her recollection of her past loans with National compared to the reality (she often took longer to pay off her loans than she remembered). *Id.* As for her desperation, she lived close to the federal poverty line for an individual and regularly utilized National to meet basic needs. *Id.* at 831.

The other elements of procedural unconscionability further counted against National. There was no actual bargaining—the loan contract was a form presented on a take-it-or-leave-it basis.<sup>99</sup> National’s employees tried to induce borrowers to take out the largest possible loan while downplaying how much the actual interest was.<sup>100</sup> And, in what the court called the most “critical” aspect, the contract was deceptive: the purpose and actual effect of the contract was to avoid the Delaware statute meant to protect payday loan customers like James.<sup>101</sup> When the court balanced all the factors, it found no balance at all. It found that National fell on the wrong side of every measure Delaware uses to determine unconscionability.<sup>102</sup>

I do not draw a direct comparison between retirement fund companies and National. The latter deliberately and knowingly exploits a vulnerable group. At worst, retirement fund companies act as unknowing accomplices within a complex—and problematic—economic and political system. But deliberate malfeasance is not a requirement of unconscionable contracts; Chancellor Hardwicke accepted that Sir Abraham Jansen believed he acted honorably.<sup>103</sup> It is the consequences of the contract and the conditions of its formation that matter. We now turn to the consequences, the price, that retirement fund companies require: the surrender of a constitutional right.

## II. THE RIGHT (NOT) TO ASSOCIATE

One thing that sets close-up magic from cardistry is the intent of deception on the part of the performer. Cardistry involves shuffling techniques, card spreads, and the like. Entertaining, but everything is there for the audience to see. Close-up magic, on the other hand, is all about misdirection: trickery is at its heart. Unless the performer is clear from the start, it can be hard to determine which is being done before the audience. Fair warning.

Next move in my prestidigitation: the Right (Not) to Associate.

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99. *Id.* at 832, 834.

100. *Id.* at 833. Specifically, the interest for loans was presented as being \$30 for every \$100 and that the actual APR rate did not matter unless loans were outstanding for more than a year; in fact, what was required was that \$130 be paid *every two weeks*. *Id.* at 806. Thus, James thought she would be paying \$260 for a \$200 loan; in fact, she agreed to pay \$1,620 over the life of the loan. *Id.* at 833.

101. *Id.* at 834.

102. *Id.* at 837.

103. *See supra* note 30.

*A. Origins of the Doctrine*

The First Amendment Right (Not) to Associate traces its lineage to *West Virginia Board of Education v. Barnette*.<sup>104</sup> The Board, in 1942, required that all school teachers and pupils in its schools participate in the Pledge of Allegiance to the U.S. flag; refusal to do so would “be regarded as an act of insubordination, and shall be dealt with accordingly.”<sup>105</sup> Insubordination could be punished by expulsion.<sup>106</sup> But a child so expelled by operation of the regulation would also be considered “unlawfully absent” and considered a delinquent.<sup>107</sup> Delinquency of the child could make the parents criminally liable for fines of up to fifty dollars (in 1942 dollars) and thirty days in jail.<sup>108</sup>

Barnette and similarly situated parents sued the Board.<sup>109</sup> As Jehovah’s Witnesses, they viewed the flag as a graven image, and their religious beliefs precluded saluting it in any manner.<sup>110</sup> The plaintiffs did offer to “publicly” state “[respect for] the flag of the United States and acknowledge it as a symbol of freedom and justice for all,” but the Board never responded to this compromise.<sup>111</sup>

The Supreme Court determined the Board had gone too far.<sup>112</sup> Writing for the Court, Justice Jackson made clear that:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act faith therein.<sup>113</sup>

Justice Murphy cast the matter in more legal terms:

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak and the right to refrain from speaking at all . . . .<sup>114</sup>

As such, even in a time of war, the right to publicly disagree must be preserved.

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104. 319 U.S. 624 (1943).

105. *Id.* at 626.

106. *Id.* at 629.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 628 & n.4.

112. *Id.* at 642.

113. *Id.*

114. *Id.* at 645 (Murphy, J., concurring).

*B. The Doctrine's Elements*

The Right of Association has intrinsic and instrumental aspects.<sup>115</sup> Intrinsic associations are “certain intimate human relationships.”<sup>116</sup> Safeguarding such relationships is “central to our constitutional scheme.”<sup>117</sup> This intrinsic freedom of association receives protection “as a fundamental element of personal liberty.”<sup>118</sup> However, these intrinsic associations are outside the scope of this Article.

Our focus is on the instrumental associations. Such associations are important as “an indispensable means of preserving other individual liberties.”<sup>119</sup> Protection for these associations exists as a corollary for “those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>120</sup> The Supreme Court equally recognizes the mirror image: the right not to have such association forced on unwilling participants.<sup>121</sup>

A First Amendment Right (Not) to Associate violation has several components:

1. A compelled, mandated, or required association;<sup>122</sup>
2. As a consequence of state action;
3. Without adequate justification.<sup>123</sup>

If all three elements are met, a statute violates the First Amendment principles of the Right of Association.

115. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

116. *Id.* at 617.

117. *Id.* at 618.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 623 (citing *Abood v Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1976), *overruled by* *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)); *see* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (“The right of freedom of thought and of religion guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . .”).

122. The Court has used these terms interchangeably. “Compel” is used by *Abood*, 431 U.S. at 212, 222 (using “compel” and “require”), *Roberts*, 468 U.S. at 614, 622 (same), and *Janus*, 138 S. Ct. at 2457, 2460, 2495 (2018) (using “compel,” “require,” and “mandate”).

123. *See Roberts*, 468 U.S. at 623 (finding that infringement on the Right to Associate for expressive purposes may only be justified by “regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms”).

First, there must be a relationship formed or forced towards some common end.<sup>124</sup> The Right (Not) to Associate rises from these relationships.<sup>125</sup> Such “expressive” relationships exist along a spectrum. Private associations set up to promote networking among businesspeople, for example, are accorded the least amount of protection.<sup>126</sup> Association based upon the expression of certain ideas receives higher protections against forced associations, with political association receiving the highest degree of protection.<sup>127</sup>

Second, there must be some form of state action involved.<sup>128</sup> The intensity of the state action depends on the type of association. When an association has a purpose other than purely political, such as a business or social association at issue in *Roberts v. United States Jaycees*,<sup>129</sup> the state must require the association in order to trigger a Right (Not) to Associate analysis.<sup>130</sup> When the association in question involves political activity, then the threshold that triggers Right (Not) to Associate analysis is lower: whether the state action creates conditions for a forced association that would not otherwise exist.<sup>131</sup>

Third, there must not be an adequate governmental justification for the compelled association. In considering the justification, courts use a test known as “exacting scrutiny.”<sup>132</sup> This fact-intensive test examines laws that do not seek to suppress idea but nonetheless may infringe upon the Right of Association.<sup>133</sup> The forced association must be one

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124. *Id.* at 622–23.

125. *Id.* at 623.

126. *See id.* at 620 (emphasizing that “the Constitution undoubtedly imposes constraints on the State’s power to control the selection of one’s spouse that would not apply to regulations affecting the choice of one’s fellow employees”).

127. *Id.* at 622–23.

128. *See Ry. Emps. v. Hanson*, 351 U.S. 225, 232 (1956).

129. 468 U.S. 609 (1984).

130. *Id.* at 621–22 (“We turn therefore to consider the extent to which application of the Minnesota statute to compel Jaycees to accept women infringes the group’s freedom of . . . association.”).

131. *Hanson*, 351 U.S. at 232 (“The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitutional operates, though it takes a private agreement to invoke the federal sanction.”); *Abood v Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1976) (analogizing the case at bar to that of *Hanson*), *overruled by Janus*, 138 S. Ct. 2448 (2018). *But see Janus*, 138 S. Ct. at 2479 (criticizing *Abood*’s reliance on *Hanson*).

132. *Janus*, 138 S. Ct. at 2465.

133. *Roberts*, 468 U.S. at 623. The Court provides no test about how to determine if that interest is “important” or “compelling”; it seems to be an “I know it when I see it” test. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).



“serv[ing] compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>134</sup> Among the interests the Court found compelling: to prevent discrimination based on gender,<sup>135</sup> to oversee the way elections are conducted,<sup>136</sup> and to preserve the integrity of elections.<sup>137</sup> As a practical matter, the “exacting scrutiny” test still presents a high burden for any forced mandatory association.<sup>138</sup>

*C. Interlude: The (Lack Of) Distinction Between “Intermediate” and “Exacting” Scrutiny; A.K.A. Discussion That Would Not Fit in a Footnote*

Some discussion about the language and tests used by the Court when discussing First Amendment rights should be presented. A distinction exists between Right of Association cases and freedom of speech cases: they are different rights protected by the First Amendment.<sup>139</sup> At first glance, this distinction seems important, as current First Amendment jurisprudence cites to different lines of cases using different language. For cases involving non-expressive Right of Association issues, where a person does not seek to actively “speak” in any way, the test applied is “exacting scrutiny.”<sup>140</sup> For statutes and regulations that impact an individual’s expressive conduct, actions

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134. *Roberts*, 468 U.S. at 623.

135. *Id.*

136. *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 126 (1981).

137. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam) (limiting campaign contributions).

138. Since *Roberts*, the Court has upheld an associative restriction on several occasions. *See Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (preventing gender discrimination is a compelling interest); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 687–90 (2010) (“All Comers” provision for student organization use of public university resources exist to meet state’s anti-discrimination provisions). Most cases that examine a restriction under exacting scrutiny still find it falls short. *See, e.g., Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2465 (2018); *Harris v. Quinn*, 573 U.S. 616, 648–49 (2014); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 310 (2012); *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

139. David L. Hudson, Jr., *Freedom of Association*, THE FIRST AMENDMENT ENCYC., <https://www.mtsu.edu/first-amendment/article/1594/freedom-of-association> [https://perma.cc/R3KP-EZ66].

140. *Janus*, 138 S. Ct. at 2464–65.

other than vocalized speech, the Court uses a test called “intermediate scrutiny.”<sup>141</sup>

As a practical matter, however, the distinction appears to be no more than rhetoric. Both tests use similar language when stating the criteria of government purpose that justifies the intervention. That purpose must be “important” (conduct) or a “compelling” (Right of Association) government interest unrelated to the suppression of “free speech” (conduct) or “ideas” (Right of Association).<sup>142</sup>

Past Court opinions indicate further blurring of the lines between the two. *Roberts* determined that preventing gender discrimination is a “compelling state interest[] of the highest order,” never once using the term “exacting scrutiny.”<sup>143</sup> Yet the author of the *Roberts* opinion, Justice Brennan, did use “exacting scrutiny” in another Right of Association case, *Elrod v. Burns*,<sup>144</sup> but did not say “compelling”; instead, Justice Brennan said that the government interest must be “paramount, one of vital importance, and the burden is on the government to show the existence of such an interest.”<sup>145</sup> *Abood v. Detroit Board of Education*,<sup>146</sup> another Right of Association case, decided after *Elrod*, discussed “important government interests” as a reason for requiring some relationships but never used the term “exacting scrutiny.”<sup>147</sup>

Most interestingly on this point, Justice Powell complained in his concurrence in *Abood* that the majority opinion did not follow the precedent of *Buckley v. Valeo*.<sup>148</sup> Justice Powell pointed out that Justice Brennan explicitly followed the *Buckley* standard in his plurality opinion of *Elrod*.<sup>149</sup> Of course, *Buckley* is not a Right of Association case,

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141. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27 (2010).

142. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

143. *Roberts*, 468 U.S. at 624.

144. 427 U.S. 347 (1976).

145. *Id.* at 362.

146. 431 U.S. 209 (1977), *overruled by* *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

147. *Id.* at 224–25. For further discussion on what is and is not a compelling government interest, see Sections II.B, The Doctrine's Elements, and II.D, The Doctrine Applied: Union Agency Fees.

148. *Id.* at 255–56 (Powell, J., concurring) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

149. *Abood*, 431 U.S. at 259 (Powell, J., concurring) (citing *Elrod*, 427 U.S. at 362).

but a freedom of speech case: the first campaign finance laws case.<sup>150</sup> Thus, the two rights are analyzed on a similar level.<sup>151</sup>

A final note: Even when a case is analyzed under a more permissible standard of “exacting scrutiny” instead of “strict scrutiny,” the necessary “compelling interest” is a bit of a moving target. *Roberts* found that addressing gender bias is a compelling interest.<sup>152</sup> *Boy Scouts of America v. Dale*<sup>153</sup> found that it is not a compelling interest to prevent discrimination based on a person’s sexual identity.<sup>154</sup> This may indicate that First Amendment jurisprudence is a tad more subjective than we might prefer.

#### D. *The Doctrine Applied: Union Agency Fees*

Fourteen years after *Barnette*, the Court began to consider the consequences of the Right (Not) to Associate in the context of a labor union’s political activities. Beginning in the latter half of the twentieth century, both federal and state legislatures had passed statutes governing labor relations.<sup>155</sup> These laws allowed, but did not require, the use of “agency shop” clauses in labor contracts.<sup>156</sup> Such clauses

150. Compounding the confusion is that even when a statute or regulation is content based, there is still a spectrum of application. If the purpose or the application of a statute is based on the content of the speech, then what might be called “intermediate scrutiny plus” examination occurs; but if the Court determines that the purpose or application is based on the *political* content of the speech, then we are in the realm of “strict scrutiny.” Compare *Holder v. Humanitarian L. Project*, 561 U.S. 1, 25–26, 28 (2010) (applying a “more demanding” (but not “strict scrutiny”) standard to uphold a statute prohibiting material support, including monetary support, of terrorist organizations is not “political” because nothing in the statute prohibited an organization from “say[ing] anything they wish on any topic”), with *Citizens United v. FEC*, 558 U.S. 310, 339–41 (2010) (applying strict scrutiny: “prohibition on corporate independent expenditures” is a ban on political speech by “disfavored speakers”).

151. *Citizens United* retroactively changed the test from the one created and championed by Justice Powell in *Buckley*. *Citizens United*, 558 U.S. at 340. Instead of being conduct, subject to intermediate scrutiny, donations became a form of political speech to the level of strict scrutiny, indicative of the decision’s radical nature. *Citizens United*, 558 U.S. at 340.

152. 468 U.S. 609, 623 (1984).

153. 530 U.S. 640 (2000).

154. *Id.* at 659.

155. See *Railway Labor Act*, 45 U.S.C. § 152; *Int’l Ass’n of Mechanists v. Street*, 367 U.S. 740, 764–70 (1961); *MICH. COMP. LAWS* § 423.210-211 (1970); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 213 (1977), *overruled by* *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018); *ILL. COMP. STAT.* ch. 5, § 315/6(e) (2016).

156. See *Ry. Emps. v. Hanson*, 351 U.S. 225, 231–32 (1956) (detailing the provisions of the *Railway Labor Act*, 45 U.S.C. § 152); *Street*, 367 U.S. at 764–70 (same); *Abood*, 431

require employees covered by a contract to pay union dues, or the equivalent, regardless of whether the employee actually joins the union.<sup>157</sup>

The Court moved very slowly towards addressing the Right of Association issue presented by these laws.<sup>158</sup> In 1956 and in 1961, the Court heard cases concerning the Railway Labor Act.<sup>159</sup> The act allowed labor unions to require mandatory fees from all employees represented by that union, and the unions then used some of those monies to engage in political activities.<sup>160</sup> The issue was whether the forced association with a union's political activity triggered Right of Association analysis.<sup>161</sup>

At each point, the Court sidestepped the issue. First, in *Railway Employees v. Hanson*,<sup>162</sup> because the constitutional question was not indicated by the facts.<sup>163</sup> Then, in *International Ass'n of Mechanics v. Street*,<sup>164</sup> because the statute itself prohibited the political use of membership dues.<sup>165</sup>

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U.S. at 223–24 (analyzing MICH. COMP. LAWS § 423.210-211 (1970)); *Janus*, 138 S. Ct. at 2460–61 (describing ILL. COMP. STAT. ch. 5, § 315/6(e)).

157. *Abood*, 431 U.S. at 211.

158. At the time the Court began addressing these labor laws, the Freedom of Contract Era of *Lochner v. New York*, 198 U.S. 45 (1905), had only ended twenty years prior with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (the “switch in time that saved nine” case). The Justices were likely wary of returning to Constitutional means to overturn business and labor regulation.

159. 45 U.S.C. § 152; *see Street*, 367 U.S. 740; *Hanson*, 351 U.S. 225.

160. *Street*, 367 U.S. at 742–44.

161. *Hanson*, 351 U.S. at 236; *Street*, 367 U.S. at 746 n.4.

162. 351 U.S. 225 (1956).

163. *Id.* at 238.

164. 367 U.S. 740 (1961).

165. *Id.* at 764–70. This was the approach taken by the five Justices who all joined the majority opinion. *Id.* Two Justices, Frankfurter and Harlan, would have dismissed the case completely, deferring to Congress's power to regulate. *Id.* at 801, 803, 819 (Frankfurter, J., dissenting). One, Justice Black, would have affirmed an injunction enjoining any collection of fees. *Id.* at 797 (Black, J., dissenting). And one Justice, Justice Whittaker, joined the opinion regarding it being a statutory, not constitutional, question but dissented because he would enjoin the enforced collection of fees. *Id.* at 779–80 (Whittaker, J., concurring in part and dissenting in part).

Justice Douglas wrote a concurrence trying to have it both ways. He would have reached the constitutional issue and found that union dues violated the Right (Not) to Associate. *Id.* at 777–78 (Douglas, J., concurring). However, he could not find a simple remedy that both affirmed First Amendment rights and the continued funding of labor unions by those who benefit. *Id.* at 778 (Douglas, J., concurring). He disliked the proportional result of the decision but joined it ultimately because of the practical

In 1977, the constitutional issue could no longer be put off. The case is *Abood*.<sup>166</sup> The plaintiffs were a collection of teachers with the Detroit public school system.<sup>167</sup> After a secret ballot election, their employer, the Detroit Board of Education, recognized the Detroit Federation of Teachers as the exclusive representative of the teachers in contract negotiations.<sup>168</sup> One of the clauses of the resulting collective bargaining clauses provided that Detroit public schools were an “agency shop.”<sup>169</sup>

The plaintiff teachers refused to join the union and sued. They argued they were forced to engage in political speech: the union engaged in political and other activities “of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities.”<sup>170</sup> A Michigan court of appeals sided against the plaintiffs, holding that “compulsory service charges” could be used to lobby for policies and support political candidates.<sup>171</sup> The Michigan Supreme Court denied review, leading to the U.S. Supreme Court taking up the case.<sup>172</sup>

The Court found the plaintiff’s argument as “a meritorious one.”<sup>173</sup> The Michigan legislature had passed a statute allowing “agency shop” clauses in union contracts.<sup>174</sup> A Michigan state court interpreted that statute to allow the use of those fees for political purposes.<sup>175</sup> The state acted and reached the constitutional issue, and now the Court had to decide.<sup>176</sup>

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problem “of mustering five Justices for a judgment in this case.” *Id.* at 778–79 (Douglas, J., concurring).

166. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *overruled by* *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018).

167. *Id.* at 212.

168. *Id.* at 211–12.

169. *Id.* at 212. Michigan’s labor law requires that any union that gets a majority in a secret ballot of employees becomes the exclusive representative of the employees and may negotiate agency shop clauses in labor contracts. *Id.* at 223–24 (citing MICH. COMP. LAWS §§ 423.210(1)(c), 423.211 (1970)).

170. *Id.* at 213 (including quotes from plaintiffs’ complaint).

171. *Id.* at 215–16 (citing *Abood v. Detroit Bd. of Educ.*, 230 N.W.2d 322, 327 (Mich. Ct. App. 1975), *vacated sub nom.* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

172. *Id.* at 216.

173. *Id.* at 234.

174. *Id.* at 211–12 (citing MICH. COMP. LAWS § 423.211 (1970)).

175. *Id.* at 232.

176. *Id.* at 232–33.

Once it faced the issue, the *Abood* outcome turned on balancing equally important principles: a legislature's ability to create labor policy versus protecting an individual's Right (Not) to Associate.<sup>177</sup> The decision found the legislature's policy and purpose "important."<sup>178</sup> It accepted "labor peace" as a justifiable goal and the "free riders" problem as a justifiable concern.<sup>179</sup> Therefore, *Abood* did not remove the ability for unions to negotiate for agency clauses.<sup>180</sup>

Nevertheless, Michigan's statute did allow a Right (Not) to Associate violation to occur.<sup>181</sup> Either being prevented from making political contributions or compelled to make them was "no less an infringement of their constitutional rights."<sup>182</sup> Therefore, "the Constitution requires . . . that such expenditures be financed . . . by employees who do not object . . . and who are not coerced . . . by the threat of loss of governmental employment."<sup>183</sup> As such, a union collecting a mandatory agency fee had to return any amounts used for political advocacy.<sup>184</sup>

This refund remedy stood until 2018. *Janus v. American Federation of State, County, and Municipal Employees, Council 31*<sup>185</sup> was the culmination of a campaign to end the *Abood* compromise.<sup>186</sup> The facts are nearly identical: a state law that allowed agency shops and a dissenting employee based on the political uses of the agency fee.<sup>187</sup> The Court determined that *Abood* had upheld the principle but ignored the consequences that flowed from it.<sup>188</sup> This is because violations of the Right (Not) to Associate are particularly egregious:

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177. *Id.* at 223–32.

178. *Id.* at 224.

179. *Id.* at 224, 237.

180. *Id.* at 235–36.

181. *Id.* at 232.

182. *Id.* at 234.

183. *Id.* at 235–36. The exact text is not as elegant as it could be, as Justice Stewart was discussing multiple principles in a single, overly long sentence:

Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

184. *See id.* at 240–42 (holding that the lower court erred in denying plaintiffs a refund of the fees that were used by the union for political expenditures).

185. 138 S. Ct. 2448 (2018).

186. *See id.* at 2464–65 (discussing the earlier cases that challenged *Abood*).

187. *Id.* at 2460–62.

188. *Id.* at 2460–61.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” [for court intervention] than a law demanding silence.<sup>189</sup>

As a result, *stare decisis* is no basis for ignoring the fundamental freedom of the Right (Not) to Associate.<sup>190</sup>

The decision also attacks the justifications supported by *Abood*.<sup>191</sup> The Court dismissed “labor peace” justifications for agency clauses because there was no connection between the two: unions would still seek to organize without incentive of mandatory agency fees.<sup>192</sup> The Court found that free-rider concerns were not a compelling interest, but for the reason that “[t]o hold otherwise across the board would have startling consequences.”<sup>193</sup> Finally, the remedy provisions of *Abood* caused practical problems and abuse.<sup>194</sup> As neither the (reinterpreted) facts or *stare decisis* justified a different result, *Abood*’s forty-one-year-old remedy was overruled.<sup>195</sup>

189. *Id.* at 2464 (citations omitted).

190. *Id.* at 2460.

191. There is a striking similarity between *Janus*’s dismissal of *Abood* labor peace and free rider justifications and *Citizens United*’s refutation of *Austin*’s anticorruption and antidistortion: one gets the impression that no facts could actually deter the initial conclusion.

192. *Id.* at 2465–66 (citing studies that show union membership and activities are strong even when agency fees are not guaranteed by statute).

193. *Id.* at 2466. Justice Alito examines these “consequences” in a series of hypotheticals. *Id.* at 2466–69. And I really mean very hypothetical. Justice Alito engages in the mind experiments practiced in many a law school classroom. But not once does he cite any studies that support his musings. The Justice would probably cite such studies if he had them, given his willingness to rely on them at other points in his argument regarding union incentives to organize. *Id.* at 2476 nn.17–18.

194. *Id.* at 2460, 2481–82.

195. *Id.* at 2465–66. If *Janus* is correct, *Citizens United*’s Right of Association analysis may not be as sound as its rhetoric makes it. *Citizens United v. FEC*, 558 U.S. 310 (2010). *Janus* raises the political Right (Not) to Associate to the same high level of the corporation’s right to political participation in *Citizens United*. Compare *Janus*, 138 S. Ct. at 2464 (finding that “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning” and “cannot be casually allowed”), with *Citizens United*, 558 U.S. at 361–62 (claiming that if there were a potential disagreement between a shareholder’s and corporation’s political views, it could be corrected democratically). *Citizens United* found that an enforced association could be mitigated in the presence of some form of democratic process. *Citizens United*, 558 U.S. at 361–62. *Janus*, however,

### III. WHERE HAS THE STATE ACTED REGARDING RETIREMENT PLANS AND THE RIGHT TO ASSOCIATE?

There are several state actions to consider that create the conditions for an unwanted political association. There are federal statutes: the Employee Retirement Income and Security Act of 1974<sup>196</sup> (ERISA) and related provisions of the U.S. tax code. There are Delaware statutes that govern who may participate in shareholder votes, and, perhaps unique to Right of Association jurisprudence, case law in the form of the *Citizens United* decision. We shall address each in turn.

The current structure of employer/employee retirement plans is formed by ERISA.<sup>197</sup> Among Congress's stated purposes is to protect employee benefit plan participants by promulgating a host of regulations and remises.<sup>198</sup> These purposes included harmonizing the tax code regarding such plans with older provisions.<sup>199</sup> ERISA does not require employers to set up a plan or the precise form of a plan; it simply provides that an employer may do so.<sup>200</sup> In this way, ERISA parallels the federal and state laws that allow for agency shop provisions.<sup>201</sup>

The required state action also occurs with the tax deferral provisions found in § 402(a) of the U.S. tax code.<sup>202</sup> Such plans exist to induce employees to participate in such plans, which have long been seen as beneficial.<sup>203</sup> But in creating the inducement, the tax code creates a situation where employees exchange their association rights for a benefit. Both ERISA and the tax code provide enough of a state action to require

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found such associations to be so demeaning that no remedy short of an absolute ban would be satisfactory (that is, the democratic process of union membership votes was not adequate). See *Janus*, 138 S. Ct. at 2464 ("Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed."). Reconciling *Citizens United* and *Janus* would seem to turn on some clear distinction between corporations and unions. And that, we shall see, leads to some unpleasant conclusions.

196. 29 U.S.C. § 1001 (2018).

197. *Id.*

198. *Id.* § 1001(b).

199. *Yates v. Hendon*, 541 U.S. 1, 13 (2004).

200. *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004).

201. See *supra* note 156.

202. 26 U.S.C. § 402(a).

203. See *United States v. Kintner*, 216 F.2d 418, 426 (9th Cir. 1954) (illustrating that the purpose of this section is to provide to general employees what had only been available to high-salaried employees who could take the immediate tax hit).



examination of whether the underlying policy is compelling enough to justify the exchange.<sup>204</sup>

Delaware state law provides an additional example of state action that allows a Right (Not) to Associate violation. Many corporations are formed under Delaware law or under state laws that hew close to it.<sup>205</sup> Delaware's business corporations statutes vests the ability to participate in shareholder democracy with the "stockholders of record" in a ledger kept by the corporation.<sup>206</sup> Any conflict between an entity listed in the ledger and a "lawful owner" or "beneficial owner" is resolved in favor

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204. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977) (citing *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 232 (1956)), *overruled by Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018). *Janus* may not support this contention. Justice Alito makes two arguments of note in his stare decisis analysis of *Abood*. *Janus*, 138 S. Ct. at 2478–86 (2018). First, that *Abood* and *Janus* concerned public employees, while *Hanson* and *Street* concerned private employees. *Abood*, 431 U.S. at 226; *Janus*, 138 S. Ct. at 2479. Second, the laws in *Janus* and *Abood* did lead to the state requiring the association in two steps: first, in passing the authorizing statute; and second, by agreeing to the agency clause as the employer. *Janus*, 138 S. Ct. at 2479. In doing so, Justice Alito was seeking to distinguish *Abood* from *Hanson* and *Street*. *Id.*; *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 742 (1961).

I think this limitation is jarring given the full-throated roar of support *Janus* gives to the Right (Not) to Associate. Justice Alito's argument would limit that right to a group the *Abood*, *Street*, and *Hanson* Courts clearly said should have it: private employees trapped in an association allowed by a federal statute. *See Abood* at 226; *Street*, 367 U.S. at 749; *Ry. Emps.' Dep't v. Hanson*, 351 U.S. at 225. The only reason these decisions did not actually find for private employees was because either private employees were not involved or the statute at issue did not allow the association. *Abood*, 431 U.S. at 232; *Street*, 367 U.S. at 766–67; *Hanson*, 351 U.S. at 231–32.

Further proof can be seen from the concurrence by Justice Douglas and the dissent by Justice Black in *Street*. *Street*, 367 U.S. at 775, 780 (Douglas, J., concurring) (Black, J., dissenting). The opinions were not concerned with giving the employee plaintiffs too much of a right, but too little. They all would have reached the constitutional question and decided in favor of the employees. *Street*, 367 U.S. at 776, 791 (Douglas, J., concurring) (Black, J., dissenting).

Finally, I make this distinction. Justice Alito makes an argument that the state ultimately did require the association, albeit in a two-step process. *Janus*, 138 S. Ct. at 2468–69. This extra step beyond creating the conditions for the violation justifies the extreme remedy of not allowing any contribution to a union. Whether private company employees would still be violated without that extra state step, along with the question of whether the less extreme state action makes the *Abood* refund remedy more appropriate, simply is not an issue in *Janus*.

205. *See* Jan Ting, Opinion, *Why Do so Many Corporations Choose to Incorporate in Delaware?*, NPR (Apr. 27, 2021), <https://www.npr.org/articles/why-do-so-many-corporations-choose-to-incorporate-in-delaware> [<https://perma.cc/S4AC-NW3H>].

206. DEL. CODE ANN. tit. 8, § 219 (2021); *see also, e.g.*, CAL. CORP. CODE § 701 (West 2021); N.Y. BUS. CORP. LAW § 612 (McKinney 2021).

of the entity listed in the ledger.<sup>207</sup> If the shareholder of record is not the beneficial shareholder, that owner must take action to secure his, her, their, or its rights; a corporation has no duty to ensure those rights.<sup>208</sup>

Under this framework, a retirement plan manager, not the plan members (those whose actual money has been invested) gets to vote in shareholder democracy. This matters because shareholder action is the only permissible way to limit a corporation's political activities.<sup>209</sup> So, any plan member cannot protect themselves through a recourse to "corporate democracy" contemplated by Justice Kennedy.<sup>210</sup>

The final state action to consider is the most unusual and the most important: the *Citizens United* decision itself. The statutes and attendant regulations discussed above seek the efficient operation of a corporation (Delaware state laws) and the accumulation of retirement savings (ERISA).<sup>211</sup> Co-existing and developed along with these provisions were campaign finance laws that regulated the political actions of corporations.<sup>212</sup> Taken together, the legal scheme could be seen as balancing various public policies against each other. *Citizens United* removed a significant component of that scheme: all statutes and regulations that mitigated the imposed association with corporate political activity.<sup>213</sup> The case leaves intact, and thereby amplifies, the provisions that drive and tie individuals to that activity. Of all the state

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207. *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987); *see also, e.g., Twin Bay Village, Inc. v. Kasian*, 60 N.Y.S.3d 560, 563 (App. Div. 2017); *Davis v. Yageo Corp.*, 481 F.3d 661, 675 n.9 (9th Cir. 2007) (applying California law).

208. *Enstar*, 535 A.2d at 1354. *Enstar Corp.* involved shares held by Drexel Burnham Lambert Inc. and Prudential-Bache securities firms. *Id.* at 1353. The persons who paid for the shares chose to have the firms be the owners of record in order to take advantage of the better prices the firms could command. *Id.*

209. *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010).

210. *Id.* at 362 (citing *First Nat. Bank v. Bellotti*, 435 U.S. 765, 794 (1978)). Even if the administrator of a retirement plan might personally favor non-participation of corporations in the political process, fiduciary obligation may still require voting in support of such participation. A plan administrator is under a fiduciary duty of care to act solely in the interest of the plan's beneficiaries. 29 U.S.C. § 1104(a)(1). Given the purpose of these plans, the clearest benefit is to maximize the profits of corporations in which the plans hold shares. This could mean voting against any provisions that limit the political activities, overseen by corporate management and officers who are also under a fiduciary obligation to maximize a corporation's profits.

211. *See supra* notes 197–208 and accompanying text.

212. *See* 11 C.F.R. §§ 114.9–114.10 (2020).

213. *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

actions that created the conditions for violating the Right (Not) to Associate, *Citizens United* is the biggest.<sup>214</sup>

#### IV. NOW WATCH CAREFULLY . . .

With all legal doctrine cards finally dealt and on the table, we shall play my game at last. The suits consist of two legal doctrines, our majors, and two contracts, our minors. The key legal doctrine, our Spades, is the doctrine of unconscionable contracts. Playing close support, our Hearts, is the First Amendment Right of Association. The contracts most at issue, our Diamonds, are retirement plans that purchase shares in private corporations to benefit plan members. And lurking at the bottom, our Clubs, are employment contracts that include contributions to retirement plans as part of a compensation package, and perhaps mandatory participation in a retirement plan.

There are no trumps and no wild cards. Well, maybe a joker: we shall see . . . .

##### A. *The Presence of a Right (Not) to Associate Violation*

An implied contract clause sets our unconscionable contract game in motion: the price being asked to participate in the plan (and receive any matching monies from an employer). That price is the surrender of one's Right (Not) to Associate with the political activities of any corporation the retirement plan invests. However, before we can subject the clause to an unconscionable contract analysis, we must determine whether such a clause exists. That requires determining whether there is a Right (Not) to Associate violation. Below is how such a case can be made.

A Right (Not) to Associate violation has three components: (1) a mandated, forced, or required association; (2) as a consequence of state action; and (3) without adequate justification.<sup>215</sup> The first element of a violation is a mandated political association. That component is met by requiring plan members to be part of the political activities of a corporation. The plan members contribute money, the plan administrators invest in a corporation, and that corporation may do whatever it likes with that money.<sup>216</sup> This absolute and total discretion

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214. See *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956) ("Once courts enforce the agreement the sanction of government is, of course, put behind [it]").

215. See Section II.B (covering a detailed discussion of these elements).

216. See Julia Kagan, *Plan Administrator*, INVESTOPEDIA (Apr. 28, 2021), [https://www.investopedia.com/terms/p/plan\\_administrator.asp](https://www.investopedia.com/terms/p/plan_administrator.asp) [<https://perma.cc/>

on the use of plan member funds by corporations exactly parallels the control that the union had in *Abood*.<sup>217</sup>

As always with scholarly articles, counterarguments against there being a forced association exist. First is that, unlike with union dues, it is an extra step to get the money to the corporations. In *Abood* (and *Janus*), employees gave money directly to a union.<sup>218</sup> With retirement plans, members invest in a plan, and then the plan invests in corporations. I think this argument is a very close one, the kind that brings about 5-4 decisions in the Court. However, the equity principles of unconscionable contracts should decide any close questions in favor of the weaker party.<sup>219</sup>

A counter with more teeth would be that if there is no mandatory participation in a retirement plan in an employment contract. If the employee is required to participate in a plan, then this argument falls away; the facts are the same as in *Abood* and *Janus*. But voluntary participation, where employees have an opt-in or opt-out provision, is an option that the plaintiffs in *Abood* and *Janus* did not have.

One response to this argument is that employees are effectively coerced into the agreement: to not do so is to give up an additional amount of salary with no means to recover it. However, if an employer does not provide matching funds, then an employment contract would present no Right of Association problems at all.

These responses cannot provide retirement fund contracts an escape from unconscionable contract analysis. Such conditions may diminish the substantive analysis, the price being asked; they do not change that a price or participation is a surrendering of a constitutional right. And they in no way address the procedural elements, those that concern contract formation, as the contracts do not make that cost clear.

The best response to counter either the salary argument or the seeming voluntariness of the clause ignores the employer/employee aspect and pays no mind to how many steps it takes to get to the violation. What matters is that retirement investment plans are an

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9N29-T4DA] (advising how plan administrators hire investment advisors who ultimately decide how to invest the retirement plan's funds).

217. *Abood v. Detroit Dep't of Educ.*, 431 U.S. 209, 213 (1977) (highlighting the plaintiffs' complaint that they had no say in how their contributions were further expended), *overruled by* *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

218. *Abood v. Detroit Bd. of Educ.*, 230 N.W.2d 322, 323-24 (Mich. Ct. App. 1975), *vacated Abood*, 431 U.S. 209; *Janus*, 138 S. Ct. at 2461.

219. *See supra* notes 57-103 and accompanying text.

important means of securing a retirement income.<sup>220</sup> An important aspect of an unconscionable contract is that it is no defense to argue a person can always just walk if that leaves the weaker party in a materially worse position.<sup>221</sup>

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220. The ability to invest in annuities or funds that only purchase government bonds cannot escape this problem. Government bonds and annuities have lower risks than equity funds, with a corresponding lower rate of return. Chen, *supra* note 19. See Thomas Smith, *Why Stocks Generally Outperform Bonds*, INVESTOPEDIA (May 31, 2020), <https://www.investopedia.com/articles/basics/08/stocks-bonds-performance.asp> [<https://perma.cc/452R-QATM>] (noting that equities are more volatile and may provide greater return potential than bonds). The argument would be that being able to choose an investment without associating with a political party is another reason why any return is less.

The argument then turns to where on the necessity scale equity retirement funds fall: closer to gym memberships or to loans that will immediately go to rent and food? A person close to retirement age may have an economic crisis—such as medical expenses—which requires cashing out a retirement fund. Equity investments, even with short term risk and market volatility, are much more likely to rebuild those lost funds in a shorter period. *Id.* (explaining that bonds have a set schedule for payment with a fixed rate, but equity investments—i.e., shares—can involve dividends and profits can fluctuate significantly). At the same time, I think it problematic that a person must consider having less money for retirement in exchange for not giving up a basic right. As such, the question remains, is the price being asked far greater than the benefit gained.

221. Another possible argument that no mandatory association exists would be the availability of “social choice” funds. These funds target investments in companies that have certain policies, such as promoting low carbon discharge. See, e.g., *TIAA Social Choice Low Carbon Fund Summary of Investments at TIAA-CREF Equity Fund*, NUVEEN, <https://www.nuveen.com/en-us/mutual-funds/tiaa-cref-social-choice-equity-fund?shareclass=Advisor> (hereinafter “*TIAA Social Choice*”) [<https://perma.cc/WMM5-ZUCM>]. But would choosing such funds be the equivalent of choosing a political candidate who supports a variety of interrelated policies?

An analysis of the TIAA Social Choice Low Carbon Fund suggests not. I assume that those who would choose to follow such a fund are more on the political left; there are few climate change deniers in the Democratic party (Senator Joseph Manchin of coal dependent West Virginia being a noted exception). See Ari Drennen & Sally Hardin, *Climate Deniers in the 117th Congress*, CTR AM. PROGRESS (Mar. 30, 2021, 5:00 AM), <https://www.americanprogress.org/issues/green/news/2021/03/30/497685/climate-deniers-117th-congress> [<https://perma.cc/RW5S-ESZT>]. Here is what my analysis reveals. There are forty-six companies listed in the fund’s annual summary of investments (making up 0.6% or more of the fund’s total investments) that make up 60% of the fund’s investments. *TIAA Social Choice* at 44. Thirty-four of those corporations have political action committees. *Political Action Committees (PACs)*, OPENSECRETS, <https://www.opensecrets.org/political-action-committees-pacs/2020> [<https://perma.cc/ECJ8-5U8H>]. In the five political cycles since *Citizens United*, 2012–20:

The amounts given to Republican candidates and PACs constitute 60% of the total amount given;

Only four of the thirty-four companies gave more to Democratic PACs, and three those companies were in the bottom 25% of total donations made;

The other two elements of a Right (Not) to Associate violation easily fall into place. The next component is that the political association comes about because state or federal law allows it to occur. As outlined above, there are numerous federal and state laws that, taken together, create conditions that allow corporations to use plan member funds.<sup>222</sup> The *Citizens United* decision is the most important one because it removes any ability of government to mitigate any Right (Not) to Associate harm.<sup>223</sup>

The final component is the lack of a compelling government interest. The stated government interest for ERISA is to protect employees.<sup>224</sup> The tax code provisions are designed to allow the average employee to actively participate in investment to provide for his or her retirement.<sup>225</sup> And there is an implied policy of wanting an individual to be responsible for his or her retirement income, not the taxpayer.<sup>226</sup> While these may be important policies, they are more comparable to the policies regarding labor peace and preventing free riders dismissed in *Janus* than preventing gender bias upheld by *Roberts*. As such, the interests of ERISA do not rise to the level of being compelling interests.<sup>227</sup>

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Of the remaining thirty companies, twenty-four gave 55% or more of their total contributions to Republican PACs, fourteen gave 56% or more, and ten gave 60% or more;

Ranked according to the actual amounts given, the top 75% of company PACS gave the majority to Republicans;

Ranked according to the actual amounts given, the 13th and 20th top donors to Democrats gave more to Republicans.

So Democratic tree-huggers are kind of left in the cold. And nature loving Republicans cannot be too happy either. More explanation about this, including tables, can be found in an Appendix to this article. *Id.*

222. See *supra* notes 1–29 and accompanying text.

223. See *supra* notes 1–29 and accompanying text (arguing that *Citizens United* is the most illustrative violation of the Right (Not) to Associate because its holding augmented a person's connection to political activity).

224. 29 U.S.C. § 1001(b) (2018).

225. See *United States v. Kintner*, 216 F.2d 418, 426 (9th Cir. 1954) (positing that one of the objectives of the statute was to make pension or bonus plan benefits available to employees).

226. DAVID STUART KOITZ, CONG. RSCH. SERV., RL30571, SOCIAL SECURITY REFORM: THE ISSUE OF INDIVIDUAL VERSUS COLLECTIVE INVESTMENT FOR RETIREMENT 20–33 (2000).

227. Protecting the political speech rights of corporations can provide the saving compelling interest for ERISA. Supreme Court precedent holds that when a statute regulates activities protected by the First Amendment, statutory text and legislative history must show that Congress considered the conflict and acted in the least

Considering all the above, a state court would likely find that the Right of Association is the price asked for in a retirement plan contract, and the potential exists for that price to be present in an employment contract. While Supreme Court decisions provide persuasive authority on what is and is not a Right (Not) to Associate violation, they provide no mandatory authority on a state court interpreting state contract law. Therefore, a state court might find that even a potential violation should be treated as a contract clause and continue with unconscionable contract analysis.

*B. Unconscionable Contract Analysis: Substantive Element*

The elements of unconscionable analysis bear repeating. A contract is examined in two distinct areas: substantive and procedural.<sup>228</sup> There is no threshold to be met for each element. The more one element is present, the less the other element needs to be present.<sup>229</sup> When examining these elements, courts look for indications of unfairness.<sup>230</sup>

Substantive analysis focuses on the terms of the contract itself. The elements to be examined are the price, the right and remedies available, the penalties assessed, and clarity of language.<sup>231</sup> A court examines these characteristics both individually and in aggregate to assess the overall balance of obligations and rights between the parties.<sup>232</sup>

Such analysis begins with the cost the stronger party extracts from the weaker one. To restate: is the price “unduly harsh and one-

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obtrusive manner. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208–09 (1982); see *Holder v. Humanitarian L. Project*, 561 U.S. 1, 35–36 (2010). Congress could not do so with ERISA, in part because it was passed before *Buckley* and *Belotti*; before those cases, there were no corporation speech rights to protect. See Carl E. Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1227–28 (1986). And even if they did consider the possibility of corporate speech, the campaign finance laws passed in 1974, and after, indicate Congressional hostility to such rights. See *Citizens United v. FEC*, 558 U.S. 310, 446 (2010) (Stevens, J., dissenting) (“[O]ver the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections . . .”).

228. See *supra* note 60 and accompanying text.

229. See *supra* note 76 and accompanying text.

230. *James v. Nat. Fin., LLC*, 132 A.3d 799, 816, 821 (Del. Ch. 2016).

231. *Id.* at 815.

232. *Id.* at 816, 821.

sided”;<sup>233</sup> “a totally one-sided transaction”;<sup>234</sup> or “grossly excessive”;<sup>235</sup> If the benefit gained by the weaker party is grossly disproportionate to an obligation incurred, the price is unconscionable.<sup>236</sup>

Surrendering one’s Right (Not) to Associate with the political activities of a corporation is the price asked for here. Such a price is too much. Over and over, the Court has noted that forcing a person to further a political goal is a particularly grievous previous harm. *Barnette* states it is a “fixed star in our constitutional constellation” that a government cannot force political opinions and positions on anyone.<sup>237</sup> *Aboud* made clear that, in any context, political participation of an employee must not be coerced “by the threat of loss of governmental employment.”<sup>238</sup> *Janus* put it in the strongest possible terms: “[w]hen speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . .”<sup>239</sup> Trading such a valued constitutional right for the possibility of a more comfortable retirement fits the test, being a price “no man in his senses would make, or as no honest man would come into . . . .”<sup>240</sup>

A court would be concerned that these contracts do not allow remedies available to others. The *Citizens United* decision states “through the procedures of corporate democracy” is the means by which a corporation’s shareholders may protect their political rights.<sup>241</sup> But that nebulous option is not available for participants in a retirement plan. The company administering the retirement plan

233. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1573 (D. Kan. 1986).

234. *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503, 514 (Cal. 1985).

235. *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995).

236. *See In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 823 (S.D. Ohio 2012) (citing *Carlson v. Gen. Motors, Corp.*, 883 F.3d 287, 296 (4th Cir. 1989)).

237. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942).

238. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234, 236 (1977) (citing *Elrod v. Burns*, 427 U.S. 347, 357–60 (1976) (plurality opinion)) (positing that employment cannot be conditioned in support of a political official or party), *overruled by Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

239. *Janus*, 138 S. Ct. at 2464.

240. *Chesterfield et al. v. Jansen*, (1750) 95 Eng. Rep. 621, 627 (KB). *James* dealt with an argument that while the price (by interest rate) for the loans it provided were very high, they were in fact justified by the market. *James v. Nat’l Fin., LLC*, 132 A.3d 799, 818–19 (Del. Ch. 2016). Vice Chancellor Laster response was blunt: theories about possible market justifications are “not a persuasive response to [a] facially shocking price.” *James*, 132 A.3d at 819.

241. *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010).



holds any stock in its name; it is the owner of record and the only party allowed to participate in any shareholder vote.<sup>242</sup> No provisions in a retirement plan contract or an employment contract allow members to indicate their preference.<sup>243</sup>

Simply refunding a portion of an employee's contributions that might have been part of a corporation's political activity is, according to *Janus*, no remedy at all. Prior to *Janus*, a retirement plan or employer could argue that a saving remedy would be to return the percentage a corporation spent in political activities as a refund to members. *Janus* dismissed such remedies as inadequate due to practical problems and abuse.<sup>244</sup> And, even if, an *Aboud* remedy would place a great deal of discretion on the retirement plan or the employer, meaning any remedy would still favor the stronger party.

There are penalties for any employee who seeks to get out of a retirement plan, in whole or in part. Any member who chooses to exit a plan after contributions have already been made must pay an additional tax penalty in addition to regular income taxes on money returned.<sup>245</sup> These penalties contribute to the unfairness of the contract.<sup>246</sup>

Finally, a court would examine the use and placement of language in a contract. It would look to see if relevant clauses are "disadvantageous," placed "inconspicuous[ly]," contain language that

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242. DEL. CODE. tit. 8, §§ 212, 219 (2021).

243. Even if such clauses were put into place, it may be a practical impossibility to carry them out. In a retirement plan, a member's contribution would have to be weighted to determine just how much of a stock he or she actual had. A plan would then have to engage in some manner of aggregating the combined opinions of members. And that is not even bringing into consideration whether a corporation's by-laws allow a record owner to vote the shares in multiple ways.

244. *Janus*, 138 S. Ct. at 2460. *Janus*'s hard line against unions getting funds actually conflicts with *Citizens United*. As repeated many times, Justice Kennedy says that any Right of Association problems for shareholders can be resolved through "the procedures of corporate democracy." *Citizens United*, 558 U.S. at 361–62. If that is true for the shareholders, it should be true for the those covered by a closed shop agreement: the correct remedy is to join the union and subject political support to some sort of internal regulation.

245. See Charles Delafuente, *Borrowing from the Future*, N.Y. TIMES, Feb. 12, 2013, at F6 (outlining the potential tax penalties from withdrawing funds from retirement plan).

246. See *James v. Nat'l Fin., LLC*, 132 A.3d 799, 822 (Del. Ch. 2016) (showing that contract penalties that are allowed by statute do not in themselves indicate unconscionability but can contribute to an overall assessment regarding the fairness of the contract).

is “incomprehensible to [the] layman,” or “divert[s] . . . attention from the problems raised . . . or the rights given up.”<sup>247</sup>

Such analysis with retirement plans and employment contracts would turn on this. They are absolutely silent on whether a member/employee will be forced to support the political activities of multiple corporations. The cause of this silence may very well be that the contract drafters did not know that such consequences existed.<sup>248</sup> But it is damning. As a matter of First Amendment jurisprudence, silence cannot equal consent when dealing with the waiver of such rights: it must be affirmatively agreed to, and such agreement cannot be presumed.<sup>249</sup> The silence proves to be a “disadvantage . . . incomprehensible to [the] layman” that provides no indication of the “rights given up.”<sup>250</sup>

When assessing the overall fairness of a contract, a court considers the balance of obligations and rights.<sup>251</sup> No term can be more onerous than giving up a constitutional right. When an overall contract imposes “onerous” terms that it may act on “unilaterally” and leaves the weaker party with few if any remedies, it is unconscionable.<sup>252</sup>

### C. *Unconscionable Contract Analysis: Procedural Element*

Procedural unconscionability analysis examines the environment surrounding the making of a contract. Overall, a court looks to see whether a “seemingly disproportionate outcome could have resulted from legitimate, arms’-length bargaining.”<sup>253</sup> Factors used that indicate the absence of arm’s length negotiation include whether there is unequal bargaining power, whether the weaker party is unsophisticated, and whether the parties used a standardized contract.<sup>254</sup> The gist of this examination: does a weaker party have the means and understanding to have an actual choice?

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247. *Id.* at 822.

248. This is one reason why fraud cannot be used. It requires scienter, knowledge that one’s actions are wrong. *Fraudulent Misrepresentation*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/fraudulent\\_misrepresentation](https://www.law.cornell.edu/wex/fraudulent_misrepresentation) [<https://perma.cc/EA7S-DBCY>] (explaining the elements of fraud).

249. *Janus*, 138 S. Ct. at 2486.

250. *James*, 132 A.3d at 824.

251. *Id.*

252. *Id.* at 826.

253. *Id.*

254. *Id.*

We first consider the bargaining and economic power of the parties. On one side, we have either a company—like TIAA or Prudential—or an employer. Companies that provide retirement plans do not need any individual member; they have thousands.<sup>255</sup> They possess market experts and bargaining power with brokerage firms, making such plans the best means for a person to secure reticent income.<sup>256</sup> An employer's power is obvious: the ability to provide a salary, health insurance, and other benefits. On the other side, we have a potential plan member/employee. The typical individual has no comparable counterweights, just the difference in bargaining capability would weigh heavily on a court's examination of a contract.<sup>257</sup>

But coupling the bargaining power with economic advantage means that the weaker party may have no choice but to accept the contracts. A pension plan administrator certainly has economic advantages that an individual investor lacks. In addition to the investment specialists employed, such firms can often negotiate better prices for shares due to the size and frequency with which they trade.<sup>258</sup> An employer has even greater power: the ability to offer a livelihood to a perspective employee.<sup>259</sup> Most people lack the resources, both in money and talent, to equalize the bargaining power.

Further evidence of the ability to conduct arm's-length negotiations can be found in the relative sophistication and privilege, or lack thereof, between the parties. Pension plans have access to numerous experts.<sup>260</sup> Among them, there can be experts in corporate governance law who understand the political power available to corporate managers.<sup>261</sup> Some retirement administrators, such as public employer pension plan administrators, often seek to further their own political goals through their ability to influence corporate management.<sup>262</sup> Even a person as

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255. *Id.* at 827.

256. See Robert A. G. Monks, *Corporate Governance and Pension Plans*, in *POSITIONING PENSIONS FOR THE TWENTY-FIRST CENTURY* 140 (Michael S. Gordon, Olivia S. Mitchell, & Marc. M. Twinney eds., 1997).

257. *James*, 132 A.3d at 827–28.

258. *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354 (Del. 1987).

259. That the weaker party belongs to a class thought to need state and federal protection further indicates a disparity of economic power. See *James*, 132 A.3d at 828–29 (highlighting that the fact that there were state and federal laws seeking to protect debtor from predatory practices provides further reasons for courts to examine conditions of contract formation).

260. *Monks*, *supra* note 256, at 140, 146.

261. *Id.* at 142, 150.

262. *Id.* at 142–43.

sophisticated as a law professor might not appreciate the intersectionality of corporate governance, ERISA, and First Amendment law at play.<sup>263</sup>

An employer, especially a large employer, can have a human resources department. Experts in that department know how to structure an employment contract and may stay abreast of the employment trends and salaries in the company's industry. This knowledge, gathered by a group with both time and expertise, provides a significant information advantage in negotiations over even a highly sophisticated individual, such as a university law professor. Again, most people find themselves negotiating by themselves against such knowledge without comparative assistance.

Other procedural unconscionable elements concern whether the conditions at contract formation permit negotiations. Is the contract drafted as a result of negotiations or simply presented to the weaker party as a "take-it-or-leave-it proposition"?<sup>264</sup> A form contract is not itself unconscionable any more than a non-form contract is always acceptable, but such a contract calls for greater scrutiny.<sup>265</sup> It indicates a weaker party may not be able to "shop around" for better terms.<sup>266</sup>

It is here that retirement plans and employment contracts become most intertwined. Often, an employer offers few options regarding which retirement plan investment company, such as TIAA or Prudential, to which an employee may directly contribute his or her salary.<sup>267</sup> Such conditions of employment often lie buried within the benefits package given to employees.<sup>268</sup> A prospective employee has no

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263. It may be the case that both sides do not understand, or have not even considered, specific First Amendment issues. But what I am certain of is that the fund managers do understand that they are the owners of record for the stocks that they purchase, and this allows them to participate in "shareholder democracy". Regardless of what they do with it, retirement plans do know the voting power they have and will use it.

264. *James*, 132 A.3d at 832.

265. *Id.*

266. *Id.*

267. Sean Ross, *My Employer Doesn't Offer a 401(k). Should I Care?*, INVESTOPEDIA (Apr. 11, 2021), <https://www.investopedia.com/articles/personal-finance/101415/my-employer-doesnt-offer-401k-should-i-care.asp> [<https://perma.cc/WKH5-EKET>] (highlighting several reasons why an employer may not offer a retirement package for its employees, including lack of experience, time, or resources).

268. Chris Renz, *Only Half of Employees Understand Their Benefits. Here's What HR Leaders Can Do About It*, FORBES (July 2, 2019), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2019/07/02/only-half-of-employees-understand-their-benefits-heres-what-hr-leaders-can-do-about-it/?sh=221c63a77813> [<https://perma.cc>

real ability to negotiate such a provision, only the ability to accept or decline employment.<sup>269</sup>

A court also examines whether a weaker party had an actual choice, not just a theoretical one. It makes a difference when a contract concerns spending discretionary income on a gym membership or a loan to buy food and pay rent.<sup>270</sup> When faced with a bad deal, it is no choice when the consequences of walking away involve placing the weaker party in even worse circumstances.<sup>271</sup>

Retirement plan contracts skate very close to being a contract people cannot walk away from. A retirement plan is much more a necessity than a gym membership. The United States does not provide the same degree of pensions to the elderly as other countries.<sup>272</sup> Social Security

/WT3S-24H5] (“Many benefit plans involve complex rules and jargon driven by the IRS code or insurance companies that are confusing and complicated to employees.”).

269. Roy Maurer, *Most Employers Open to Negotiating Salary, Not Benefits*, SHRM (Feb. 24, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/most-employers-open-to-negotiating-salary-not-benefits.aspx> [https://perma.cc/Q5B2-F3NE] (“U.S. regulations ensure consistency and nondiscrimination in benefits offerings, but there is no guarantee that consistent offerings translate to equal value in the workforce.”).

270. *James*, 132 A.3d at 834.

271. *Id.*

272. Some examples:

France covers almost all citizens and residents, especially since a reform in 1998 extended coverage to those who lacked an income during their working years. Centre des Liaisons Européennes et Internationales de Sécurité Sociale, *The French Social Security System: III—Retirement*, [https://www.cleiss.fr/docs/regimes/regime\\_france/an\\_3.html](https://www.cleiss.fr/docs/regimes/regime_france/an_3.html) [https://perma.cc/63X7-XEJ];

Germany has had an old-age pension plan since the 1880s (introduced by Bismarck). *Otto von Bismarck*, SOC. SEC. AGENCY, <https://www.ssa.gov/history/ottob.html> [https://perma.cc/7582-UNFH];

Japan has provided extensive pension insurance since the 1950s. Akiko Nomura, *Japan’s Pension System: Challenges and Implications*, 3 Nomura J. Asian Capital Mkts. 4, 4 (2019); and

The United Kingdom has provided retirement pensions since 1946, with important reforms in the 1970s and 1990s. ANTOINE BOZIO ET AL., INSTITUTE FOR FISCAL STUDIES, *THE HISTORY OF STATE PENSIONS IN THE UK: 1948 TO 2010* 12 (2010).

Although both Britain and Germany also have extensive private pension plans, these represent an alternative to the publicly provided ones. See Pension System in Germany, PENSION FUNDS ONLINE, <https://www.pensionfundsonline.co.uk/content/country-profiles/germany> [https://perma.cc/5DFD-56BA] (describing private pensions as making up one of the three pillars of the German pension system); *Types of Private Pensions*, GOV.UK, <https://www.gov.uk/pension-types> [https://web.archive.org/web/20210928184011/https://www.gov.uk/pension-types] (describing the two main types of private pensions in the United Kingdom). Further, the differences in campaign finance rules in those countries mean that a participant in such a plan does not face the same price

turns on how much a person has contributed, how long they have made contributions, and how long they wait to begin drawing funds.<sup>273</sup> Not participating in an employer-sponsored retirement plan often means not receiving matching funds, giving up tax benefits, and not having access to an efficient means of saving for retirement.

An employment contract with mandatory participation matches the loan contract at issue in *James*.<sup>274</sup> To walk away from it is to walk away from a salary and health care. Some employees may very well be so valuable they may shop around for the perfect mix of salary and benefits. Most of us are not so lucky.

The retirement plan members/employees cannot negotiate on equal terms with the retirement plan administrator or employer. They lack the expertise and support to bargain effectively and the economic power to move the other party. The contracts the employer presents the employee offer, at best, some ability to negotiate the size of the salary or the amount of the contribution, but such flexibility cannot compare with the non-negotiable term regarding the surrender of the Right (Not) to Associate. Thus, procedural unconscionableness is present.

Considering these substantive and procedural elements, retirement plans are unconscionable. Depending on how they are structured, employment contracts can be equally problematic. The price paid is staggeringly high: the surrender of constitutional rights. There is no meaningful way for people to protect themselves from the consequences of that price. They may not even know what they are giving up: the contract is silent, and the price is not obvious. Even if they are aware, these contracts must be accepted. To not do so endangers one's ability to retire. These contracts are unfair.

But what remedy might a court fashion?

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as those of us in the United States. Paul Waldman, *How Our Campaign Finance System Compares to Other Countries*, AM. PROSPECT (Apr. 4, 2014), <https://prospect.org/power/campaign-finance-system-compares-countries> [<https://perma.cc/CQ3H-5ZVG>] (discussing the United Kingdom's limit on candidate spending but not donations and Germany's complete lack of limitations on contributions and candidate spending due to the differing campaign funding structure, such as when contributions can be made).

273. The Social Security Administration provides extensive information on its retirement benefits. See *Retirement Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/learn.html#h3> [<https://perma.cc/9WZP-SC6V>].

274. *James*, 132 A.3d at 823 (concerning a contract with ambiguous and unclear provisions that do not allow the consumer a reasonable opportunity to refrain from granting the business the requested authorization).

## V. SO . . . WHAT?

I hope you enjoyed this little intellectual prestidigitation. And like any magic trick, its principal goal is to entertain. I do not suggest that courts invalidate retirement plan contracts and force the return of all or part of a member's funds.<sup>275</sup> Nor do I think mandatory or voluntary participation in retirement plans should be reduced. Employers can easily replace the nanny functions of government; a business is just as accountable to its employees as our government is to a voter . . . oh wait.

Seriously though . . . .

A. *A Flank Attack Instead of a Frontal Assault*

I use the doctrine of unconscionable contracts to make a flank attack on *Citizens United*. I am very deliberate in choosing the equitable doctrine of unconscionable contracts as my analytical choice. I have typical law review article reasons for doing so. One reason: to show that problems of the decision go beyond the immediate issues discussed in the opinion and the dissent. Another: to show that alternative legal analysis supports moving campaign finance regulation back to legislatures.

There are other contract doctrines that might be relevant for this discussion: fraud and contracts against public policy. But they have requirements not present in the contracts at issue in this Article. Examining a contract through the lens of fraud requires demonstrating "scienter": an intent to defraud.<sup>276</sup> I think it unlikely that either investment funds or employers act in bad faith in these contracts. Arguing that a contract should be made void as a matter of public policy simply returns the debate as to what policies justify court intervention: whether the anticorruption or antidistortion rationales justify limitations on corporate political participation.<sup>277</sup>

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275. Tempted though I am because this market approach to retirement planning perpetuates an economic model that provides large benefits to preexisting economic elites.

276. 26 WILLISTON ON CONTRACTS § 69:3 (4th ed. 2020) (Definitions of Fraud and Misrepresentation—Elements of Fraud).

277. 5 WILLISTON ON CONTRACTS § 12:3 (4th ed. 2020) (Limits of Judicial Recognition of Public Policy). Unconscionable contracts have the additional advantage of examining a contract based on the objective circumstances, not the subjective perspective of the parties. *Lewis v. Lewis*, 748 P.2d 1362, 1366 (Haw. 1988) *cited by* 8 WILLISTON ON CONTRACTS § 18:8 (4th ed. 2020) (Construction of the Concept of Unconscionability) ("The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the

An equity argument provides a means to recalibrate the debate. Questions of law involve “either/or” thinking. Line drawing. Something is or is not legal. When it comes to constitutional protections, the “conservative” and “liberal” positions have reached religious levels. Defending one’s side is a matter of duty; considering alternatives is a road to heresy.

This rigidity gives First Amendment jurisprudence a particularly subjective nature. The analysis applied to a policy depends on how Justices view that policy. The majority in *Citizens United* found that regulating how corporations may spend money is an attack on political speech, and strict scrutiny applied.<sup>278</sup> The dissent indicates that “exacting scrutiny,” the analysis previously employed, should continue to be used.<sup>279</sup> Yet, the same term as the *Citizens United* decision, *Holder v. Humanitarian Law Project*,<sup>280</sup> with all five of the *Citizens United* Justices supporting, said that providing any material support, including monetary support, to organizations “engage[d] in terrorist activity” should be examined under “exacting scrutiny” not “strict scrutiny,” because the statute does not affect plaintiff’s political speech.<sup>281</sup> This is

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clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . .”).

278. *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010).

279. *Id.* at 366, 445 (Stevens, J., dissenting) (“[E]ven though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest.”); *see id.* at 441, 444–46 (analyzing past cases, which show consistent use of an exacting standard when examining the use of money in politics); *id.* at 365 (*Citizens United*’s move to strict scrutiny represents new analysis, not a return to previous standards).

Further indicating the subjective nature of current First Amendment jurisprudence, Justice Breyer cited *Bellotti* as being an example of strict scrutiny in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 45 (2010) (Breyer, J., dissenting). This, despite Justice Powell’s use of exacting scrutiny in *Belotti* and *Buckley* and support of that analysis in *Abood*. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 (1977) (Powell, J., concurring), *overruled by* *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

280. 561 U.S. 1 (2010).

281. *Id.* at 25–29. The statute prohibited providing material support to organizations designated “terrorists.” The Court said that combatting terrorism is an “urgent objective of the highest order.” *Id.* at 28. The “material support” at issue concerned training to have the terrorist organizations renounce violence and seek redress through the courts. *Id.* at 21–22, 32–34. No matter, the Court should defer to Congress and the Executive’s conclusions. *Id.* at 33–34.

Further indicating the subjective nature of current First Amendment jurisprudence, Chief Justice Roberts cited *Bellotti* as being an example of strict scrutiny in *Humanitarian Law Project*. *Id.* at 45 (Breyer, J., dissenting). As discussed above, Justice Powell created and followed an “exacting scrutiny” standard and was at pains to have it



because the statute at issue was “carefully drawn to cover only a narrow category of speech.”<sup>282</sup> Yet, three of the Justices who dissented in *Citizens United*, arguing for exacting scrutiny, dissented in *Humanitarian Law Project* because they felt that strict scrutiny analysis should be used.<sup>283</sup>

An equity approach may allow all sides to reach towards balance without feeling they have betrayed basic principles. Equity arguments are, at their core, arguments concerning fairness—not whether a contract is a contract, but whether it is right and proper for a court to enforce that contract. I very much think it would be useful to consider *Citizens United* and its consequences in a similar vein: not whether its analysis is legally correct but whether *Citizens United* and its attendant consequences are fair.<sup>284</sup>

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adopted elsewhere. See *supra* Section II.C (Interlude: The (Lack of) Distinction Between “Intermediate” and “Exacting” Scrutiny; A.K.A. Discussion That Would Not Fit in a Footnote).

282. *Humanitarian Law Project*, 561 U.S. at 26. This may imply that even had the Court analyzed the matter under strict scrutiny’s requirement, the statute could be the only and least intrusive method of carrying out a compelling interest. The Court may have wished to not do so: upholding a law using strict scrutiny analysis. Doing so invites comparisons with *Korematsu v. United States*, 323 U.S. 214 (1944). That case was the first to use strict scrutiny analysis . . . and notoriously upheld laws that discriminated against persons of Japanese descent.

283. *Id.* at 42–43 (Breyer, J., dissenting). In a brilliant bit of cheek, Justice Breyer cited both *Citizens United*, Justice Kennedy’s dissent in *Hill v. Colorado*, 530 U.S. 703, 787 (2000), and because he joined the *Humanitarian Law Project* decision, Justice Stevens’s concurrence in *R. A. V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

Justice Stevens, unlike the other eight Justices involved in these two decisions, does have a more objective jurisprudence. He dissented in *Citizens United* and joined the *Humanitarian Law Project* majority likely for the same reason: because the activity at issue was conduct, not speech, exacting scrutiny should be used, and courts should defer to legislatures when they have a compelling interest supported by legislative investigation. *Citizens United*, 558 U.S. at 461 (Stevens, J., dissenting in part); see Miller, *Shareholder Rights*, *supra* note 12, at 60 n.48.

284. One might, just might, detect a hint of John Rawls’s theory of justice as fairness. And one would be correct. JOHN RAWLS, *A THEORY OF JUSTICE* 3–4 (Revised ed. 1999).

Just to show off: while Rawls deserves great credit for introducing (or re-introducing) moral questions into political theory, I agree with Amartya Sen’s gentlemanly, but devastating, dismantling of the details of Rawls. Sen makes no bones about Rawls being an inspiration and their common political goals. AMARTYA SEN, *THE IDEA OF JUSTICE* 52–74 (2009).

A philosophical point from the other side of the political spectrum: this idea of fairness can also be supported by Mary Ann Glendon’s critique of rights jurisprudence. Glendon urges us to consider rights in light of their role or impact on

*B. A Question of Fairness*

And now, my final flourish, the prestige of this entire Article. Because a good trick, one that makes the audience truly gasp in amazement, is often one the audience does not expect. Retirement plan contracts were a means to an end: to prime everyone for the real trick.

The actual contract I wish to discuss is the social contract of our nation: the Constitution and the attendant government structures. It is inescapable that the terms of our social contract are continuously rewritten. *Citizens United* is an example of the most crucial negotiation that occurs with that social contract: the balance of rights between competing groups—especially balancing those rights considered vital to the system. After all, Justice Kennedy adamantly opposed the results in *Austin v. Michigan Chamber of Commerce*<sup>285</sup> and *McConnell v. FEC*<sup>286</sup> because he believed the decisions inappropriately rewrote the Constitution.<sup>287</sup> And the *Citizens United* decision also exposes or creates crucial flaws in that contract. Would the current form of the Constitution's social contract, as rewritten by recent Court decisions, pass unconscionable contract analysis? Obviously, I think not.

Let's address procedural problems first.

There are twists present in our analysis here that are outside the usual fact pattern in unconscionable contract analysis. Usually, a party that has sophistication, knowledge about matters being negotiated, also has the advantage in raw power.<sup>288</sup> But a procedural problem comes from the fact that the party with the knowledge must accept the terms from the party with the power. Courts, even district courts, have a limited capacity to carry out investigations. Both the *Janus* and *Citizens United* opinions engaged in hypothetical fact situations to justify some of their conclusions.<sup>289</sup> Congress, and other legislatures, do have the

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society, not as absolute legal requirements. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109–44 (1991).

285. 494 U.S. 652 (1990) (Kennedy, J., dissenting), *overruled by Citizens United*, 558 U.S. 310.

286. *McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Kennedy, J., dissenting in part), *overruled by Citizens United*, 558 U.S. 310.

287. *Austin*, 494 U.S. at 696 (Kennedy, J., dissenting); *McConnell*, 540 U.S. at 286–87 (Kennedy, J., dissenting in part).

288. *James v. Nat'l Fin. LLC*, 132 A.3d 799, 826, 828 (Del. Ch. 2016).

289. *Janus v. AFSCME*, Council 31, 138 S. Ct. 2488, 2466–67 (2018) (discussion of free rider concerns); *Citizens United*, 558 U.S. at 352–53 (speculation about how the law

ability to investigate.<sup>290</sup> Yet, despite the extensive investigations that led to the passage of the statutes at issue in *Citizens United* and *Janus*, the Court deemed them insufficient.<sup>291</sup>

The fact that the Court dictates to Congress what is and is not acceptable makes the Constitution a contract of adhesion.<sup>292</sup> Almost any controversial policy Congress and state legislatures enact will be subjected to a court challenge.<sup>293</sup> There is no negotiating with a court, especially the Supreme Court, regarding the Constitution: the legislatures (and the lower courts) have no choice but to accept.

This gets to the real procedural concern, another fact question that usually does not arise in investigations of any contract: whether the parties that should conduct the negotiations are the ones who actually negotiate. The current structure is one where the negotiations are between the Court and Congress.<sup>294</sup> The Court, I feel, has no business being at the bargaining table.

Many political philosophers agree, exemplified by Hamilton's argument in Federalist Number 78, that courts should be removed from being vulnerable to democratic political processes.<sup>295</sup> Their role

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might limit the ability of media corporations to report based on whether their speech came from the "media" or "corporation" aspect).

290. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32–35 (2010) (regarding Congress's and the Executive's ability to investigate), see *Citizens United*, 558 U.S. at 433–34 (Stevens, J., dissenting) (listing congressional reports accompanying spending regulation statutes).

The Supreme Court even recognizes that Congress can balance important government policies with First Amendment considerations, especially when it conducts extensive investigations. *Humanitarian Law Project*, 561 U.S. at 35–36 ("Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns"); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982) (Rehnquist, C.J., writing for a unanimous Court) (Congress has the authority and ability to balance between Constitutional Rights; it's activities "warrant[] considerable deference").

291. *Citizens United*, 558 U.S. at 361; *Janus*, 138 S. Ct. at 2480.

292. *Supra* note 70.

293. *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/unconstitutional-laws> [<https://web.archive.org/web/20210414184631/https://constitution.congress.gov/resources/unconstitutional-laws>].

294. Roman Sankovych, Comment, *Supremacy of Law or Religion: Congress's Power to Amend the Constitution Bypassing Constraints of the Constitutional Process*, 15 DEPAUL BUS. & COM. L.J. 185, 186 (2017).

295. THE FEDERALIST NO. 78 (Alexander Hamilton) ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent

calls for them to protect a minority's rights against a tyrannical majority's attack.<sup>296</sup> As such, courts can, do, and should put the rights of some groups ahead of others, including groups that do not command a democratic majority.<sup>297</sup> But when two competing rights must be balanced against each other, better that balance be made by a body accountable to the electorate.<sup>298</sup> Then, it is those subject to the social contract negotiating with each other through elected representatives. The Court does not engage in negotiations: its pronouncements are very much contracts of adhesion. As the Court's decisions are not subject to the scrutiny by regular elections, we citizens are left without even the ability to walk away. This absence of democratic accountability, means any contract term made by the Court will always be procedurally suspect in unconscionable contract analysis.

Substantive analysis examines the benefits gained versus the cost incurred. Our first question must be what is the benefit we, as citizens

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tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”).

296. *Id.* (“This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”).

297. For one possible means of determining when the Court should act and when it should defer, consider Justice Stone's footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

298. I consider this point self-evident. But, *The Federalist* does not discuss balancing rights; unsurprising since the First Amendment came after ratification. I acknowledge that *Federalist* 78 presents an argument that balancing rights is the role of the courts, for it is only there that interpretation of the Constitution is discussed. I point out in response that *Federalist* 39 (“The Conformity of the Plan to Republican Principles”) requires that the Constitution must adhere to Republican principles: “It is ESSENTIAL to such a government that it be derived from the great body of the society . . . . It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people.” THE FEDERALIST NO. 39. (James Madison) (emphasis added). I think then, that *The Federalist* provides support for either the Court or the legislature being the appropriate branch to balance constitutional rights. I therefore fall back on which branch has the better capabilities to engage in balancing rights. On that score, I rely on the argument made above.

subject to the Constitution, gain? Is it a fair and just society? Or is it simply an ordered one?<sup>299</sup>

That question can be answered by the price asked of us. The current Court appears to have made the determination that a new group of actors needs protection from a “tyranny of the majority”: economic elites.<sup>300</sup> Unlike people in celebrated cases such as *Brown v. Board of Education*,<sup>301</sup> *Loving v. Virginia*,<sup>302</sup> *Griswold v. Connecticut*,<sup>303</sup> the economic elite are not a group lacking power or influence, even under the restricted schemes struck down by *Citizens United*.<sup>304</sup> With the decisions in *Citizens United* and *Arizona Free Enterprise*,<sup>305</sup> the Court’s holdings act to preserve and further the power of these elites, power they already possess because of their greater economic resources, and keep other actors who might threaten it at bay.<sup>306</sup>

The Court has established political elites to further entrench themselves by granting those elites greater control. Many of those political elites are members of the Republican party, long known as the

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299. Modern political philosophy began with Thomas Hobbes’s observation that life without an ordered society would be “nasty, brutish, and short.” Thomas Hobbes, *LEVIATHAN* (1651).

300. “[T]yranny of the majority” finds its first expression in John Stuart Mill’s, *On Liberty*, 3 (1913), available at <https://archive.org/details/onliberty02millgoog/page/n16/mode/2up> [<https://perma.cc/9V6V-KG5Y>].

301. 347 U.S. 483 (1954).

302. 388 U.S. 1 (1967).

303. 381 U.S. 479 (1965).

304. See, e.g., Charles Duhigg, *Is Amazon Unstoppable?*, *NEW YORKER* (Oct. 10, 2019), <https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable> [<https://perma.cc/98TA-MMQX>] (discussing Amazon’s wealth and power in terms of its control of the market through owning the distribution and the sale of goods, which the Government had previously “forc[ed] industries to separate”).

305. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

306. *Id.* at 749 (citing *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (“We have repeatedly rejected the argument that the government has a compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.”)). Saying the state cannot match monetary expenditures by groups and individuals with greater economic power, the Court is giving those economic elites greater power than those without the same resources.

party of big business.<sup>307</sup> In *Shelby County v. Holder*,<sup>308</sup> the Court ended preclearance of any changes to voting laws under sections 4 and 5 of the Voting Rights Act.<sup>309</sup> Many states with Republican majority legislatures and governors unleashed a torrent of new state statutes that made it harder to vote.<sup>310</sup> In *Rucho v. Common Cause*,<sup>311</sup> the Court said that it could never hear a case alleging partisan gerrymandering because the Court is prohibited from decisions allocating political power.<sup>312</sup> This, despite ample evidence that the sheer amount of data that can now be brought to bear, creates a situation where politicians are choosing their voters instead of voters choosing who governs them.<sup>313</sup> Of course, not making a choice is still a choice; in *Rucho*, that choice was to leave political elites entrenched.<sup>314</sup>

With these decisions, the Court has radically rewritten our current social contract in the past decade. The Court moves the social contract towards a system akin to Delaware corporate governance. And

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307. *Republican Party*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Republican-Party> [<https://perma.cc/Q74Y-9F83>].

An argument currently exists as to whether the Republican party can still be considered the party of big business. Since 2013, a split has occurred between the populist/cultural and the economic/free market wings of the party. Lydia DePillis, *Here's the History of How Big Business Lost Control of the GOP*, WASH. POST (Oct. 14, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/10/14/heres-the-history-of-how-big-business-lost-control-of-the-gop> [<https://perma.cc/DCJ6-ZPYX>]; David Gelles, *'We Need to Stabilize': Big Business Breaks with Republicans*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2021/01/15/business/republicans-business-trump.html> [<https://perma.cc/HY8D-ECV8>]. While corporations have actively opposed cultural legislation, they are willing to accept, if not outright support, the current wave of voter restriction laws occurring in Georgia and other states in the wake of the 2020 election. Sam Levine, *Activists Call on Coca-Cola, Delta to Fight Republican Anti-Voting Bills in Georgia*, GUARDIAN (Mar. 17, 2021), <https://www.theguardian.com/us-news/2021/mar/17/activists-call-on-coca-cola-delta-to-fight-republican-anti-voting-bills-in-georgia> [<https://perma.cc/UQ4J-4E22>].

308. 570 U.S. 529 (2013).

309. *Id.* at 544, 547, 556–57. States even recently continue to seek to strip away voting rights. *See, e.g.,* *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (holding a state statute making it a felony for a third party to collect and delivery another person's early mail-in ballot not a violation of the Voting Rights Act).

310. Jaime Fuller, *How Has Voting Changed Since Shelby County v. Holder?*, WASH. POST (July 7, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/07/how-has-voting-changed-since-shelby-county-v-holder> [<https://perma.cc/ZCL7-7XAS>].

311. 139 S. Ct. 2484 (2019).

312. *Id.* at 2508.

313. *Id.* at 2509, 2512 (Kagan, J., dissenting).

314. *Id.*

Delaware General Corporations Law<sup>315</sup> creates a system that is anything but democratic.<sup>316</sup> Delaware law places the operation of the company in the hands of the board of directors, who in turn select the officers.<sup>317</sup> This board is often handpicked and led by the very corporate officers a board is meant to oversee.<sup>318</sup> There are very tight rules over who can vote and what can be voted on.<sup>319</sup> Delaware courts consistently support corporate management against shareholders who seek greater say on how a company should be run.<sup>320</sup>

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315. Del. Code Ann. tit. 8, § 101–245 (2021).

316. Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 708, 714 (2016).

317. E.g., Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 387, 388 (2018); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK L. REV. 1637, 1661–62 (2016); Stephen M. Bainbridge, *Director Versus Shareholder Primacy: New Zealand and USA Compared*, 2014 N.Z. L. REV. 551, 561 (2014); Stephen M. Bainbridge, *An Abridged Case for Director Primacy*, 62 UCLA L. REV. DISCOURSE 69, 69, 70 (2014); Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043, 1046 (2008); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 603 (2006).

Professors Bainbridge and Fisch both agree that (1) the principal role of the corporation has been to increase shareholder wealth; and (2) that the director primacy approach of Delaware law has proven the most efficient means of achieving that corporate goal. Professor Bainbridge has long argued that the ultimate task of corporations is to increase shareholder wealth and that the most efficient way of doing so is to empower directors over shareholders.

Professor Fisch takes a more nuanced approach, noting that shifts favoring director authority necessarily mean reducing director accountability to act in the shareholders' interests, including ensuring shareholder wealth.

318. E.g., *Yacaipa Am. All. Fund II v. Riggio*, 1 A.3d 310, 314–15 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011).

319. DEL. CODE ANN. tit. 8, § 219 (West 2017).

320. *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (clarifying that shareholder power to adopt bylaws is not coextensive to a board of directors power; to rule otherwise would go against Delaware grant of power to manage day to day affairs by 8 Del. § 141)); *see Crown EMAC Partners, L.L.C. v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (shareholder bylaws that conflict with Delaware General Corporation Law are void).

Indeed, management can prevent even broad, aspirational policies from being subject to a one-share/one-vote aspect of corporate democracy. The Securities and Exchange Commission (SEC) has extensive regulations regarding proxy contests. 17 C.F.R. § 240.14a (2020). Nevertheless, the SEC allows corporate management to prevent shareholders from voting on a rule if it “is not a proper subject for action by

In crafting such a government, any purported benefit of our constitutional contract pales in light of the price paid. The benefit is not a democratic (or fair) society, it is merely an ordered one.<sup>321</sup> It favors already elite actors, relieving them from oversight by inferior subjects in all aspects of civil governance. To agree to such a bargain, to give up that much control over our own destiny for some vague promise of prosperity, would very much be a deal such that “no man in his senses would make or as no honest man would come into.”<sup>322</sup>

This society of elites resembles another society from history: feudalism.<sup>323</sup> And this is not a good thing. Feudal lords threatened those under their direct authority with punishments up to and including death for any act of disobedience.<sup>324</sup> In addition to the power over their subjects, feudal lords secured privileges against nominal political superiors, including kings, emperors, and popes.<sup>325</sup> This included exemptions from taxes or other financial obligations.<sup>326</sup> These rights

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shareholders under the laws of the jurisdiction of the company’s organization.” § 240.14a-8(i) (1) (The provision is organized under the rubric of “Question 9”).

321. *Rucho v. Common Cause*, 139 U.S. 2484, 2511–12 (2019) (Kagan, J., dissenting) (“Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.”); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 776 (2011) (Kagan, J., dissenting) (“[T]he Clean Elections Act attacks corruption and the appearance of corruption in the State’s political system. The majority’s denigration of this interest—the suggestion that it either is not real or does not matter—wrongly prevents Arizona from protecting the strength and integrity of its democracy.”); *Citizens United v. FEC*, 558 U.S. 310, 393–94 (2010) (Stevens, J., dissenting) (stating that the Court’s rewriting of existing campaign expenditure laws for for-profit corporations, in the name of the First Amendment, is “profoundly misguided”).

322. *Hume v. United States*, 21 Ct. Cl. 328, 331 (1886) (quoting Lord Hardwicke), *aff’d*, 132 U.S. 406 (1889).

323. Feudalism, it should be recalled, is the social and economic system between the end of the Western Roman Empire in the fifth century and the emergence of nation states in the seventeenth. It is characterized by the absence of public authority where local lords performed the administrative duties formerly done by a centralized government. Absent that public authority, local lords were able to demand service from vassals in exchange for property and protection. *Feudalism*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/feudalism> [<https://perma.cc/KZ4T-QXPA>].

Substitute salary and insurance for property and protection, and the modern employee starts to bear an uncomfortable resemblance to the vassals and serfs of old.

324. Charles S. Lobingier, *The Rise and Fall of Feudal Law*, 18 CORNELL L. Q. 192, 213–14 (1933).

325. *Feudalism*, *supra* note 323.

326. *See* Lobingier, *supra* note 324, at 204.



were often secured by threats to withdraw military or other material support or by the active support of military or economic rivals.<sup>327</sup>

The parallels that can be drawn between those medieval lords and corporate officers are many. Modern corporations may not have the power of death over their employees, but they can fire employees for almost any reason.<sup>328</sup> In the United States today, that means the loss of pay, higher health insurance costs, and the removal of a host of other benefits a corporation provides to its employee subjects.<sup>329</sup> The corporate overlords use corporate resources to gain access to political actors. Then the corporate overlords influence those actors to give a corporation favorable treatment; not just within government institutions but also more power over their workers, customers, and

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327. *Id.* at 195, 219.

328. This can include not agreeing to “suggestions” on research articles and for protesting against a company.

An example of this can be seen in Google’s treatment of employees who are critical of management policies and actions. Julie Carrie Wong, *More than 1,200 Google Workers Condemn Firing of AI Scientist Timnit Gebru*, *GUARDIAN* (Dec. 4, 2020), <https://www.theguardian.com/technology/2020/dec/04/timnit-gebru-google-ai-fired-diversity-ethics> [<https://perma.cc/X6PB-NEP4>]. Timnit Gebru, a researcher on artificial intelligence and ethics, was told to either retract or remove her name on a research article. *Id.* The article argued that companies, such as Google, developing programs analyzing language need to be more active to avoid perpetrating historical prejudices in language. *Id.* When Gebru sought to negotiate with the company and sought support from her peers at the company, she was fired (Google claims she resigned). *Id.*

The National Labor Relations Board (NLRB) filed a complaint against Google for retaliating against employees engaged in internal protests. The protests concerned the company’s continued work with U.S. Customs and Border Protection. The NLRB said that Google engaged in “terminations and intimidation in order to quell workplace activism.” Kari Paul, *Google Broke US Law by Firing Workers Behind Protests, Complaint Says*, *GUARDIAN* (Dec. 2, 2020), <https://www.theguardian.com/technology/2020/dec/02/google-labor-laws-nlrbs-surveillance-worker-firing> [<https://perma.cc/P85Q-ZJDV>].

329. Alex Janin, *Laid off, Furloughed or Fired: Understanding the Differences*, *WALL STREET J.* (Feb. 24, 2021 12:57 PM), <https://www.wsj.com/articles/what-to-do-if-you-are-furloughed-fired-or-laid-off-11607377619> [<https://perma.cc/UR8F-3ATU>]; *Health Insurance After Employment: COBRA*, *LEGAL AID AT WORK*, <https://legalaidatwork.org/factsheet/health-insurance-after-employment-cobra> [<https://perma.cc/P2RZ-M9FS>].

even otherwise unconnected citizens.<sup>330</sup> And they have the ability to punish those who will go against their corporate will.<sup>331</sup>

Equity doctrines are about fairness. We need courts, especially the Supreme Court, to consider the consequences of a particular course of action and to do more than answer what is or is not legally permissible under the constitutional contract. Because the Court not only can, but does, alter the terms of the constitutional contract. When the Court is presented with a case that may alter the terms of our social contract in a new or different way, we need the Court to do more than just decide whether something is legally permissible under the Constitution. We need it to be equitable; we need it to be fair.

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330. Amazon provides (obvious) examples. In 2018, the company announced it would open a second headquarters and facilitated a “beauty contest” between cities over which one would provide the biggest tax breaks and other incentives. David Reibstein, *Amazon’s HQ2 Beauty Contest a Wake-up Call to Many Cities*, HILL, <https://thehill.com/opinion/finance/416222-amazons-hq2-beauty-contest-a-wake-up-call-to-many-cities> [<https://perma.cc/Z8RW-3PFS>]. New York City “won” with \$3 billion in incentives. Fatma Khaled, *Amazon Will Add More Delivery Stations in New York City in 2021*, INSIDER, <https://www.businessinsider.com/amazon-to-add-more-delivery-stations-in-new-york-city-2021-3> [<https://perma.cc/LV54-JXDU>]. The citizens of New York City rebelled, angered by the incentives and the planned redevelopment of a working-class area in Queens (the memories of Robert Moses are long). Amazon cancelled plans in the face of this opposition. But then . . . Amazon decided to massively expand its presence in the city without any incentives. Kari Paul, *Alexandria Ocasio-Cortez on Amazon’s New New York City Offices: I Told You so*, GUARDIAN (Dec. 6, 2019, 7:24 PM), <https://www.theguardian.com/technology/2019/dec/06/amazon-new-york-city-offices-lease> [<https://perma.cc/Y2F2-F8EL>].

Amazon did succeed in fighting off a “head tax” in Seattle. This tax, based on the number of people employed, would have significantly impacted Amazon, Seattle’s single biggest employer. The tax was justified because the company’s large office space and high-salaried employees had created a housing crisis. The new tax would have gone to addressing that crisis. However, threats to leave the city caused the city council to repeal the tax one month after it was enacted. Levi Pulkkinen, *Seattle Leaders Repeal Amazon ‘Head Tax’ Passed One Month Ago*, GUARDIAN (June 12, 2018, 6:28 PM), <https://www.theguardian.com/technology/2018/jun/12/seattle-amazon-head-tax-repealed-one-month> [<https://perma.cc/6U7T-5RRX>].

331. Amazon attempted to remove the city council members who proposed the Seattle tax increase and a host of other “worker-friendly” laws. It contributed \$1.5 million dollars to the campaign rivals of six city council members and defeated two of them. Hallie Golden, *How Socialist Kshama Sawant Triumphed over Amazon in Its Own Backyard*, GUARDIAN (Nov. 17, 2019, 3:30 AM), <https://www.theguardian.com/us-news/2019/nov/17/kshama-sawant-seattle-socialist-amazon-election> [<https://perma.cc/Y7ZW-PCA7>].