

**Testimony of
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Introduction

The Brennan Center for Justice at NYU School of Law¹ thanks the Committee for holding this hearing on “The Future of Campaign Finance in an Age of Supreme Court Activism” and for inviting me to testify. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns – As the most important single response, we urge the enactment of public funding for congressional and presidential campaigns. The Fair Elections Now Act (FENA) introduced by Rep. Larson would provide multiple matching funds for small contributions, a major step.
- Modernize voter registration – The Brennan Center has proposed improvements to the voter registration system that would add up to 65 million voters to the rolls, while reducing fraud and duplication. To respond to the expected flood of new corporate funds, we must assure that all voters have a chance to cast their ballot.
- Advance a voter-centric view of the First Amendment – The Supreme Court, in *Citizens United*, advanced a novel and radical vision of the First Amendment. They did so with no factual basis and no trial record. (Indeed, the ample trial record in the *McConnell* case persuaded that court to uphold the same restrictions

¹ The Brennan Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Part think-tank, part public interest law firm, part advocacy group, the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change that furthers our democracy. In our work to address the problems of money and politics, we have supported disclosure requirements that inform voters about the potential influences on elected officials, contribution limits that mitigate the real and perceived influence of donors on those officials, and public funding that preserves the significance of the voters’ voices in the political processes. The Brennan Center defends federal, state, and local campaign finance and public finance laws in court and gives legal guidance and support to state and local campaign finance reformers through publications and testimony.

now so blithely stricken by the Roberts Court.) We urge Congress to build such a factual record through hearings and other investigations.

In today's hearing, we focus on a fourth, critical step: one that directly addresses the phenomenon of corporate managers who wield other people's money as political clubs. We urge Congress to modify securities laws to give shareholders the power to authorize future corporate political expenditures and to require corporations to report past political spending to shareholders on a periodic basis. Attached to this testimony, please find the Brennan Center's recently released policy proposal, *Corporate Campaign Spending: Giving Shareholders a Voice*, which explores these topics in more depth. Such an approach has been the law in Great Britain since 2000.

The Policy Solution in Brief

We conclude there should be three prongs to Congressional legislation that protects shareholder interests after *Citizens United*: (1) corporate managers should get authorization of future political spending; (2) corporate managers should provide periodic notice of political spending from the company to the shareholders; and (3) any unauthorized corporate political spending should trigger liability.

Below, I will outline the problems created by *Citizens United*. Then I will articulate the Brennan Center's policy proposal and will explain why existing laws are insufficient. Finally, I will answer common questions about the policy proposal.

What's Wrong with Corporate Political Spending?

Corporate political spending presents risks to both American democracy and to American shareholders. Investing has expanded markedly over the past few decades, to the point where nearly one in two American households owns stocks, many through mutual funds or 401(k) retirement accounts.² After the Supreme Court's decision in *Citizens United*, corporations will be able to spend the capital generated through such investments in federal and state elections for the first time in decades. This new license raises two questions: Should shareholders have a say on whether their money should be used for political purposes? And should shareholders be informed of the use of their investments for political purposes?

American shareholders currently lack the ability to object or consent to political spending by American corporations. Indeed, because of gaps between corporate and campaign finance law, U.S. corporations can make political expenditures without giving shareholders any notice of the spending either before or after the fact. As beneficial

² See JOINT ECONOMIC COMMITTEE, 106TH CONG., THE ROOTS OF BROADENED STOCK OWNERSHIP 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, 2 (2005), <http://www.ici.org/pdf/fm-v14n5.pdf>; THE INVESTMENT COMPANY INSTITUTE, 2009 INVESTMENT COMPANY FACT BOOK 8 (49th ed. 2009), http://www.icifactbook.org/pdf/2009_factbook.pdf (noting "[h]ouseholds are the largest group of investors in [investment] funds, and registered investment companies managed 19 percent of households' financial assets at year-end 2008.").

owners of corporations, investors should be given the opportunity to approve corporate political spending through a shareholder vote.

Until *Citizens United*, a century's worth of American election laws prohibited corporate managers from spending a corporation's general treasury funds in *federal* elections.³ Pre-existing laws required corporate managers to make political expenditures via separate segregated funds (SSFs), which are also commonly known as corporate political action committees (PACs), so that shareholders, officers and managers who wanted the corporation to advance a political agenda could designate funds for that particular purpose.⁴

These laws protected both shareholders and the integrity of the democratic process. Recognizing the wisdom of this approach, many states followed suit with similar laws. In the 28 states that lack federal-style election rules, however, corporations made political donations directly from their corporate treasuries, including high cost states like New York, California and Illinois, where political campaigns can cost millions of dollars. This money paid for legislative, executive and judicial elections without consent from or notice to shareholders.⁵

It is hard to overstate what a paradigm shift *Citizens United* has caused for both American democracy and American shareholders. *Citizens United* stuck down decades-old restrictions on the use of general treasury funds to directly support or opposed candidates. Now corporate managers are free to spend corporate treasury funds in Presidential, Congressional and over 20 additional state elections.⁶ This will greatly

³ Until *Citizens United*, the Federal Elections Campaign Act (FECA) prohibited corporations (profit or nonprofit), labor organizations and incorporated membership organizations from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b. The limits have a long vintage. For 63 years, since Taft-Hartley, corporation have been banned from spending corporate treasury money to expressively support or oppose a federal candidate and for 103 years, since the Tillman Act, corporations have been banned from giving contributions directly from corporate treasury funds to federal candidates. After *Citizens United*, corporations are still banned from direct contributions in federal elections.

⁴ 11 C.F.R. 100.6; FED. ELECTION COMM'N, SSFs AND NONCONNECTED PACs (May 2008), <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

⁵ Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELEC. L. J. 361, 361 (2004) (arguing “treasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds—such as a political action committee (PAC)—raise and spend money from knowing, voluntary political contributors.”); see *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (explaining “the [corporate treasury spending] ban has always done further duty in protecting ‘the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed’” (internal citations omitted)).

⁶ ALASKA STAT. § 15.13.074(f); ARIZ. CONST. ART. XIV, § 18; ARIZ. REV. STAT. §§ 16-919(A), -920; COLO. CONST. XXVIII, § 3(4)(a); CONN. GEN. STAT. § 9-613(a); IOWA CODE § 68A.503; KY. REV. STAT. § 121.150(20); MASS. GEN. L. CH. 55, § 8; MICH. C. L. S. § 169.254(1); MINN. STAT. § 211B.15; MONT. CODE ANN. § 13-35-227; N.C. GEN. STAT. §§ 163-278.15,-278.19; N.D. CENT. CODE § 16.1-08.1-03.3; OHIO REV. CODE ANN. § 3599.03(A)(1); OKLA. STAT. TIT. 21, § 187.2 CH. 62, APPX., 257: 10-1-2(d); 25 PA. STAT. § 3253(a); R.I. GEN. LAWS § 17-25-10.1(h), (j); S.D. CODIFIED LAWS § 12-27-18 2a; TENN. CODE ANN. § 2-19-132; TEX. ELEC. CODE § 253.094; W. VA. CODE § 3-8-8; WIS. STAT. § 11.38; WYO. STAT. § 22-25-102(a).

amplify special interests at the expense of American democracy, putting both our economy and shareholders at risk.

Even before *Citizens United*, many corporate managers had a history of spending corporate funds on politics. For example, when federal soft money was legal, corporate managers would often give significant sums to political parties directly out of the corporate treasury.⁷ They spent this corporate money without shareholder authorization or any notice to shareholders either before or after the fact. *Citizens United* did not disturb the federal soft-money ban; however, a pending federal case, *RNC v. FEC*, seeks to do exactly that. But an even more troubling frontier of corporate political spending has been opened up by the decision—that of unlimited corporate political independent expenditures and electioneering communications.

What Are the Specific Risks of Corporate Political Spending?

Unchecked corporate political spending threatens democracy. The risk to democracy is that corporate political spending will attempt to buy policies which are antithetical to the common good, instead benefiting only the company or industry that purchased political advertisements. Professor Daniel Greenwood has outlined this democratic problem:

When the pot of [corporate] money enters the political system, it distorts the very regulatory pattern that ensures its own utility. When the pot of money is allowed to influence the rules by which it grows, it will grow faster, thus increasing its ability to influence—setting up a negative feedback cycle and assuring that the political system will be distorted to allow corporations to evade the rules that make them good for all of us (to extract rents, in the economists’ jargon).⁸

In addition, at least two key shareholder rights are implicated by corporate political spending. First, shareholders have a right to a fair return on their investment. This is a classic example of what Supreme Court Justice Louis Brandeis called the potential misuse of “other people’s money.”⁹ The U.S. Solicitor General dryly noted, “[Founding Father] John Hancock pledged his own fortune; when the CEO of John Hancock Financial uses corporate-treasury funds for electoral advertising, he pledges someone else’s.”¹⁰ Since shareholder money is at stake, shareholders deserve more say about whether that money is spent on political contributions and expenditures.

⁷ Center for Responsive Politics, *Soft Money Backgrounder* (undated), <http://www.opensecrets.org/parties/softsource.php> (showing soft money from corporations and unions combined between 1992 and 2002 totaled over a \$1 billion); Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 5 (2009) (“By the 2000 election cycle, corporate soft money contributions totaled 48% of all soft money receipts and often were given in sums of \$100,000 or more by large companies.”) (citing Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 112-18* (Michael J. Malbin ed., 2006)).

⁸ Daniel Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1054 (1998), <http://ssrn.com/abstract=794785> (in sum, arguing that “corporations, not being citizens, cannot be legitimate political actors”).

⁹ LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* (1914).

¹⁰ Supplemental Reply Brief for Appellee, *Citizens United v. FEC*, No. 08-205 at 7 (2009).

Second, shareholders have a First Amendment right to remain silent in a political debate or to support a candidate of his or her choosing. These are at risk when a manager uses corporate money to support political causes which are antithetical to a given shareholder's wishes. Senators McCain and Feingold and Former Representatives Shays and Meehan, the Congressional sponsors of the Bipartisan Campaign Reform Act (BCRA), recognized that shareholders' First Amendment rights were at risk in *Citizen United*:

The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups. So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders' money.¹¹

Now, corporate managers may trample on shareholders' free speech and associational rights by making them unwittingly subsidize speech that they do not support ideologically.

How did *Citizens United* Affect Shareholder Rights?

Citizens United poses a policy question: should Congress protect shareholders from corporate managers' spending corporate treasury funds on politics? Writing for the 5-4 majority, Justice Anthony M. Kennedy argued that shareholders do not need Congress to protect them from corporate political spending through campaign finance laws because they can protect themselves using corporate governance tools.¹² Although, Justice Kennedy asserts this as a fact, there was an incomplete factual record before the Court. Perhaps, with a full factual record, Justice Kennedy would have agreed that shareholder rights are sharply circumscribed under current state law.

According to Justice Kennedy, the free flow of information empowers shareholders to protect their own interests. As he wrote, "[s]hareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative."¹³ His vision, however is not grounded in reality. In fact, corporate political spending is far from transparent.

¹¹ Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 2 (2009).

¹² *Citizens United v. FEC*, slip opinion at 46 (arguing there is "little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.").

¹³ *Id.* at 55.

While 48 corporations in the S&P 100 have decided to voluntarily disclose their political spending,¹⁴ the vast majority of publicly traded companies keep their political activities in the dark and no corporate law requires them to do otherwise. While it is laudable that so many top companies are embracing transparency, there are over 3,900 companies listed on the New York Stock Exchange alone.¹⁵ The fact that a few dozen companies are being transparent does not change the state of play for the average stockholder. Furthermore, because these companies are doing this disclosure voluntarily, they can rescind these good practices and revert to more secretive ways of doing business at any moment. Also, there is no indication that any corporation voluntarily gives its shareholders a vote over corporate political spending.

Justice Kennedy's second mistaken assumption is that shareholders who discovered a large or imprudent corporate political expenditure could actually do anything about it.¹⁶ Unfortunately, state-based corporate law gives shareholders little recourse. A suit for breach of fiduciary duties or a waste of corporate assets is likely to be in vain; and attempts to oust the board that oversaw the spending would likely fail. Although shareholders can sell their shares, it could be at a loss. Genuine protections require Congressional action.

Justice Kennedy is correct that knowledge of corporate political spending will help shareholders and voters alike make informed decisions. The world he pictured in *Citizens United* of transparent corporate expenditures does not exist presently, but it should. Consequently, Congress should change the securities laws to require corporations to grant them the power to authorize future expenditures and inform shareholders about past political spending.

Why Don't Shareholders Know About Corporate Political Donations?

The short answer to why shareholders have so little information about corporate political spending is that neither the Federal Elections Commission (FEC) nor the Securities and Exchange Commission (SEC) requires corporations to disclose political spending directly to their shareholders. Publicly traded corporations are governed by securities laws,¹⁷ which require detailed public reporting of many aspects of organizational structure and financial status. Political contributions are not one of the categories of required reporting.

¹⁴ Press Release, Center for Political Accountability, *New Companies Bring Political Disclosure to Nearly Half of Trendsetting S&P 100*,

<http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/2636>.

¹⁵ New York Stock Exchange, *Listings Directory* (2009),

http://www.nyse.com/about/listed/lc_all_overview.html (noting 3908 US companies are listed on the NYSE) (last visited Feb. 1, 2010).

¹⁶ *Citizens United v. FEC*, slip opinion at 55 (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits.”).

¹⁷ The laws governing publicly traded companies include the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Sarbanes-Oxley Act of 2002. See SEC, *The Laws That Govern the Securities Industry*, <http://www.sec.gov/about/laws.shtml>.

Campaign finance disclosure law varies state to state and often fails to capture modern political spending. For example, independent expenditures—the very type of political expenditures unleashed by *Citizens United*—are underreported in most states. One study found that a mere five states make information about independent expenditures readily available to the public. As this report noted, “holes in the laws—combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws—results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public.”¹⁸

Even for the political spending that is properly reported to a government agency, there is no duty to share this information directly with shareholders in an accessible way. Because political spending by corporate entities is not disclosed in a single place like a Form 10-K filed with the SEC, discovering the full extent of the political spending of any corporate entity takes copious research. This basic asymmetry of information needs to be addressed by changing federal securities laws to better inform shareholders.

Thus, disclosure of corporate political expenditures presently falls into a gap between corporate and campaign finance law.¹⁹ Consequently, shareholders often know very little about the beneficiaries of corporate political expenditures,²⁰ and they may unwittingly fund political spending at odds with their political philosophies.²¹ As Professor Jill Fisch has explained:

Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation’s internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity.²²

With even governing boards in the dark about corporate political spending, shareholders have little hope of fully understanding the scope of companies’ political expenditures.²³

¹⁸ LINDA KING, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, INDECENT DISCLOSURE PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (Aug. 1, 2007), <https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1>.

¹⁹ Victor Brudney, *Business Corporations and Stockholders’ Rights under the First Amendment*, 91 YALE L. J. 235, 237 (1981) (stating “[t]he use of that wealth and power by corporate management to move government toward goals that management favors—with little or no formal consultation with investors—is also a phenomenon that is generally undeniable.”).

²⁰ Bruce F. Freed & John C. Richardson, *Company Political Activity Requires Director Oversight*, ALI-ABA COURSE OF STUDY MATERIALS, 478 (Dec. 2005).

²¹ *Id.* at 480; see also Brudney, *supra* note 19, at 239-40 (noting “unless investor approval is obtained, the funds of some investors are being used to support views they do not favor.”).

²² Jill Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006).

²³ The lack of board approval is the norm. However two states (Louisiana and Missouri) do require board approval of political donations before they are made. See La. Rev. Stat. Ann. §18:1505.2(F) (also allowing officers of the corporation to make such contributions if empowered to do so by the board of directors); Mo. Ann. Stat. §130.029.

Why Aren't Shareholders Protected by a Corporation's Structure?

The more complex answer to why corporations have not traditionally sought consent for political spending nor disclosed such spending to shareholders lies in the very structure of the way corporations are organized and the very magnitude of many modern corporations. At first blush, many principles of corporate law appear to favor disclosure of political spending as a basic part of overall transparency, a lynchpin of good corporate governance.²⁴ But the structure of corporations makes shareholder input unlikely.

Shareholders own a corporation by holding a transferable share interest, but do not manage the corporation day-to-day.²⁵ The default management structure of a corporation is that the shareholders elect a board of directors.²⁶ The board delegates business decisions to the officers, who are vested with day-to-day management of the business and affairs of the corporation.²⁷ The distinction between ownership and control ideally works to reduce the costs of corporate decision making by placing control over most corporate affairs in the hands of elected directors and appointed officers who are better informed than shareholders about the business of the corporation.²⁸ Conversely, this structure inhibits shareholders from changing or controlling corporate political spending, or even requesting that the spending be disclosed in a particular manner.²⁹

Professor Thomas Joo has rightly noted the Supreme Court's misunderstanding of corporate structure and its confusion concerning the breadth of shareholder controls:

²⁴ For example, Sarbanes-Oxley imposes increased disclosure and reporting requirements, creates stricter rules concerning the independence of the accounting firms working for publicly traded companies and imposes additional responsibilities on the directors and officers of public companies. See *Excellence in Corporate Governance Online*, Legal Issues, <http://www.corpgovonline.com/Content/LegalIssues.html>; J. Brent Wilkins, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. ILL. U. L. J. 339, 349 (2005); Scott Harshbarger & Goutam U. Jois, *Looking Back and Looking Forward: Sarbanes-Oxley and the Future of Corporate Governance*, 40 AKRON L. REV. 1, 3 (2007).

²⁵ WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 96 (2003).

²⁶ *Id.*

²⁷ *Id.* at 100.

²⁸ *Id.*; see also *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (1919) (holding “[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”).

²⁹ The division of ownership and day-to-day management largely collapses in the case of a closely-corporation. A close corporation is often defined simply as one with few shareholders, whose shares are not traded in securities markets. The small number of shareholders means that management and ownership are frequently concentrated in the same hands. See JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, FORMS OF BUSINESS ASSOCIATION: DEFINITIONS AND DISTINCTIONS § 1.20 (2002); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L. Q. 1, 109 (2001) (“[E]lection-related spending may in fact constitute shareholder expression in some corporations, such as a corporation owned by a single person, or a closely held corporation actively managed by its shareholders. Those shareholders do not require state protection from management abuses.”).

Dissenting in *Austin*, Justice Scalia dismissed the idea that shareholders might justifiably object to management political speech. According to Justice Scalia, every shareholder “knows that management may take any action that is ultimately in accord with the majority (or a specified supermajority) of the shareholders’ wishes, so long as that action is designed to make a profit. That is the deal.” This passage suggests that shareholders are entitled to vote on corporate actions, but that is most emphatically *not* the deal with respect to a corporation’s election-related spending.³⁰

Accordingly, most shareholders have zero say about the corporation’s political spending. The ability to transfer shares on the open market in publicly traded companies could potentially work to restrain self-serving behavior of corporate managers.³¹ But the sale of shares does not give shareholders a way to signal to the managers that it was motivated by the corporation’s political spending. Moreover, because nearly all publicly traded corporations tend to be similarly situated *vis a vis* their treatment of political donations, the shareholder has no way of buying shares that give them a greater amount of control over corporate political spending. So long as shareholders invest in American companies, they risk that part of their investment may be used for a political purpose.³²

Doesn’t a Corporation Owe Fiduciary Duties to Shareholders?

Directors and officers owe fiduciary duties to the corporation and its shareholders.³³ There are three fiduciary duties: obedience, loyalty, and care. The duty of care is the broadest of the fiduciary duties, reaching all aspects of conduct,³⁴ and encompassing a duty to not waste assets. Theoretically, if corporate political spending were incredibly high, this could be deemed a waste of corporate assets and violation of the fiduciary duty of care. Courts and regulators, however, have not traditionally construed these duties to restrain political spending.

Claims that an action like spending corporate funds on political advertisements constitutes a waste of corporate assets or a breach of a fiduciary duty are likely to be thwarted by the business judgment rule, a judicially created principle that is extremely deferential towards the decisions of directors and officers.³⁵ The business judgment rule

³⁰ Joo, *The Modern Corporation*, *supra* note 29, at 42-43.

³¹ *Id.* at 95.

³² The only way to buy shares in a company that gives shareholders more rights over corporate political spending is by investing in an American company which is subject to the British Companies Act of 2006. Companies Act, c. 46, §§ 369, 374 (2006), http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf.

³³ ALLEN & KRAAKMAN, *supra* note 25, at 31; a fiduciary relationship is one “founded on trust or confidence reposed by one person in the integrity and fidelity of another.” *See* BLACK’S LAW DICTIONARY (7th ed. 1999).

³⁴ ALLEN & KRAAKMAN, *supra* note 25, at 240. The classic formulation of this duty requires a corporate director or officer to perform his or her functions (1) in good faith, (2) in a manner that he or she reasonably believes to be in the best interests of the corporation, and (3) with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances. *See* ALI, PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994).

³⁵ ALLEN & KRAAKMAN, *supra* note 25, at 252.

holds that a decision constitutes a valid business judgment if it is (1) made by financially disinterested directors or officers, (2) who have become duly informed before exercising judgment, and (3) who exercise judgment in a good faith effort to advance corporate interests.³⁶ Courts have traditionally been very hesitant to apply the label of bad faith to decisions made by officers and directors unless they are clearly extreme and irrational,³⁷ and thus, courts have been overwhelmingly reluctant to intervene in such decisions.³⁸

For instance, in *Cort v. Ash*,³⁹ the Supreme Court held that there was no private right of action for shareholders to peruse derivative suits against corporations for violations of the Federal Elections Campaign Act (FECA)'s ban on the use of corporate treasury funds in federal elections thereby effectively stripping shareholders of any ability to enforce this important federal law.⁴⁰ In the same year, shareholders brought suit in California specifically claiming that a corporate political contribution to a ballot measure campaign was an improper use of corporate funds.⁴¹ The court rejected the shareholders' claims by specifically characterizing a corporate political contribution as a good faith business decision under the business judgment rule, even though there was no clear connection between the contribution and the corporation's business.⁴² The court found no restriction in either the corporation's articles of incorporation or state law regarding such a contribution and therefore found no problem with the corporation's political spending.⁴³

Professor Thomas Joo elucidates:

Shareholders must allege corruption or conduct approaching recklessness in order to even state a claim challenging management actions. This principle of deference is not limited to decisions regarding 'business,' narrowly defined. Courts have applied business judgment deference to...political spending on the ground that management may believe such decisions will indirectly advance the corporation's business.⁴⁴

In sum, courts essentially presume that managers' business decisions are made in good faith and defer to all but the most egregiously negligent or irrational management decisions.⁴⁵ Thus, suits challenging political spending would be unlikely to prevail.

³⁶ *Id.* at 251.

³⁷ *Id.* at 252.

³⁸ *Id.* at 288-90.

³⁹ 422 U.S. 66 (1975).

⁴⁰ Adam Winkler, 'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law, 92 GEORGETOWN L. J. 871, 872 (Jun. 2004).

⁴¹ *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322 (Cal. Ct. App. 1975).

⁴² *Id.* at 313.

⁴³ *Id.* at 324; but compare *McConnell v. Combination Mining & Milling Co.*, 76 Pac. 194, 198 (Mont. 1904) (finding corporate political contributions to be *ultra vires*: "The [political] donation[s]...were clearly outside the purpose for which the corporation was created, both being for strictly political purposes.?).

⁴⁴ Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 959 (2005) (citation omitted).

⁴⁵ Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L.J. 361, 368 (2002).

Why Can't the Market Solve this Problem?

Critics of interventions on the shareholder's behalf, like Justices Kennedy, Roberts and Scalia, may argue that the ability to sell shares on the open market solves this problem. But market discipline is not a good enough deterrent and this problem is not self-correcting. As Professor Thomas Joo has explained, the ability to sell shares⁴⁶ is actually no remedy at all for the harm of wasting corporate funds on politics:

[T]he 'Wall Street Rule' teaches that if a shareholder disagrees with management, it is more efficient for her to sell her stock than to attempt to change management...[E]ven if the shareholder learns of objectionable election-related spending, 'voting with her feet' allows the shareholder only to escape *continued* unauthorized use of the corporate resources. It does not put a stop to the activity or provide any remedy for unauthorized use that has already occurred. Moreover, selling shares because of the corporation's election-related spending is unlikely to have a disciplining effect on management.⁴⁷

Once the money is out the door, in the hands of campaign or political consultant, then the corporation cannot retrieve that money. Selling the shares does not make the corporation or the shareholder whole again.

How Should U.S. Securities Law be Reformed?

The U.S. should modify its securities laws to address corporate political expenditures post-*Citizens United* by (1) mandating that corporations obtain the consent of shareholders before making political expenditures, (2) requiring disclosure of political spending directly to shareholders and (3) holding corporate directors personally liable for violations of these policies. This approach will empower shareholders to affect how their money is spent. It also may preserve more corporate assets by limiting the spending of corporate money on political expenditures.

Shareholder consent is a key reform. Congress should act to protect shareholders by giving them the power, under statute, to authorize political spending by corporations. The voting mechanics would work in the following way. At the annual general meeting of shareholders, a corporation that wishes to make political expenditures in the coming year should propose a resolution on political spending which articulates how much the

⁴⁶ Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 INDIANA L.J. 1259, 1262 n.11 (Fall 2009) ("Shareholders also have the right to sell their shares. This so-called exit right has been viewed by some as particularly important because it facilitates the market for corporate control by enabling the displacement of poorly performing managers.... However, scholars have pointed out that the market for corporate control is imperfect...noting that even when shareholders sell their shares and attendant voting rights, management often remains in power.") (internal citations omitted).

⁴⁷ Joo, *The Modern Corporation*, *supra* note 29, at 57-58; *see also id.* at 67-68 ("The law should communicate society's disapproval of the mercenary view by rejecting the presumption that shareholders always value wealth above their political preferences.") (citation omitted).

company wishes to spend on politics.⁴⁸ If the resolution gains the vote of the majority of the outstanding shares (50% plus 1 share), then the resolution will be effective, and the company will be able to spend corporate treasury funds on political matters in the amount specified in the resolution. However, if the vote fails to garner the necessary majority, then the corporate must refrain from political spending until the shareholders affirmatively vote in favor of a political budget for the company.

Finally, to make sure this reform is enforceable, directors of U.S. companies who make unauthorized political expenditures using company funds, should be personally liable to the company for the unauthorized amount.

Our support for this model is grounded in a sensitivity to administration and transaction costs. A system which put every political action of a corporation to a vote would be costly and unwieldy to administer. By contrast, under this proposal, the corporation can simply add an additional question (on authorization of the political budget) to the list of items which are regularly subject to a shareholder vote at the annual meeting, alongside traditional matters such as the election of the board of directors or appointing auditors.

The disclosure of corporate political spending is under current campaign finance and securities law is inconsistent, keeping shareholders in the dark about whether their investment money is being used in politics. Therefore, Congress should require corporations to disclose their political spending, as many top firms have already agreed to do voluntarily at the urging of the Center for Political Accountability.⁴⁹

To be useful, disclosure of political spending under this proposal should be frequent enough to notify shareholders and the investing public of corporate spending habits and yet with enough time lag between reports so that corporations are not unduly burdened. To accommodate these two competing goals, disclosure of political expenditures should occur quarterly to coincide with company's filing of its Form 10-Qs with SEC. Because the political disclosure will be contemporaneous with the 10-Q filing, transaction costs can be minimized.

In summary, to improve American corporate governance, the U.S. should change its securities laws and should require publicly traded companies to (1) get shareholders' authorization before spending corporate treasury funds on politics and (2) report their political spending directly to their shareholders on a periodic basis. In addition, (3) any unauthorized political spending should result in personal liability for directors.

Does Congress Have the Authority to Act under the Commerce Clause?

Congress has the full authority to legislate in the corporate governance sphere of publicly traded companies using its Commerce Clause power. The recent experience with Sarbanes-Oxley proves this. Just as Sarbanes-Oxley regulated the independence of

⁴⁸ If particular candidates or ballot measures are known to the company at the time of the annual general meeting, then those particular candidates and ballot measures should be mentioned in the language of the resolution.

⁴⁹ Press Release, Center for Political Accountability, *supra* note 16.

boards and other matters which were traditionally state-law matters and was not barred by federalism concerns, the legislative proposal articulated here would also not be barred. Legal commentators agree that Congress has broad powers to regulate corporate governance and any objections to “federalization” are purely normative. As Professor Stephen M. Bainbridge⁵⁰ notes:

No one seriously doubts that Congress has the power under the Commerce Clause, especially as it is interpreted these days, to create a federal law of corporations if it chooses.⁵¹

Or as Professor Robert B. Ahdieh⁵² put it, “[n]o line of sufficient impermeability to categorically exclude any and all possible federal interventions into corporate law can be identified.”⁵³

When the Sarbanes-Oxley bill was debated by Congress, few legislators raised concerns about the bill’s constitutionality on the record, perhaps due to its quick passage.⁵⁴ Representative Ron Paul is the only congressional voice that raised any specter of constitutional challenge in record.⁵⁵ While chiefly objecting to the expansion of “federal power over the accounting profession,” as it “preempt[ed] the market’s ability to come up with creative ways to hold corporate officials accountable,” Rep. Paul also argued that the bill, “interfere[d] in matters the 10th amendment reserves to state and local law enforcement.”⁵⁶ Despite Rep. Paul’s predictions, thus far no plaintiff has tried to assert a purely federalism claim against the enforcement of Sarbanes-Oxley.⁵⁷

⁵⁰ Stephen M. Bainbridge is a Professor of Law at UCLA School of Law.

⁵¹ Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REGULATION, 26 (Spring 2003), available at <http://ssrn.com/abstract=389403>; see also Harvard Law Professor Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 592 (2003) (“Federal authorities reverse state corporate law that they dislike and leave standing laws that they tolerate. State power is to jigger the rules in the middle by adopting those rules that Washington does not gear up to reverse....”).

⁵² Professor of Law and Director, Center on Federalism and Intersystemic Governance, Emory Law School.

⁵³ Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes Oxley*, 53 BUFF. L. REV. 721, 731 (2005).

⁵⁴ See Ahdieh at 724 (“The brief congressional debate over the Sarbanes-Oxley Act only cursorily addressed issues of corporate governance.”). See also Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1549-1556 (2005) (discussing the lack of debate in both chambers).

⁵⁵ See H.R. REP. NO. 107-414 (statement of Ron Paul).

⁵⁶ *Id.*

⁵⁷ In one case challenging Sarbanes-Oxley, the defendant health insurance company executive raised an unsuccessful vagueness challenge to the criminal penalties in 18 U.S.C.S. § 1350, which penalizes executives who “willfully certify[]” a periodic financial report knowing that the report does not comply with the Act’s requirements. See *United States v. Scrushy*, 2004 U.S. Dist. LEXIS 23820 (N.D. Ala. Nov. 23, 2004). In the second case, the plaintiffs brought a facial challenge to the constitutionality Public Company Accounting Oversight Board, created by Sarbanes-Oxley but classified as a non-profit rather than a governmental agency, see 15 U.S.C.S. 7211(b), as a violation of the Appointments Clause and the separation of powers. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008). The challenge was rejected by both the district and appellate courts and is currently before the U.S. Supreme Court. See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 129 S. Ct. 2378 (2009) (granting certiorari).

It is fully appropriate for Congress to respond to *Citizens United* through the securities laws. In previous democratic crises caused by corporate political spending, Congress has responded with the twin tools of campaign finance regulations as well as revised corporate laws. For example, following the revelations of corporate political spending in the Watergate hearings, Congress reacted by both (1) revising the Federal Elections Campaign Act to make it more robust as well as (2) passing the Foreign Corrupt Practices Act, which makes it a federal crime for U.S. companies to give contributions to candidates in foreign countries if such contributions are meant to secure business or are stand-ins for bribes. Similarly, after Enron collapsed following years of giving lavishly to both sides of the political spectrum, Congress acted by passing both (1) the Bipartisan Campaign Reform Act of 2002 (BCRA which is also known as McCain-Feingold) and (2) Public Company Accounting Reform and Investor Protection Act of 2002 (which is also known as Sarbanes-Oxley). Now that *Citizens United* has severely limited Congress' ability to regulate corporate political spending through the campaign finance laws, the securities laws remain an open avenue to enact thoughtful protections for the American public and the American investor.

Do Shareholders Even Care about this Issue?

Some may argue that shareholders either do not really care about corporate political spending or that they may be ill-equipped to judge the political spending by corporate managers. However, as Professor Joo explains, this view is contrary to American democratic norms:

[T]he extension of business judgment discretion to political decisions expresses norms inconsistent with our self-governing polity. Most shareholders presumably have neither expertise nor interest in making the corporation's routine business decisions....But to presume that shareholders have neither expertise nor interest in matters involving political preference contradicts the basic assumptions of self-government and thereby perverts the meaning of the First Amendment.⁵⁸

For those who do care about their investments being funneled into the political system, the current U.S. system offers no redress, save selling all stock holdings. As discussed above, this "solution" offers little redress at all.

A recent survey of shareholders found that shareholders do care about corporate political spending and want greater disclosure.⁵⁹ Shareholders have demonstrated their interest in disclosure of corporate political activity by filing shareholder resolutions requesting more corporate transparency on this very topic. As the Committee for

⁵⁸ Joo, *The Modern Corporation*, *supra* note 29, at 72 (citation omitted).

⁵⁹ Press Release, Center for Political Accountability, *Shareholders See Risky Corporate Political Behavior As Threat to Shareholder Value, Demand Reform, CPA Poll Finds*, (Apr. 5, 2006), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267> (announcing a "poll found a striking 85 percent [of shareholders] agreed that the 'lack of transparency and oversight in corporate political activity encourages behavior' that threatens shareholder value. 94 percent supported disclosure and 84 percent backed board oversight and approval of 'all direct and indirect [company] political spending.'").

Economic Development (CED) reports, disclosure of political expenditures has become the second most popular shareholder resolution.

After climate change, the leading category of social issue proposals filed by shareholders in 2007 dealt with political contributions, according to an analysis by the governance rating firm RiskMetrics. Proposals on political contributions usually ask companies to issue semi-annual reports on political contributions and to provide guidelines for making contributions.⁶⁰

In the past few years, there have been numerous shareholder resolutions requesting the disclosure of political expenditures by corporations. In 2006 such resolutions gained the support of 20% or more of the vote at 11 major companies, including Citigroup (20%), American Financial Group (20.5%), Clear Channel Communications (20.5%), General Dynamics (21%), Washington Mutual (22%), Wyeth (25.2%), Charles Schwab (27%), Marsh and McLennan (30.5%), Verizon (33%) and Home Depot (34%).⁶¹ At Amgen, a political expenditure disclosure resolution received 75.5% of the vote following endorsement by the company's directors.⁶² At least 56 disclosure resolutions were filed during the 2009 proxy season, including at major financial institutions such as Charles Schwab, Goldman Sachs, JPMorgan Chase, Regions Financial and Wells Fargo.⁶³ Such resolutions have been strongly supported by major institutional investors, including the New York City pension fund.⁶⁴ In 2008, the proxy voting advisory service RiskMetrics Group supported a disclosure resolution calling on AT&T to disclose its political spending, after opposing a similar resolution at AT&T the three previous proxy seasons.⁶⁵ For example, a typical resolution requests periodic disclosure of political expenditures including payments to trade associations and other tax exempt organizations.⁶⁶

These shareholder sentiments have greater urgency after the *Citizens United* decision, and many papers across the nation have written editorials calling for Congressional action to protect the interests of shareholders. *The New York Times* urged:

⁶⁰ Committee for Economic Development, *Rebuilding Corporate Leadership: How Directors Can Link Long-Term Performance with Public Goals* 18 (2009),

http://www.ced.org/images/library/reports/corporate_governance/cgpt3.pdf (citing Carolyn Mathiasen, "2008 Preview: Social Issues," *RiskMetrics Risk & Governance Blog* (Mar. 28, 2008), http://blog.riskmetrics.com/2008/03/2008_preview_social_issuessubm.html).

⁶¹ Timothy Smith and Bruce Freed, *Social Investment—Highlights from 2006 Proxy Season*, GreenMoneyJournal.com, Oct. 10, 2006, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/373>.

⁶² *Id.*

⁶³ Jeanne Cummings, *Companies Try to Clean Up Their Act*, Politico, Mar. 24, 2009, <http://www.politico.com/news/stories/0309/20401.html>.

⁶⁴ Francesco Guerrera, *Investors Want Facts on Political Donations*, Financial Times, Apr. 1, 2007, available at <http://www.politicalaccountability.net/index.php?ht=d/ArticleDetails/i/532>.

⁶⁵ *Key Proxy Advisor Recommends Vote Against AT&T Management on Political Contributions Disclosure*, Center for Political Accountability, Apr. 21, 2008, <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1275>.

⁶⁶ Shareholder Resolution filed by Trillium Asset Management Corporation Requesting Political Contributions by Ford Motor Company (2010), <http://www.onlineethicalinvestor.org/eidb/wc.dll?eidbproc~reso~9143> (asking for semi-annual reporting on Ford's political expenditures).

Congress and members of the public who care about fair elections and clean government need to mobilize right away, a cause President Obama has said he would join. Congress should repair the presidential public finance system and create another one for Congressional elections to help ordinary Americans contribute to campaigns. It should also enact a law requiring publicly traded corporations to get the approval of their shareholders before spending on political campaigns.⁶⁷

Editorials from *The Boston Globe*,⁶⁸ *The L.A. Times*,⁶⁹ *Philadelphia Inquirer*,⁷⁰ *Tennessean*,⁷¹ and *Cleveland Plain Dealer*⁷² echoed this call for change in U.S. securities laws.

How Do Corporate Directors Feel About More Disclosure of Political Spending?

The data on how corporate directors view disclosure of political contributions is relatively sparse. However, a 2008 survey of 255 directors at Russell 2000 companies found that 88 percent said corporations should be required to publicly disclose all corporate funds for political purposes.⁷³ “Significantly, 76 percent agreed that ‘corporations should also be required to disclose payments made to trade associations and other tax exempt organizations which are used for political purposes.’”⁷⁴

Directors surveyed thought they knew the requirements of campaign finance laws that applied to their corporations, but “overwhelming majorities of directors *incorrectly* think

⁶⁷ Editorial, *The Court's Blow to Democracy*, THE NEW YORK TIMES, Jan. 21, 2010.

⁶⁸ Editorial, *Corporations Aren't People, Don't Merit Special Protections*, BOSTON GLOBE, Jan. 23, 2010, http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2010/01/23/corporations_arent_people_dont_merit_special_protections/ (“Congress should require corporations to seek shareholders’ permission before spending money in political campaigns, coupled with a similar restriction on unions.”).

⁶⁹ Editorial, *The 1st Amendment and Corporate Campaigning*, L.A. TIMES, Jan. 22, 2010, <http://articles.latimes.com/2010/jan/22/opinion/la-ed-campaign22-2010jan22> (“Congress also could consider regulations that would require unions and public companies to ensure that their political activities are supported by the rank-and-file or shareholders.”).

⁷⁰ Editorial, *Corporate Blunder*, PHILADELPHIA INQUIRER, Jan. 25, 2010, <http://www.philly.com/inquirer/opinion/82575027.html> (“Congress must immediately blunt the impact of the Supreme Court’s disastrous decision allowing unlimited corporate spending on elections.... They could require stronger rules against campaigns’ coordinating with outside groups, or *require publicly traded firms to get approval from shareholders before spending on elections.*” (emphasis added)).

⁷¹ Editorial, *Money Motivates Push for Corporate Political Clout*, TENNESSEAN (Jan. 29, 2010), <http://www.tennessean.com/article/20100129/OPINION01/1290326/1008> (praising “U.S. Rep. Michael Capuano, D-Mass., who proposes legislation giving shareholders power to block corporate campaign spending” for having “the courage to continue fighting the heavy hand of the justices”).

⁷² Editorial, *Supreme Court Ruling on Corporations and Free Speech Opens Big Checkbooks to Politicians*, CLEVELAND PLAIN DEALER, Jan. 26, 2010, http://www.cleveland.com/opinion/index.ssf/2010/01/supreme_court_ruling_on_corpor.html (“Congress might . . . be wise to guarantee shareholders a clear say in how their money is spent.”).

⁷³ Valentina Judge, *Survey Assesses Director Views on Political Disclosure*, CORPORATE SOCIAL ISSUES REPORTER (Mar. 2008).

⁷⁴ Press Release, Center for Political Accountability, *Directors Strongly Support Corporate Political Spending Disclosure, Question Whether Contributions Help Companies, CPA Poll Finds* (Feb. 28, 2008), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1259>.

that all political contributions by corporations, trade associations and non-profits are required to be disclosed [and] [m]ore interestingly is the fact that 63% of directors mistakenly think that boards are required to approve and oversee political expenditures.”⁷⁵

Conclusion

To protect the integrity of both our democracy and our capital markets, we urge the Committee, to exercise its power under the Commerce Clause and change U.S. securities laws to give shareholders the ability to approve future company expenditures and notice of past corporate political expenditures.

⁷⁵ MASON-DIXON POLLING & RESEARCH, THE CENTER FOR POLITICAL ACCOUNTABILITY & ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH, THE WHARTON SCHOOL 2008 NATIONWIDE SURVEY OF MEMBERS OF CORPORATE BOARDS OF DIRECTORS ATTITUDES TOWARDS & AWARENESS OF CAMPAIGN FINANCE LAWS, CORPORATE OVERSIGHT OF POLITICAL SPENDING AND ACTIVITY, PROPOSED REFORMS (2008), <http://cpa.timberlakepublishing.com/files/CPA%20-%20Dir%20Survey%20Report%20-%2003-20-08.pdf> (emphasis added).