ARTICLES

LEGISLATIVE INTERVENTION IN CORPORATE GOVERNANCE IS NOT A NECESSARY RESPONSE TO *CITIZENS UNITED v. FEDERAL ELECTION COMMISSION*

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Few recent decisions of the United States Supreme Court have created quite the stir as did *Citizens United v. Federal Election Commission*.[1] One reason the opinion had such an effect is that it contains a smorgasbord of business-related legal and political issues, including issues relating to election law, ethics, social responsibility, *stare decisis*, judicial review, selection of Supreme Court Justices, the definition of free speech, and corporate "personhood" for purposes of the First Amendment.[2] Perhaps surprising for a case involving a lawsuit brought by a nonprofit public advocacy organization against the federal agency charged with enforcing federal election laws, the opinion also ventures into one of the most important current issues in corporate governance, the role of shareholders in the business and affairs of a corporation.

Citizens United reflects a larger struggle underway in the United States and elsewhere over the relative roles of the various participants in the operation of complex business organizations, particularly the role of shareholders relative to management and the board of directors. Many

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1. Citizens United v. FEC, 130 S. Ct. 876 (2010).
2. *Id.*

observers view the *Citizens United* decision as judicial activism favoring big business at the expense of shareholders.[3] These observers argue that the proper solution for this intrusion by the courts into corporate governance is enactment of one or more new laws to right the ship. This article argues that no such solution is necessary or proper if we accept that the board of directors will, in the area of political expenditures by their organizations, fulfill their duty to steer the ship for the benefit of all stakeholders with a long-term perspective.

SUMMARY OF *CITIZENS UNITED* AND FEDERAL ELECTION LAW

On January 21, 2010, the U.S. Supreme Court issued its decision in *Citizens United v. Federal Election Commission*, holding that portions of the 2002 Bipartisan Campaign Reform Act (BCRA), commonly known as the McCain-Feingold Act,[4] prohibiting corporate and union expenditures for certain political communications, violated the First Amendment's protection of free speech. The Court found that the government's interests in restricting such expenditures were not important enough to justify the infringements on free speech.[5] The Court's decision sparked protests that the Court had overturned precedent to reach its ruling, and the Court had undervalued the government's interests in restricting such expenditures.[6]

Congress and state legislatures have attempted to rein in corporations' ability to influence elections many times since at least the early 20th century. One important purpose of such laws has been to avoid corruption or the appearance of corruption.[7] In his dissenting opinion in *Citizens United*, Justice Stevens noted that the first such federal law was the Tillman Act, passed in 1907, which banned all corporate contributions to candidates.[8]

By the mid-20th century, it had become apparent that corporations and labor unions could avoid the Tillman Act's provisions by taking out ads in

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3. *See, e.g.*, Robert Monks, *Corporate Governance Redux in the Light of* Citizens United, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 7, 2010, 9:24 AM), http://blogs.law.harvard.edu/corpgov/2010/05/07/corporate-governance-redux-in-the-light-of-citizens-united/.

4. Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 and 18 U.S.C.).

5. *Citizens United*, 130 S. Ct. at 913.

6. *See, e.g.*, Peter Baker, Obama v. Roberts*: The Struggle to Come*, N.Y. TIMES, Apr. 18, 2010, at WK1, *available at* www.nytimes.com/2010/04/18/weekinreview/18baker.html?scp=1&sq=citizens%20united%20april%2018&st=cse.

7. *Citizens United*, 130 S. Ct. at 901.

8. *Id.* at 953 (Stevens, J., dissenting).

support of candidates, so long as there was no "coordination."[9] As noted by Justice Stevens in his *Citizens United* dissent, the Taft-Hartley Act[10] was passed in 1947 in order to, among other reasons, prohibit corporations and labor unions from using their corporate funds make what are today called "independent expenditures" to support candidates indirectly in a way that they could not do directly in a federal election.[11] An "independent expenditure" is defined today in FEC regulations as an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents."[12] This concept of indirect, non-coordinated campaign contributions was a central issue sixty years later in *Citizens United*.

Nearly a quarter of a century after the Taft-Hartley Act, Congress again expressed its concern over the role of corporations in federal elections when in 1971 it passed the Federal Election Campaign Act (FECA),[13] which consolidated earlier election laws. FECA added more stringent disclosure requirements for federal candidates.[14] However, due to continued perceived abuses during the 1972 federal elections, just three years after FECA became law, Congress amended FECA in 1974 and created the Federal Election Commission as a centralized enforcement agency for the law.[15] The 1974 amendments also provided the mechanism for the first publicly-funded presidential election in 1976, and set limits on contributions by individuals, political parties and political action committees (PACs).[16]

In response to the 1974 amendments to FECA, conservatives led by U.S. Senator James Buckley of New York challenged, in *Buckley v. Valeo*, the restrictions on, among other things, indirect expenditures for political campaigns, using the argument that money is itself speech and the "quantity

9. *Id.* at 953–54 (Stevens, J., dissenting). *See also The FEC and the Federal Campaign Finance Laws*, FED. ELECTION COMMISSION (Jan. 2010), http://www.fec.gov/pages/brochures/fecfeca.shtml.

10. The Labor-Management Relations (Taft-Hartley) Act, 80 Pub. L. 101; 61 Stat. 136 (1947).

11. *Citizens United*, 130 S. Ct. at 953 (Stevens, J., dissenting).

12. 11 C.F.R § 100.16(a) (2003).

13. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971) (amended 1974).

14. *See, e.g.*, 2 U.S.C. § 434 (2009).

15. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (amending Federal Election Campaign Act of 1971). *See also* Joel L. Fleishmann, *The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions*, 1975 DUKE L.J. 851, 861–62 (1975).

16. Fleishmann, *supra* note 15, at 852.

of expression" could not be limited under the First Amendment.[17] In 1976 the Supreme Court agreed with the plaintiffs in *Buckley* that the 1974 FECA amendments had indeed violated the First Amendment when the law limited the rights of individuals and groups to make independent expenditures.[18] The *Buckley* Court held that the government's "important government interest" in the prevention of corruption and the appearance of corruption was not sufficient to justify such a limitation on individuals.[19]

By contrast, the *Buckley* Court upheld a separate provision of the 1974 amendments that restricted an individual's *direct* contributions to candidates, ruling that this provision was justified by the same anti-corruption government interest that was not sufficient for restricting independent expenditures.[20]

Two years later, in *First National Bank of Boston v. Bellotti*,[21] the Supreme Court looked at the political speech rights of corporations in the context of a Massachusetts statute prohibiting contributions and expenditures by corporations for the purpose of affecting referenda votes. The Court held that such a prohibition violated the corporation's First Amendment rights, and the First Amendment applied to corporations and to their political speech.[22]

The *Bellotti* Court considered but rejected the argument in support of the Massachusetts law that it was necessary in order to protect shareholders who disagreed with the political speech by the corporation.[23] The Court reasoned that shareholders "normally are presumed competent to protect their own interests," and they can decide "through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[24] The Court noted that if shareholders disagreed with corporate political expenditures, whether because they believed they were made to further the personal interests of management or simply were bad business decisions, then they could bring derivative suits or sell their shares.[25]

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17. Buckley v. Valeo, 424 U.S. 1 (1976).
18. *Id.* at 51.
19. *Id.* at 53.
20. *Id.* at 29. *See also From Buckley to Citizens United, Part One of Two*, NAHMOD L. (Feb. 26, 2010, 3:50 PM), http://nahmodlaw.com/2010/02/26/from-buckley-to-citizens-united-part-one/.
21. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
22. *Id.* at 785.
23. *Id.* at 787–88.
24. *Id.* at 794–95. *See also* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004) (discussing shareholder protection as a motivation for campaign spending restrictions on corporations).
25. *Bellotti*, 435 U.S. at 795 n.34 (noting that a dissenting shareholder "is free to withdraw his investment at any time and for any reason").

The next time that the Supreme Court had to apply the notion of an "independent expenditures" limitation to corporations, it took a different approach from *Buckley* (where it had struck down a restriction on such expenditures), and in 1990, it upheld a Michigan law that barred corporations from using treasury funds for independent campaign expenditures.[26] In *Austin*, the Court rested its decision on the new grounds that corporate political speech could be constitutionally limited in order to prevent "the corrosive and distorting effects of immense aggregations of [corporate] wealth" that it said had "little or no correlation to the public's support for the corporation's political ideas."[27] The Court took special note of the unique characteristics of corporations that contributed to their power, including perpetual existence, separation of ownership and control and limitation of liability for shareholders.[28] Justice Scalia was highly critical of the majority's opinion in *Austin*, labeling the desire to equalize the resources available to different political groups as "Orwellian."[29]

The Court in *Austin* was not clear as to whether it was also relying on the shareholder protection rationale in reaching its decision in the case. The Court mentioned the shareholder protection rationale but only in its effort to distinguish the facts in *Austin* from the facts in its 1982 decision in *Federal Election Commission v. National Right to Work Committee*.[30] There, the Court agreed with the FEC that the shareholder protection rationale was a proper justification for restrictions on a nonprofit organization's wide-ranging public solicitation for its PAC, along with the goal of avoiding "aggregations of wealth amassed by the special advantages which go with the corporate form of organization."[31] This mention would set the stage for Chief Justice Roberts, two decades later in his *Citizens United* concurrence, who argued that it was never intended to be a rationale for the *Austin* holding.[32]

By 2002, Congress once again believed that further revisions to federal election law were necessary, particularly in order to curb the rise of "issue ads" and to address the fact that election-related communications were

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26. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

27. *Citizens United*, 130 S. Ct. at 883 (alteration in original) (citing *Austin*, 494 U.S. at 660).

28. *Austin*, 494 U.S. at 658–59.

29. *Id.* at 679. (In his dissent in *Citizens United*, Justice Stevens distinguished *Buckley* from *Austin* by noting that the risk of corruption is less in referenda than in elections of individuals: "A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation." 130 S. Ct. at 959. *See* discussion at note 52, *infra*.)

30. FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).

31. *Id.* at 207–08.

32. *See infra* note 73 and accompanying text.

occurring not only on broadcast television and radio but also on cable and satellite media.[33] "Issue ads" were typically negative messages about candidates but were not covered by previous restrictions because they did not use the words "vote no" or "vote against."[34] So, in BCRA Congress added a new election law term, "electioneering communications," defined to include "any broadcast, cable, or satellite communication" that could be "received by at least 50,000 people," that "refers to a clearly identified candidate for Federal office" and that is publicly distributed within 60 days before general election (30 days before a primary election).[35] BCRA prohibited corporations and labor unions from making "independent expenditures" for "electioneering communications."[36]

Not long after McCain-Feingold was enacted, the first case challenging its effects on corporate political speech made its way to the Supreme Court, and the result was a defeat for corporations seeking to strike down BCRA as violating the First Amendment. The Court held in *McConnell v. Federal Election Commission*[37] that the new "electioneering communications" restrictions on corporations, unions and non-profits were necessary not only to prevent the anti-corruption purposes of election laws but also to prevent the "distorting" effect that the aggregated wealth of such organizations described in the 1986 *Right to Work Committee* decision and the 1990 *Austin* decision.[38] The Court believed that the remaining ability of corporations to give through PACs was sufficient opportunity to engage in election advocacy.[39]

In 2007, the Supreme Court again addressed the constitutionality of the McCain-Feingold Act's restrictions on electioneering communications, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*[40] This time, the majority opinion written by Chief Justice Roberts (who had joined the court after *McConnell*) held that the only advertisements that could be kept off the

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33. *See The FEC and the Federal Campaign Finance Laws*, FED. ELECTION COMMISSION (Jan. 2010), http://www.fec.gov/pages/brochures/fecfeca.shtml.8.

34. Justice Stevens stated in his *Citizens United* dissent: "After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham 'issue ads' that 'eschewed the use of magic words' but nonetheless 'advocate[d] the election or defeat of clearly identified federal candidates.'" 130 S. Ct. at 956–57.

35. 2 U.S.C. § 441b(c)(1) (2006); 2 U.S.C. § 434(f)(3) (2006).

36. 2 U.S.C. § 441b(b)(2) (2006). See *Examples of Communications*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/bcra/rulemakings/ECs_WRTL_Exemption_Examples.shtml (last visited Oct. 6, 2010).

37. 540 U.S. 93 (2003).

38. *Id.* at 205.

39. *Id.* at 203.

40. 551 U.S. 449, 455–57 (2007).

air in the pre-election period covered by the law were those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"; that is, those advertisements explicitly urging a vote for or against a particular candidate.[41]

So, in summary, over the thirty-six years leading up to *Citizens United*, the Supreme Court had zig-zagged on the question of whether the First Amendment protects a corporation's expenditures for political activities from state or federal restrictions. McCain-Feingold's restrictions on independent expenditures for electioneering communications had survived through the 2008 elections, but commentators at the time predicted that further challenges could lie ahead in view of the willingness of a majority in *Wisconsin Right to Life* to force a narrowing of the law.[42]

With the above as a backdrop, a nonprofit education, advocacy and grass roots corporation called Citizens United took center stage in federal election law during the 2008 presidential campaign. According to its website,[43] Citizens United's mission is to "reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security."[44] The organization produced *Hillary: The Movie*, a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate for the Democratic Party's nomination for president of the United States in the 2008 campaign.

The movie was highly critical of Senator Clinton, including its advertisements that portrayed Ms. Clinton against a dark and cloudy sky with what appears to be a tornado forming above her head.[45] Citizens United distributed *Hillary* in theaters and on DVD, but also sought to distribute the movie through video-on-demand channels on digital cable networks.[46] One cable company offered to make *Hillary* available on a video-on-demand channel called "Elections 08" for a payment of $1.2 million to Citizens United.[47]

Recognizing the tenuousness of its position under the existing election law precedents, Citizens United requested a preliminary injunction from the

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41. *Id.* at 469–70.
42. *See, e.g.*, Linda Greenhouse & David D. Kirkpatrick, *Justices Loosen Ad Restrictions in Campaign Finance Law*, N.Y. TIMES, June 26, 2007, at A1.
43. CITIZENS UNITED, http://www.citizensunited.org/ (last visited Oct. 6, 2010).
44. *Id.*
45. *See* HILLARY THE MOVIE, http://www.hillarythemovie.com/trailer.html (last visited Oct. 6, 2010).
46. *Citizens United*, 130 S. Ct. at 887 (2010).
47. *Id.*

United States District Court for the District of Columbia against the FEC from enforcing the McCain-Feingold Act's prohibition on "independent expenditures" on "electioneering communications" against the distribution of *Hillary*.[48] The district court denied the organization's request,[49] and Citizens United sought review by the Supreme Court.

The Supreme Court noted its jurisdiction for the appeal in 2008,[50] and the case was argued in March of 2009. In June 2009, however, after oral arguments that had focused on narrow questions of how to interpret BCRA in the context of *Hillary*, the Court instructed the parties to brief and argue whether it should overrule its decisions in *Austin* and *McConnell*, which had upheld restrictions on corporate speech.[51]

On January 21, 2010, in a majority opinion joined in by the justices viewed by most as the "conservative" members of the Court (Chief Justice Roberts and Justices Kennedy, Alito, Scalia and Thomas), the Court decided that indeed it should overrule *Austin* and *McConnell* and expand the First Amendment rights of corporations.[52] Writing for the Court, Justice Kennedy said, "Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient government interest justifies limits on the political speech of nonprofit or for-profit corporations."[53]

Noting that violation of BCRA could be a felony, the Court warned that allowing the restrictions on corporations for independent expenditures on films such as *Hillary* might make it a crime to distribute a film such as the classic 1939 film *Mr. Smith Goes to Washington*, which placed establishment Washington, D.C. in an unflattering light.[54] Justice Kennedy said that if BCRA were applied in such a way, "[s]peech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime."[55]

Justice Stevens was joined in a vigorous 90-page dissent by the other justices most often viewed as "liberal" (Ginsburg, Breyer and Sotomayor). Justice Stevens decried the departure from the Court's earlier respect for the

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48. Citizens United v. FEC, 530 F. Supp. 2d 274, 275–77 (D.D.C. 2008).
49. *Id.* at 282.
50. Citizens United v. FEC, 129 S. Ct. 594 (2008).
51. Citizens United v. FEC, 129 S. Ct. 2893 (2008) (mem.).
52. *Citizens United*, 130 S. Ct. at 912.
53. *Id.* at 913.
54. *Id.* at 916–17.
55. *Id.* at 917.

government's anti-corruption and anti-distortion interests in *Austin* and *McConnell*. In particular, he criticized the unwillingness of the majority to draw distinctions based on the speaker's identity when interpreting the First Amendment, noting that it has routinely done so in the past.[56]

The Court's *Citizens United* decision sparked a firestorm of commentary, pro and con, from a wide variety of sources, including bloggers,[57] columnists,[58] law professors,[59] and shareholder activists.[60] Many commentators have called it a pro-business decision.[61] President Obama himself made a very public criticism of the case during his State of the Union remarks just one week after the decision was handed down, when he stated, "I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."[62] Justice Alito, a member of the majority on the opinion, was televised mouthing the words "that's not right" in response to the president's remarks.[63] The topics covered in the various commentaries were as varied as the identities of the commentators, revealing the richness of the subject matter at issue in the case, from election law itself, to the possibility of an amendment to the Constitution to reverse the result.

CORPORATE GOVERNANCE IMPLICATIONS OF *CITIZENS UNITED*

Corporate governance can be viewed both as an internal process within an organization and also as a process that has both internal and external players. One definition of "corporate governance" is the "system by which business corporations are directed and controlled."[64] Such a broad definition

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56. *Id.* at 945 (Stevens, J., dissenting).

57. *See* Jesse Strauss, *What Ted Olson Needs to Know About Corporate Democracy After Citizens United*, HUFFINGTON POST (Feb. 11, 2010), *available at* http://www.huffingtonpost.com/jesse-strauss/what-ted-olson-needs-to-k_b_457556.html.

58. *See* Baker, *supra* note 6.

59. *See* Lucian Bebchuk, *Corporate Political Speech is Bad for Shareholders*, PROJECT SYNDICATE, Feb. 23, 2010, *available at* http://www.project-syndicate.org/commentary/bebchuk10/English.

60. *See* Monks, *supra* note 3.

61. *See, e.g.*, Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, at A1, *available at* http://www.nytimes.com/2010/06/30/us/30scotus.html?emc=eta1.

62. Barack Obama, President of the U.S., Remarks by the President in State of the State of the Union Address, Jan. 27, 2010, *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

63. Video of Justice Alito Says "Not True" During State of the Union, YOUTUBE (Jan. 27, 2010), http://www.youtube.com/watch?v=xzP_s-Ynr0M.

64. James McRitchie, *Corporate Governance Defined*, CORP. GOVERNANCE, http://www.corpgov.net/library/definitions.html (last visited Oct. 6, 2010) (quoting Sir Adrian Cadbury,

would include all of the various internal and external constituencies of a business organization that might direct its governance, including its board of directors; management; audit committee; internal risk managers; independent auditors; lawyers; other "gatekeepers" such as ratings agencies and investment bankers; regulators, particularly the Securities and Exchange Commission; and Congress as it passes laws seeking to control corporate governance processes.[65] The definition might also include taxpayers, at least in the case of bailed out companies.[66]

Citizens United itself involved a narrower definition of corporate governance; the relationship between a corporation and its shareholders. Specifically, the case raises the issues of whether shareholders should have a say in how their corporations spend corporate funds in the political process and whether laws restricting corporate political speech are justified by protecting shareholders who might disagree with such spending. Notwithstanding that *Citizens United* considered only the internal corporate governance players of shareholders and management, the response to the case has triggered calls for legislative "fixes," which reflect the more macro approach to the concept of corporate governance that would include regulators and legislators.

At its broadest level of impact, *Citizens United* has been labeled as being representative of the ascendency of big business as the most powerful force in our society overall.[67] Shareholder activist Robert Monks has described the period from the late seventies through 2008 as America's "Thirty Glorious Years" during which corporate power increased yet co-existed with a well-functioning democracy.[68] He believes that the financial crisis of 2007–2010 has shown that such co-existence is not possible and that *Citizens United* has created a "compelling need" for "preemptive federal action" to reverse the consequences of such power.[69]

Others might see the case as just another chapter in the cyclical rise and fall over time of business's influence.[70] Finally, some commentators have

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The Report of the Committee on the Financial Aspects of Corporate Governance).

65. *See* K. KIM, J. NOFSINGER & D. MOHR, CORPORATE GOVERNANCE (3d ed. 2010). *See also* JOHN C. COFFEE, GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE (2006).

66. KIM ET AL., *supra* note 65, at 8.

67. *See, e.g.*, Posting of David H. Gans to Text & History, http://theusconstitution.org/blog.history/?p=1518 (Jan. 27, 2010).

68. *See* Monks, *supra* note 3.

69. *Id.*

70. *See, e.g.*, P. MACAVOY & I. MILLSTEIN, THE RECURRENT CRISIS IN CORPORATE GOVERNANCE (2004).

suggested that the result in *Citizens United* raises the possibility that not only corporate funds but also taxpayer funds might be used by bailed-out businesses to help ensure "the reelection of politicians who treated the corporation or executives favorably."[71]

Within the four corners of the *Citizens United* opinion, the case raises corporate governance in the various Justices' discussion of whether protecting shareholders is a constitutionally sufficient justification for restricting corporate speech. In the majority opinion, Justice Kennedy rejects the shareholder protection interest as a reason for restricting corporate speech.[72] First, he notes that if such an interest were relied upon, then the Government would be able to ban the political speech of even media corporations in order to protect their dissenting shareholders, a ban that he says, the First Amendment would never allow.[73]

Justice Kennedy's second reason for rejecting the shareholder protection interest argument provides a good illustration of some key current issues in the role of shareholders in corporate governance. His general premise is that the "procedures of corporate democracy" should be sufficient to protect shareholders, citing *First National Bank of Boston v. Bellotti*.[74] While not enumerated by Justice Kennedy in the *Citizens United* majority opinion, these procedures for a shareholder would include bringing a derivative action; selling the shareholder's shares; voting in directors who agree with the shareholder's views (and vice versa) and, for publicly-held corporations, using the shareholder proposal process found in Securities and Exchange Commission Rule 14a-8.[75]

The majority in *Citizens United* argued that corporate democracy mechanisms should be even more effective today than they would have been at the time the McCain-Feingold Act was passed because modern technology such as the Internet makes disclosures about corporate political spending "rapid and informative."[76]

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71. *See, e.g.*, Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 THE YALE L.J. ONLINE 53 (2009), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/citizens-not-united:-the-lack-of-stockholder-voluntariness-in-corporate-political-speech/. *See also infra* note 86.

72. *Citizens United*, 130 S. Ct. at 911.

73. *Id.*

74. *Id.* (citing *Bellotti*, 435 U.S. at 794).

75. 17 C.F.R. § 240.14a-8 (1998). *See* Pollman, *supra* note 71.

76. *Citizens United*, 130 S. Ct. at 916.

Chief Justice Roberts's concurring opinion, joined in by Justice Scalia, addressed mainly the *stare decisis* issues presented in the case.[77] The concurring opinion touched on the shareholder rights issue only to say that, in his view, the Court in earlier cases such as *Austin* had actually never adopted the shareholder protection rationale for campaign finance restrictions on corporations.[78] So, lest anyone believe that the mere overruling of *Austin* is not enough to discredit the idea that the Court sees shareholder rights as a factor in the First Amendment analysis as applied to corporations, Chief Justice Roberts and Justice Scalia thoroughly discredit that notion by expressly removing it as an underpinning of earlier precedents.

Like many other points in the majority opinion, Justice Stevens takes a forceful, opposite view of the shareholder protection rationale in his dissenting opinion. He cites as one of the purposes of the 1907 Tillman Act, "respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed."[79] In his summary of Supreme Court decisions on election law, he also quotes *McConnell* to say that one of the purposes behind all of Congress's regulation of "corporate participation in candidate elections" was to "protect the expressive interests of shareholders."[80]

Not surprisingly, when considering the majority's reliance on corporate democracy as sufficient to protect shareholder interests, Justice Stevens's dissent expresses a considerably more jaundiced view:

> It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management.[81]

Justice Stevens's view that shareholders lack meaningful input into the management of a corporation is supported by commentators who describe the difficulties with the shareholder derivative suit and shareholder proposal processes. For example, these opponents attack the "business judgment rule" under Delaware law for the protection it provides to most decisions by

77. *Id.* at 917–25 (Roberts, C.J., concurring).
78. *Id.* at 923.
79. *Id.* at 953. *See* Winkler, *supra* note 24, at 878.
80. *Citizens United*, 130 S. Ct. at 960.
81. *Id.* at 972.

corporate officers and directors, including presumably decisions on how to spend corporate funds in the political process.[82]

Similarly, opponents of the *Citizens United* result are suspicious of the somewhat arcane rules of the Securities and Exchange Commission on shareholder proposals that have been used to allow corporations to exclude proposals requiring them to disclose (or limit) their political contributions.[83] If such contributions are a matter "relating to the company's ordinary business operations," then proposals relating to that topic may be excluded under the rule.[84] However, if they represent a "significant policy issue," then they may not be excluded.[85] As discussed below, it is entirely possible that *Citizens United* will have the dual but contradictory effects of encouraging more shareholder proposals on political contributions but also establishing that such contributions are day-to-day business operations and therefore excludable under Rule 14a-8.

Observers of the *Citizens United* opinion have predicted that the case might embolden management of public corporations to attempt to influence elected officials to dilute shareholder rights even further.[86] For example, in a blog post entitled "Corporate Political Speech is Bad for Shareholders," well-known shareholder rights proponent Lucien Bebchuk of Harvard Law School argues that the ownership of U.S. corporations is so dispersed that most companies "are *de facto* controlled by professional managers."[87] Bebchuk writes, "Such managers can be expected to use their influence to obtain and maintain rules that weaken the rights of dispersed shareholders and make it difficult for shareholders to replace them.[88] He further writes that when corporations are deciding on political expenditures, "their general investors are not consulted. Rather, such decisions are likely to reflect the preferences and objectives of the insiders who manage the companies, ostensibly on shareholders' behalf."[89]

In short, *Citizens United* is a microcosm of one of the most contentious current issues in business law, the power of shareholders to influence corporate decision-making.

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82. *See* Strauss, *supra* note 57.
83. *See, e.g.*, Pollman, *supra* note 71.
84. *See* 17 C.F.R. § 240.14a-8(c)(7) (1998).
85. *See* 17 C.F.R. § 240.14a-8(c)(7) (2010); Strauss, *supra* note 57.
86. Some have the additional concern that such influence might be paid for with taxpayer funds, where a corporation has received "bailout" funds. *See* Pollman, *supra* note 71.
87. Bebchuk, *supra* note 59.
88. *Id.*
89. *Id.*

LEGISLATIVE SOLUTIONS PROPOSED

In the months following the announcement of the *Citizens United* decision, a wide variety of legislative responses have been proposed by opponents of the decision, citing the weaknesses of existing remedies for shareholders aggrieved by a corporation's political expenditures noted above. One suggestion has been a law that would set in motion an amendment of the Constitution itself to provide that corporations are not "persons" at all, and are not entitled to the protections of the Constitution afforded to persons, such as the First Amendment free speech protections.[90] At the opposite extreme of the federalism spectrum, there have been state-level proposals for amendments of state corporation laws to require that the board of directors approve any political contributions.[91] There have also been a number of laws proposed at the state level that would require increased disclosure of campaign spending by corporations and labor unions.[92]

Finally, opponents of the *Citizens United* result have proposed amendments of various existing federal laws to undo that result. For example, the DISCLOSE Act (Democracy is Strengthened by Casting Light on Spending in Elections) passed the U.S. House of Representatives in June 2010 after the *Citizens United* decision.[93] It would restrict campaign expenditures and force advocacy groups, unions and corporations to disclose their major donors and political advertising budgets.[94] Yet another approach directed at

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90. *See, e.g.*, *Proposed Constitutional Amendments*, RECLAIMDEMOCRACY.ORG, http://www.reclaimdemocracy.org/political_reform/proposed_constitutional_amendments.html (last visited Oct. 6, 2010) (proposed constitutional amendments "to revoke corporate constitutional 'rights,' reverse *Buckley v. Valeo*, and establish a right to vote"). *See also* Arthur Delaney, *John Kerry: Amend the Constitution in Response to Citizens United Decision*, THE HUFFINGTON POST, Feb. 2, 2010, *available at* http://www.huffingtonpost.com/2010/02/02/john-kerry-amend-the-cons_n_445842.html.

91. *See, e.g.*, Missouri Campaign Finance Disclosure Law, MO. REV. STAT. § 130.029 (2000), Louisiana Election Code, LA. REV. STAT. § 18.1502.2 (2010), and Iowa Election Law, IOWA CODE § 68A.402A (2009) (requires a majority of the board of directors to vote in the affirmative to authorize political expenditures by a corporation).

92. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 16-914.02 (2010). *See also* BRENNAN CENTER FOR JUST., http://www.brennancenter.org (last visited Oct. 6, 2010) (discusses both state and federal laws being considered in response to *Citizens United*).

93. H.R. 5157: Democracy is Strengthened by Casting Light on Spending in Elections Act, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-5175 (last updated July 1, 2010, 6:58 AM).

94. H.R. 5175, 111th Cong. (2nd Sess. 2010) (the bill failed, however, to pass the Senate when an attempt was made in July 2010). *See* David M. Herszenhorn, *Campaign Finance Bill Is Set Aside*, N.Y. TIMES, July 28, 2010, at A14, *available at* http://www.nytimes.com/2010/07/28/us/politics/28donate.html.

public companies would be amendments to the federal securities laws to require more disclosure of political activity, to give shareholders power to authorize political spending by corporations and to impose new personal liability on directors of companies that make unauthorized political expenditures.[95]

It is these proposals that would require express changes in the ways that shareholders, management and directors interact with each other that I address below and further suggest that they are neither necessary nor proper. I offer no opinion on the proposed amendment to the Constitution to take away corporations' "personhood" rights. The concept sounds like an exceedingly complex one to have to explain to the many people who would have to be involved in such an endeavor and perhaps unlikely to gain traction when one considers that the "Equal Rights Amendment" failed. On the other hand, depending upon the specifics of a proposal calling for increased disclosure, including the exceptions granted,[96] added disclosures may indeed help inform the public policy discussion of campaign financing including among directors and management.[97]

CHANGING THE RULES ON INTERACTIONS IS NOT THE PROPER CORPORATE GOVERNANCE SOLUTION

To address the necessity or propriety of the proposals calling for new governance behaviors by boards, management and shareholders, I first address what appear to be the key assumptions underlying these proposals in order to determine points of agreement or disagreement. First, of course, the proposals assume that there is something broken about our election laws governing expenditures by corporations. I do not disagree with this assumption. Clearly, a system that engenders such vociferous reactions when a result is reached on one side or the other is not operating properly.

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95. *Cf.* Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, BRENNAN CENTER FOR JUST., http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/ (last visited Oct. 7, 2010) (full discussion of such legislation); *Corporate Governance After* Citizens United: *Hearing Before the Subcomm. On Capital Markets, Ins. And Gov't Sponsored Enterprises of the H. Comm. on Fin. Services, 111th Cong. (2010)* (Statement of Professor John C. Coffee, Jr., Columbia University Law School), *available at* http://www.house.gov/apps/list/hearing/financialsvcs_dem/coffee.pdf [hereinafter Testimony of Professor John C. Coffee, Jr.].

96. *See, e.g.*, Dan Eggen, *Disclose Act in jeopardy after interest groups balk at NRA deal*, WASHINGTON POST, June 18, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/17/AR2010061705859.html?hpid=topnews.

97. See *infra* notes 128–31 and accompanying text.

Second, the proposals assume that decisions on political expenditures are related to corporate governance. If one adopts the broadest possible view of what constitutes corporate governance, that it is the process by which the myriad of functions are carried out in an organization and includes both internal and external participants, then decisions on political expenditures are indeed a part of corporate governance.[98] In certain cases, it is appropriate to require disclosures about such otherwise private decisions because public policy-makers have judged that external parties deserve to know about the matters being disclosed. To a very great extent, for example, the enforcement approach of the Securities and Exchange Commission is premised on requiring such transparency.

I do agree that in the broadest sense of the word "governance" it is proper for legislatures to attempt to exert some control over the behavior of corporate governance participants in order to fix a system that is not working properly. Requiring disclosure of political expenditures serves to inform various participants in the corporate governance process about the inner workings of the corporation, just as requiring accurate SEC filings serve such a purpose.

Where I do disagree with the proponents of legislative solutions; however, is exactly how far into the governance process of a corporation it is necessary or proper for a legislature to venture. Requiring new behaviors in the form of additional disclosures by management seems acceptable, as noted above. But the proponents of new legislation seem to assume that they must regulate the actual interaction (such as a new board or shareholder approval requirement) among the three key corporate governance players, shareholders, the board of directors and management, with management being on the losing end of the new regulation in terms of its ability to participate in the governance process.

If my one area of disagreement with the legislative fixes for corporate political expenditures is that they should not impose new interaction rules among the participants, what arguments do I have for saying that?

First, it should be noted that as described above the Supreme Court has apparently rejected the idea that there is a constitutional reason for giving shareholders more of a say in political expenditure decisions.[99] Indeed, it is the absence of such a view on the part of the Court that has prompted calls for legislative mechanisms to provide shareholders with such a say.

98. See *supra* note 64 and accompanying text.
99. *See supra* note 73 and accompanying text.

Second, the law of Delaware, under which most business corporations are organized,[100] provides that the "business and affairs" of a business corporation is to be "managed under the direction of a board of directors," except as may be expressly provided otherwise by law or in the governing documents of the corporation.[101] Other states might not have such a clear director-centric view on who's in charge,[102] but the reality is most larger corporations can rely on this fundamental principle of governance because they are incorporated in Delaware.

Decisions on political expenditures are part of the "business and affairs" of a corporation that should be managed "under the direction" of the board of directors. In turn, of course, the board delegates day-to-day decisions to management.[103] Proponents of using corporate governance to fix the problems with corporate political spending seek to "expressly provide otherwise by law," but the fundamental principle remains clear that absent such a new law, shareholders are generally to stay out of the "business and affairs" of the corporation.

Although it has been criticized by those seeking a more shareholder-centric approach to corporate governance,[104] the judicial branch of the Delaware government recently confirmed the statutory foundation for placing responsibility for management of a corporation with the board. In *C.A. Inc. v. AFSCME Employees Pension Plan*,[105] a union pension plan proposed a bylaw amendment that would compel the corporation to reimburse stockholders for reasonable expenses incurred in a proxy fight, if the stockholders succeeded in electing at least one director. *C.A. Inc.* asked the SEC to permit it to exclude this proposed bylaw under SEC Rule 14a-8 on several grounds, including that it was not a "proper subject" for shareholder action under Delaware law because it contravened Del. Gen. Corp. L. § 141 by invading the authority of the board of directors. The SEC certified this question of whether it was a "proper subject" to the Delaware Supreme Court.[106] The Court found that the

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100. According to the Delaware Department of State, Division of Corporations, over one-half of the Fortune 500 companies are incorporated in Delaware. *See* Lewis Black, Jr., *Why Corporations Choose Delaware* (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf.

101. DEL. CODE. ANN. tit. 8, § 141(a) (2006).

102. *See* North Dakota Publicly Traded Corporations Act, N.D. CENT CODE § 10-35 (2010).

103. Section 142 of the Delaware General Corporation Law provides that corporate officers shall have such duties as are stated in the bylaws or in the a resolution of the board of directors. DEL. CODE ANN. tit. 8, § 142 (2010).

104. *See* Testimony of Professor John C. Coffee, Jr., *supra* note 95, at 13.

105. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 230 (Del. 2008).

106. *Id.* at 231.

bylaw violated Section 141 by attempting to curb the right and ability of the board to manage the corporation's business and affairs.[107] The Court held that if the directors were to have agreed to this restriction, they would have breached their fiduciary duties.[108]

At this point, it may be useful to remember why it is that Delaware law, and indeed the law of most states, seems to give so much power to the board and so little to shareholders, the owners of the corporation. Have shareholders been shortchanged? The answer is most certainly no if one considers that shareholders won the all-important limitation from liability for the acts and omissions of their corporations in exchange for agreeing not to participate in the "ordinary" business of the organization. Section 102 of the Delaware General Corporation Law provides that the stockholders or members of a Delaware corporation "shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts."[109]

Of course, the debate over exactly what rights shareholders should be given in corporate governance is considerably more nuanced than to allow Section 102's limitation on liability for shareholders to be used to foreclose them from gaining any new powers. The law of corporate governance must evolve as the nature of corporations and their various constituents change. Still, it is useful to remember that not even the business judgment rule gives directors the protection from liability that Section 102 gives to shareholders, and this protection certainly has to be worth something as we consider what to give and take among corporate governance participants.

Even at the federal level, the primary participant in the corporate governance process, the Securities and Exchange Commission, has acknowledged that shareholder rights must be limited by the restrictions imposed on them under state corporation law. Rule 14a-8 of the SEC allows shareholders who meet certain ownership and length-of-holding thresholds to place proposals in the annual proxy statements of public companies for consideration by all shareholders.[110] Rule 14a-8(i)(1) permits exclusion if a proposal is "not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization."[111] Significantly, the SEC's view is that so long as a proposal is cast as a recommendation or a request that

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107. *Id.* at 240.
108. *Id.* at 238.
109. DEL. CODE ANN. tit. 8, § 102(b)(6) (2010).
110. Securities and Exchange Commission, 17 C.F.R. § 240.14a-8 (2008).
111. *Id.* § 240.14a-8(i)(1) (2008).

the board take specified action, it is proper under most states' laws.[112] In other words, the SEC recognizes that most state laws do not permit shareholders to tell the board what to do. As a result, most shareholder proposals are cast as recommendations or requests.

As a corollary to Rule 14a-8(i)(1), a company may also exclude a proposal if it relates to "ordinary business operations."[113] The SEC has explained that the term refers to "matters that are not necessarily 'ordinary' in the common meaning of the word, and is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations."[114]

Even before *Citizens United*, many companies had received shareholder proposals relating to corporate political contributions, and more can be expected now that the Court's decision has made such contributions even easier to make. Most companies have not heretofore relied on the "ordinary business operations" exception to Rule 14a-8 to exclude these proposals. Rather, they have relied on other exceptions in the rule, such as for proposals that were sufficiently "vague and indefinite" that they would cause the proxy statement to be "materially misleading,"[115] or for proposals that have been "substantially implemented."[116] With *Citizens United* establishing that corporations' political expenditures are so "core" to their existence as to deserve First Amendment protection, it would not be surprising to see companies now relying on the "ordinary business operations" exception in the future.[117]

I am not suggesting that the SEC should start automatically allowing companies to exclude precatory shareholder proposals related to political expenditures on the grounds that they relate to "ordinary business operations." Indeed, as discussed below, it may be that if directors hear about such proposals they will be better informed and better able to "direct" management as to the decisions that management makes on these expenditures. Rather, I am recognizing that in our dual system of government regulation over corporate

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112. *Id.*

113. Securities and Exchange Commission, 17 C.F.R. § 240.14a-8(i)(7) (2008).

114. Amendments to Rules on Shareholder Proposals, SEC Release No. 34-40018, 63 Fed. Reg. 102, 29107 (May 28, 1998), *available at* http://www.sec.gov/rules/final/34-40018.htm.

115. Securities and Exchange Commission, 17 C.F.R. § 240.14a-8(i)(3) (2008). *See, e.g.*, J.P. Morgan Chase & Co., SEC No-Action Letter, 2010 WL 147289, at 1 (Mar. 5, 2010) (allowing exclusion on the grounds that "grassroots lobbying communications" was vague and indefinite).

116. 17 C.F.R. § 240.14a-8(i)(10) (1998). *See, e.g.*, Exelon Corporation, SEC No-Action Letter, 2009 WL 5200578, at 3 (Feb. 26, 2010) [hereinafter Exelon Corporation, SEC No-Action Letter].

117. *See* Strauss, *supra* note 57.

governance, even the federal government's participant in that system recognizes that ordinary business decisions are not the province of shareholders. And, more importantly, political contributions are "ordinary business operations."

The "ordinariness" of decisions on political contributions can be measured both quantitatively and qualitatively. Quantitatively, political expenditures are not likely to be important to the financial results that drive shareholder value such as stock price and the ability to pay dividends. They do have to be recorded, but that does not mean that they necessarily have to be disclosed. Since 1977, to the extent that a public company does make a political expenditure, the Foreign Corrupt Practices Act amendments to the Securities Exchange Act of 1934 have required that the company's books and records fairly reflect those transactions.[118]

From a pure numerical perspective, such expenditures are not likely to be "material" for purposes of disclosure under the federal securities laws. The SEC itself has acknowledged that many companies follow a rule of thumb that the misstatement or omission of an item that falls under a 5 percent threshold "is not material in the absence of particularly egregious circumstances, such as self-dealing or misappropriation by senior management."[119] It is hard to imagine that political expenditures at public companies would ever reach 5 percent of any meaningful figure, such as revenues, operating expenses or even net income. For example, Hewlett-Packard Corporation, considered a model for the transparency of its disclosures of its political expenditures,[120] has disclosed that it spent just over $1 million in 2009 on corporate contributions to political candidates and organizations, and it had $7.66 billion in net income for that year.[121] If a company did cross a materiality threshold in such spending, then the spending ought to be disclosed, and perhaps more directly overseen by directors, but not approved by directors and certainly not approved by shareholders.

Qualitatively, political expenditures are no different from the many other decisions that managers must make every day without direct shareholder

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118. 15 U.S.C. § 78m(b)(2)(A) (2002) (amended 2010).

119. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999).

120. The company was designated as one of just three companies with "Best in Disclosure" practices by the Center for Political Accountability, a non-profit, non-partisan organization created in 2003 "to bring transparency and accountability to corporate political spending." *See Best in Disclosure*, CENTER FOR POL. ACCOUNTABILITY, http://www.politicalaccountability.net/index.php?ht=d/sp/i/1439/pid/1439 (last visited Nov. 1, 2010).

121. *See* HEWLETT-PACKARD CO., 2009 ANN. REP., at 8 (Jan. 2010), *available at* http://phx .corporate-ir.net/External.File?item=UGFyZW50SUQ9MjgxNTR8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1.

involvement. One of the leading proponents of a "director-centric" view of corporate governance is Professor Stephen Bainbridge of UCLA School of Law. Responding to Professor Bebchuk's concerns in the wake of *Citizens United* that decisions on political expenditures "are likely to reflect the preferences and objectives of the insiders who manage the companies,"[122] Bainbridge replied, "So what? When corporations decide which products to make, what kind of advertising to run, and which employee benefits to offer, 'their general investors are not consulted.'"[123]

Moreover, it can be argued that political expenditures are even less likely to be made than product, advertising and employee benefit expenditures because the return on investment for them is so questionable. To most managers, these expenditures are just another expense which, unless they can produce revenues that flow quickly to the bottom line, are not likely going to be in the budget and are not likely to be made. The pressure on short term, quarter-by-quarter, results simply does not allow for the kind of extravagant spending on political matters that some imagine. And, with the recent Dodd-Frank Wall Street Reform and Consumer Protection Act[124] financial regulatory reform bill likely to cost business many millions of dollars, there are not likely to be many public company CEOs who see a good return on investment from political expenditures.

Suggestions for Board-Management-Shareholder Interactions

Short of dictating the balance of power among shareholders, the board of directors and management by directing how they should interact in order to effect change in corporate political spending, what might be done to advance the public policy debate? I start with the premise that boards and yes, even management, wish to do the right thing for as many stakeholders as they can. I do not see subjecting corporate managers to greater board oversight as analogous to throwing "Brer Rabbit in the Briar Patch."[125] The trend toward more independent directors and fewer CEOs on corporate boards might make this increasingly true.

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122. Bebchuck, *supra* note 59 and accompanying text.

123. Stephen Bainbridge, *Bebchuk on Citizens United*, PROFESSORBAINBRIDGE.COM (Mar. 2, 2010, 10:18 AM), http://www.professorbainbridge.com/professorbainbridgecom/2010/03/bebchuk-on-citizens-united.html.

124. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

125. *See* Testimony of Professor John C. Coffee, Jr., *supra* note 95.

Perhaps one of the highest and best uses of a board of directors is to oversee the reputation risks taken by management of the corporation. Because most of them are seasoned, independent and presumably concerned with their own reputations, directors should be able to discern issues that pose reputation risks for a corporation if not handled effectively. These would include issues that arise from expenditures, like political expenditures, that are not in and of themselves material from a purely financial perspective.

I am not suggesting a particular structure for this or any other risk management by a board of directors. Indeed, to do so would be akin to the very proposals described above that I believe are not necessary. For example, in response to the widespread belief that the failure of boards of directors in the financial services industry to oversee the risks led to the problems in the financial markets beginning in 2007,[126] the Dodd-Frank legislation now requires that certain publicly-traded non-bank financial companies supervised by the Federal Reserve establish separate risk committees.[127]

I am suggesting that boards of directors continuously identify significant issues of public and social policy that might affect the corporation's reputation, and actively oversee management's handling of these issues. Sensitizing boards to this responsibility and to current issues would be an appropriate topic for continuing education efforts for directors. For example, directors could be directed to the sources of public disclosures on the company's political expenditures, which might be growing in number.[128] As noted by the majority in *Citizens United*, modern technology such as the Internet makes disclosures about corporate political spending "rapid and informative."[129]

For its part, management should be encouraged to provide its own take on such issues to the board by disclosing all shareholder proposals made to the corporation, whether or not subsequently withdrawn. For example, there was an immediate uptick in the number of shareholder proposals on political

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126. *See, e.g.*, Stephen Davis & Jon Lukomnik, *Giving Institutional Shareholders Food for Thought*, COMPLIANCE WEEK, June 8, 2010, http://www.complianceweek.com/article/5972/giving-institutional-shareholders-food-for-thought.

127. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 165(h), 124 Stat. 1376, 1429–30 (2010).

128. *See supra* note 91 and accompanying text.

129. *See Citizens United*, 130 S. Ct. at 916.

contributions immediately following the *Citizens United* decision.[130] Some of them were withdrawn after the companies adopted disclosure policies.[131]

Another way for directors to oversee issues such as political expenditures and their effect on a corporation's reputation would be to make a concerted effort to find ways to listen to shareholders, who both help form and are affected by a corporation's reputation. Again, I am not suggesting an institutionalized structure for such meetings, such as that adopted recently by the pharmaceutical company Pfizer.[132] Rather, interaction with institutional shareholders on social and public policy issues could be far less structured, consisting perhaps of occasional meetings of the type Pfizer has commenced. This interaction could also take the form of monitoring of websites of organizations such as the Council of Institutional Investors, which is made up of union and pension fund members with combined assets of over $3 trillion and which has well-defined views on social and public policy issues, including corporate disclosure of political contributions.[133] Concerns with compliance with SEC Regulation FD, which prohibits selective disclosure of material information by public companies,[134] should be manageable if the focus of any direct communications with institutional shareholders is listening to the concerns of the shareholders.

The purpose of informing the board and management on political expenditures and other social and public policy issues should not be primarily to influence short-term decision-making on such expenditures. Rather, as advocated by lawyer Martin Lipton, a well-known expert on corporate policy, the purpose of any efforts directed at changing corporate governance should be to encourage investing by the corporation "for long-term growth and true value creation."[135] In the context of the corporate governance of political expenditures, this would mean common sense board and management

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130. *See* Erik Krusch, *Proxy Disclosure: Corporate Citizens United*, WESTLAW BUS. CURRENTS, Apr. 2, 2010, http://currents.westlawbusiness.com/Articles/2010/03/20100330_0033.aspx?cid=&src=&sp=.

131. *See, e.g.*, Exelon Corporation, SEC No-Action Letter, *supra* note 116.

132. The company announced in 2007 that it will invite representatives from institutions holding approximately 35% of the company's shares who evaluate governance practices. PFIZER (June 28, 2007, 9:10 AM) http://mediaroom.pfizer.com/portal/site/pfizer/index.jsp?ndmViewId=news_view&newsId=20070628005559&ndmConfigId=1006615.

133. *See* Council Policies, COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/policies (last visited Nov. 1, 2010).

134. 17 C.F.R. § 243.100 (2010).

135. *See* Martin Lipton, *The Future of the Board of Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 6, 2010, 9:27 AM), http://blogs.law.harvard.edu/corpgov/2010/07/06/the-future-of-the-board-of-directors/.

practices that encourage relationship building with public policy-makers, including elected officials, that benefit the corporation over the long term.