MONEY MANAGERS IN THE MIDDLE: SEEING AND SANCTIONING POLITICAL SPENDING AFTER *CITIZENS UNITED*

*Jennifer S. Taub**

INTRODUCTION

On January 21, 2010, with *Citizens United v. FEC*,[1] the United States Supreme Court vastly expanded the First Amendment rights of corporations to engage in political spending.[2] The opinion rested on several questionable premises. First, the Court treated the corporation

* Associate Professor of Law, Vermont Law School. The author thanks J. Robert Brown, Jackie Cook, Lynne Dallas, Bruce Freed, Cheryl Hanna, Matthew Robinson, Ciara Torres-Spelliscy, and Heidi Welsh for advice, assistance, comments, and suggestions.

1. 130 S. Ct. 876 (2010).

2. *See id.* at 886 (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), which held "that political speech may be banned based on the speaker's corporate identity").

as an association of individual citizens.[3] As such, the Court reasoned that these individuals should not lose their constitutional rights simply because they joined together to exercise them. Thus, the Court concluded that corporations deserve political "speech" rights equivalent to those of real people.[4] Second, the Court treated corporations as voices of empowered shareholders capable of using the "procedures of corporate democracy" to monitor and object to any political spending that departs from their interests.[5] Third, the Court presumed that disclosure of corporate political spending would be both prompt and complete.[6] Relying on these misconceptions, the Court closed the door on legislation prohibiting the use of unlimited corporate treasury funds to influence elections.[7]

While this door closed, others remained open. For example, the Court reminded Congress that it could further regulate corporate political spending through enhanced disclaimer and disclosure requirements.[8] Eight of the nine justices signed on to Part IV of the opinion, which made clear that mandating disclosure of spending would be permissible under the Constitution.[9] Arguably, a second door was left

---

3. *See, e.g.*, *id.* at 904, 907, 908 (majority opinion); *see also id.* at 925, 928, 929 (Scalia, J., concurring).

4. This article does not endorse—but, instead, accepts as a starting point—the Court's view over the years that spending money on advocacy is "speech." *See, e.g.*, *id.* at 899–903 (presenting a history of the Court's treatment of campaign expenditures as political speech). In addition, it does not consider alternative avenues to restrict corporate political spending, such as treating elections as a "special" or distinct sphere similar to a courtroom, school, or the military. *See, e.g*., Richard Pildes, *Elections as a Distinct Sphere Under the First Amendment*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 19–36 (M. Youn, ed., 2011). Instead, it looks only to those places where the current configuration of Justices would see fertile ground for regulation.

5. *Citizens United*, 130 S. Ct. at 911 (citing First Nat'l Bank of Boston v. Bellotti*,* 435 U.S. 765, 794 (1978)).

6. *Id.* at 916 ("Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative . . . . 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."); *see also infra* Part III.

7. *But see* W. Tradition P'ship, Inc. v. Att'y Gen. of Mont. (*WTP*), 2011 MT 328 (2011). In *WTP*, the Montana Supreme Court, by a 5-2 vote, upheld a century-old state law that limited political expenditures. The Court held that the law survived strict scrutiny because it was narrowly tailored to serve Montana's compelling interests in voter engagement and the integrity of judicial elections.

8. *See Citizens United*, 130 S. Ct. at 886 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."). In addition, the Court observed that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 915.

9. *Id.* at 913–16.

open to regulate which individuals within the corporate governance structure can decide how to spend corporate funds on political matters.[10] Given that the procedures of corporate democracy include the federal securities laws and regulations, the Court thereby invited Congress and the Securities and Exchange Commission (SEC) to cure disclosure shortages and otherwise regulate through federal legislation and rulemaking in the area of corporate governance.

Spotting these two openings, legal scholars, policy makers, and activists have put forward a variety of suggestions to regulate corporate political spending. These suggestions tend to fall into two broad categories: disclosure and consent. For example, in 2011, a group of corporate and securities law professors formally petitioned the SEC to develop rules to require publicly held corporations to better disclose their political expenditures to shareholders.[11] Only with sufficient information could shareholders use the "procedures of corporate democracy" to raise objections to spending they opposed.[12] Institutional investors—including a coalition representing investors with more than $3 trillion in assets under management—have sent comment letters to the SEC supporting this petition.[13]

Since 2004, activist shareholders have encouraged disclosure by the corporations in which they invest. Each year, such shareholders have introduced resolutions at a small number of firms to be voted on at annual meetings pursuant to SEC Rule 14a-8, which allows qualifying shareholders to submit proposals to be voted on by the entire shareholder population.[14] These non-binding political spending disclosure resolutions, referred to herein as "show me" resolutions, are based on language developed by the Center for Political Accountability (CPA).[15] The CPA was established in late 2003 with the purpose of

10. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?* 124 HARV. L. REV. 83, 84–85 (2010) ("[L]awmakers should develop special rules to govern who may make political speech decisions on behalf of corporations" and "[t]he expansion of the scope of constitutionally protected corporate political speech brought about by *Citizens United*, however, makes the need for such rules all the more pressing.").

11. Letter from the Comm. on Disclosure of Corp. Pol. Spending to Elizabeth M. Murphy, Sec'y, SEC (Aug. 3, 2011) ("Professor Petition"), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

12. *Id.* at 7–8 (quoting *Citizens United*, 130 S. Ct. at 911).

13. *See* Email from Glenn Davis, Senior Research Assoc., Council for Institutional Investors, to Elizabeth M. Murphy, Sec'y, SEC (Oct. 19, 2011), *available at* http://www.cii.org/UserFiles/file/resource%20center/correspondence/2011/10-19-11%20CII%20Letter%20to%20SEC%20on%20political%20contributions%20final.pdf.

14. 17 C.F.R. § 240.14a–8 (2011).

15. For the most recent version of the Center for Political Accountability's model resolution, see *Political Disclosure and Oversight Resolution 2012*, CENTER FOR POL.

persuading corporations to disclose political spending.[16] If shareholders pass a "show me" resolution, and if management respects their vote, the corporation would simply disclose past spending, including which officers and directors participated in the decision to spend. While support for these resolutions has substantially increased over the years, as of the 2011 proxy season, just one has received more votes in support than in opposition, and even that case generated disagreement as to whether the resolution passed.[17] While some reported this as having "passed" or treated it as a "victory," the corporation did not: although the resolution garnered more "for" votes than "against" votes, it only received 40% of the outstanding shares, which included votes to abstain, broker nonvotes, and shares that were not voted at all.[18] However, many firms have voluntarily begun to disclose political spending, either at the request of shareholders or independently.[19]

Because corporate managers' interests are not always aligned with shareholders' interests, some scholars, activists and policy makers support supplementing disclosure with consent. Managers, as agents, are employed to act on behalf of a corporation but may use the firm's resources for their own personal benefit. Critics observe that corporate managers may use corporate resources for non-shareholder-related reasons, including the pursuit of their aspirations of obtaining

---

ACCOUNTABILITY, *available at* http://www.politicalaccountability.net/index.php?ht=d/sp/i/867/pid/867 (last visited Jan. 25, 2012).

16. *See* Dana L. Gold, *Symposium: Corporations and the First Amendment: Examining the Health of Democracy*, 30 SEATTLE U. L. REV. 857, 860 (2007) (discussing the CPA's strategy, which "uses the corporate structure itself—the shareholder proxy process—to compel corporations to disclose their campaign contributions because they compromise shareholder value").

17. *See infra* Part III.A

18. Gordon McCoun, *New Investor Power*, FTI J., Dec. 2011, *available at* http://www.ftijournal.com/article/new-investor-power (reporting that the resolution had passed with 53% of the votes); Press Release, John C. Liu, N.Y.C. Comptroller, Liu: NYC Funds Win Support for Political Disclosure, May 18, 2011, *available at* http://comptroller.nyc.gov/press/2011_releases/pdf/PR11-05-045.pdf (calling the vote a "victory" and urging the company to adopt the resolution); Sprint Nextel Co., Current Report (Form 8-K) (May 10, 2011). Item 5.07 in Sprint Nextel's Form 8-K, *id.*, details the vote tally: there were 926,505,302 votes for approval, 810,245,176 votes against, 524,745,925 abstentions, and 315,504,960 broker non-votes. Votes for approval accordingly comprised 53% of the votes cast either for or against, but Sprint indicated that the measure was "not approved."

19. More than half of the S&P 100 firms have voluntarily begun disclosing political spending. However, their disclosures vary. *See Leaders in Political Disclosure*, CTR. FOR POLITICAL ACCOUNTABILITY, http://www.politicalaccountability.net/index.php?ht=d/sp/i/869/pid/869 (last visited Jan. 25, 2012); *see also* Eric John Finseth, *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 289, 364–66 (2011).

political positions in the future.[20] Some highlight the developing evidence showing a negative correlation between political spending and economic return for owners.[21] Others point to participatory norms that underlie both the corporate form and the political process; shareholders should have the right to approve or reject having their firm associate with particular political candidates or causes.[22]

There are efforts to require advance consent of corporate political spending. On the Congressional front, a pending bill called the Shareholder Protection Act (SPA), which was introduced in 2010 and again in 2011, would require corporations to both disclose certain direct and indirect political expenditures and obtain advance consent by a majority of the outstanding shares before dedicating funds toward those political activities.[23] Unlike previous post-*Citizens United* efforts by Congress, such as the Democracy is Strengthened by Casting Light on Spending in Elections Act (the DISCLOSE Act), the SPA would require shareholder consent in addition to mandated disclosure.[24]

In the shareholder proposal realm, NorthStar Asset Management (NorthStar), an institutional shareholder with a history of socially responsible investing, broke new ground when it introduced a resolution at Home Depot, Inc. to provide shareholders with a non-binding vote on future political spending decisions. While Home Depot attempted to exclude the proposal from the ballot for the 2011 annual meeting,

---

20. In a recent paper, Professor John Coates revealed that of a sample studied, more than 10% of CEOs that engaged in corporate political spending in 2000 later obtained political positions, including positions in the Cabinet. John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After* Citizens United 2 (Working Paper 2011), *available at* http://ssrn.com/abstract=1973771.

21. *See, e.g.*, John C. Coates, IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?* 1 (Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 684, 2010); Coates*, Corporate Politics, Governance, and Value Before and After* Citizens United, *supra* note 20 at 2–4; *see also infra* text accompanying note 144 (discussion of the Michael Handani corporate political spending outcomes survey).

22. *See* Bebchuk & Jackson, *supra* note 10, at 111–15.

23. H.R. 2517, 112th Cong. (2011); S. 1360, 112th Cong. (2011); H.R. 4790, 111th Cong. (2010).

24. *Compare* sources cited *supra* note 23 *with* Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010) ("DISCLOSE ACT"). The DISCLOSE Act passed the U.S. House of Representatives but never reached a vote in the Senate after two attempts at cloture, receiving 59 of the 60 votes needed to end debate. Dan Eggen, *Senate Democrats Again Fail to Pass Campaign Disclosure Law*, WASH. POST, Sept. 23, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html.

the SEC determined it could not be omitted.[25] The NorthStar resolution went beyond the non-binding "show me resolutions," but not as far as the SPA's binding "sanctioning" resolutions. In contrast, the NorthStar resolution was a blend. It was a shareholder-initiated resolution requiring management to present in future proxy mailings all plans for expenditures on electioneering communications, and to provide shareholders a non-binding vote on such spending.[26]

While providing shareholders the right to pre-approve spending through a binding management-proposed proxy resolution may seem like a promising idea, it has some limitations as a practical matter. In particular, the focus on shareholders depends on an outdated view of the corporation as an association of owners who are real people. But by granting shareholders voting rights over political spending, power would not shift to the real individual investors who have their capital at risk. Instead, such a requirement would simply shift authority from corporate managers to giant institutional investors who hold more than 70% of the shares in the largest U.S. public companies.[27] The human shareholders are not only in the minority, but also vote much less frequently on matters put before them. For example, in 2007, the secretary of JPMorgan Chase explained that there were 1 million different owners of the company's 3.5 billion shares, and between 65% and 70% of those owners were institutions.[28] While the institutions were concentrated, with 50% of the shares held by approximately 100 insti-

---

25. In March of 2011, the SEC's division of Corporate Finance rejected Home Depot's attempt to exclude the proposal. Home Depot provided three grounds of exclusion under Rule 14a-8, each of which the Division of Corporate Finance determined could not be relied upon. The reasoning is detailed in a letter sent to Home Depot. Letter from Gregory S. Belliston, Spec. Counsel, SEC, to Stacy S. Ingram, Assistant Sec'y and Senior Counsel, The Home Depot, Inc. (Mar. 25, 2011), *available a*t http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf.

26. HOME DEPOT, INC., PROXY STATEMENT AND NOTICE OF 2011 ANNUAL MEETING OF SHAREHOLDERS 28 (2011).

27. *See* Ben W. Heineman, Jr. & Stephen Davis, MILLSTEIN CTR. FOR CORP. GOVERNANCE AND PERFORMANCE & COMM. FOR ECON. DEV., ARE INSTITUTIONAL INVESTORS PART OF THE PROBLEM OR PART OF THE SOLUTION? 9 (2011) (citing CONFERENCE BD., 2010 INSTITUTIONAL INVESTOR REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION (2010)); Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries*, 158 U. PA. L. REV. 1961, 1963 (2010) ("As of the end of the third quarter of 2009, institutional investors held approximately fifty percent of total U.S. corporate equities, while retail investors ('the household sector') held thirty-eight percent. This trend is exacerbated for the largest companies; as of the end of 2007, institutional investors owned an unprecedented 76.4% of the largest 1000 corporations.") (footnote omitted).

28. Unofficial Transcript: Roundtable Discussion on Proxy Voting Mechanics, held by the SEC, at 72 (May 24, 2007), *available at* http://www.sec.gov/news/openmeetings/2007/openmtg_trans052407.pdf.

tutions, the individuals were diffuse. Nearly all of the institutional investors voted their proxies, while a maximum of 50% of individual investors cast proxy votes.[29] Institutional shareholders are often managing the money of real people who count on the institutions to cast proxy votes in their interests. Yet these institutions often have business reasons to side with corporate managers rather than the investors who entrust them to manage their money.[30]

In reaction to these aforementioned disclosure and consent initiatives, this article focuses on the role shareholders are currently playing compared to the role they might play in the future if a "sanctioning" law such as the SPA is enacted, as well as what the implications of such a law would be. In doing so, this article distinguishes between institutional shareholders and real human beings who directly own shares or own them indirectly via money manager intermediaries. After examining the past behavior of shareholders in the context of proxy voting on shareholder-initiated "show-me" resolutions, I draw three conclusions. First, whether a shareholder "sanctioning" resolution regime (requiring a majority of outstanding shares to pre-approve political spending) will result in the approval of managerial spending proposals depends upon the "votes" of a very small number of powerful money managers who have historically sided with corporate management. Second, if Congress gives effect to the premise that political speech rights attach most strongly to real people and not to non-human intermediaries, and if a majority of real people (or shares held by them) are required to affirmatively consent or opt-out, a considerable check on managerial political spending might result. And, third, even if a majority of individuals who own corporate shares are required to consent, ultimate investors, such as mutual fund owners or 401k plan participants, will have no power to approve or opt-out of political spending that conflicts with their viewpoints. As such, given that money is recognized as a form of speech, these individuals whose

29. *Id.* at 73.

30. *See* Lauren Cohen & Breno Schmidt, *Attracting Flows by Attracting Big Clients,* 64 J. FIN. 2125, 2126–27 (2009) (noting that fund families overweight portfolios with holdings of stock of companies for which they also act as trustees of 401(k) plans); Gerald F. Davis & E. Han Kim, *Business Ties and Proxy Voting by Mutual Funds,* 85 J. FIN. ECON. 552, 569 (2007) (finding that "the more business ties a fund company has, the less likely it is to vote in favor of shareholder proposals that are opposed by management," and that a positive relationship between such ties and a likelihood of voting with management exists generally); Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders Rights*, 34 J. CORP. L. 843, 870–78 (2009) (finding a negative correlation between defined contribution assets under management and fund family votes on shareholder resolutions).

money is being used without their notice or consent would be compelled to speak. To remedy this result, disclosure and consent should travel down the full intermediation chain where ultimate investors can see and sanction or oppose corporate political spending.

I.
Citizens United v. FEC

During the 2008 presidential primary season, the operators of Citizens United (CU), a nonprofit membership association, planned to pay $1.2 million to an on-demand cable television service to make a documentary disparaging then-Senator Hillary Clinton ("Hillary: The Movie") freely available to its subscribers.[31] At the time, Senator Clinton was seeking the Democratic party nomination for president of the United States. To promote "Hillary: The Movie," CU's managers wanted to use corporate money to pay for ads that would appear on broadcast and cable television.[32] They were, however, aware of the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold).[33] Under McCain-Feingold, corporations and unions were subject to two major expenditure prohibitions as well as disclaimer, disclosure, and reporting requirements—all of which might have been implicated by CU's plans.[34]

First, McCain-Feingold forbade corporations and unions from using general treasury funds to make independent expenditures on communications that were considered "express advocacy."[35] Second, McCain-Feingold banned corporations and unions from funding "electioneering communications"[36] that were the functional equivalent of express advocacy.[37] This meant "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Fed-

31. CU was regulated as a social welfare type organization under the Internal Revenue Code, I.R.C. § 501(c)(4) (2006). *See* 130 S. Ct. at 936 (Stevens, J., dissenting) (noting Citizen's United tax status).

32. 130 S. Ct. at 886–87.

33. Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

34. 2 U.S.C. §§ 434, 441d (2006).

35. "Express advocacy" meant recommending a vote for (or against) a particular candidate for federal office. The term "communication" included an advertisement of the sort CU envisioned and the movie itself. The prohibition on express advocacy was not temporally bound. 2 U.S.C. § 441b (2006).

36. 2 U.S.C. § 441b.

37. FEC v. Wis. Right to Life, 551 U.S. 449 (2007), had narrowed the electioneering communications ban to cover only what was equivalent to express advocacy, a communication that would not actually say "vote for" candidate Jones or "vote against" candidate Smith, but which would send the same message.

eral office" made within 30 days of a primary of 60 days of a general election.[38] The law however, permitted both of these activities if they were paid for by a separate political action committee funded through direct contributions by shareholders or employees.[39] Additionally, election law imposed disclaimer and disclosure requirements,[40] including the requirement that a disclosure statement must be filed with the Federal Election Commission (FEC) by anyone who spends more than $10,000 in a calendar year on electioneering communications.[41] This filing would disclose the person, the amount, the related election, and the names of bundled and high-dollar contributors, but, as implemented by the FEC, only those that "earmarked" their contributions.[42] CU planned to air the advertisements and "Hillary: The Movie" within 30 days of primary elections and within 60 days of the November general election.[43] Thus, those running CU wanted to confirm that this would not be considered spending corporate treasury funds on "electioneering communications," and therefore would not present potential criminal or civil liability under McCain-Feingold.

In December 2007, CU sought a declaratory judgment from the federal district court finding that parts of McCain-Feingold were unconstitutional as applied to its movie and ads. The plaintiff asked for a

38. In other words, these are the "issue ads" or other communications that did not make a voting suggestion, but merely mentioned the candidate. These could be banned if made close enough to the primary or election. 2 U.S.C. § 434(f)(3)(A) (the ban on express advocacy as opposed to the more limited ban on electioneering "issue ads"). Further regulations by the Federal Election Commission (FEC) clarified that [both] applied only to "publicly distributed" communications. If 50,000 or more people could receive a communication related to a presidential candidate for nomination in a location where a primary would be held in the next 30 days, it would be considered publicly distributed. 11 C.F.R. § 100.29(a)(2), (b)(3)(ii) (2006).

39. *See* 130 S. Ct. at 887–88 (citing 2 U.S.C. § 441b(b)(2)).

40. Advertisements that are paid for by anyone other than the candidate for office must include the familiar, "______ is responsible for the content of this advertising." This disclaimer must also appear on screen for four seconds. Additionally, the written disclaimer must also state that the ad is not authorized by the candidate or the candidate's committee and provide the name and address of the person or entity that funded the ad. § 441d(a)(3).

41. § 434(f)(1).

42. § 434(f)(2). When this was implemented by the FEC under 11 C.F.R. § 109.10, there was no requirement to name underlying donors, just earmark donors ("[t]he identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure."). *See* Letter from J. Adam Skaggs, Senior Counsel, Brennan Ctr. for Justice, and Elizabeth Kennedy, Counsel, Brennan Ctr. for Justice, to Robert M. Knop, Assistant Gen. Counsel, FEC (Aug. 22, 2011), *available at* http://www.brennancenter.org/content/resource/comment_to_fec_on_van_hollen_independent_expenditure_petition/

43. *See* 130 S. Ct. at 888.

preliminary injunction barring the FEC from enforcing McCain-Feingold against CU. The three judge panel denied CU's request for the injunction,[44] and CU appealed directly to the US Supreme Court.[45] After additional arguments and supplemental briefs, on January 21, 2010, the Supreme Court announced its decision.[46] Rather than consider McCain-Feingold's provisions as applied to CU, the Court ended the ban on *all* corporation and union expenditures in connection with federal elections at any time. In particular, the decision struck down the ban on spending for "electioneering communications" and for independent expenditures for express advocacy.[47] In doing so, it reversed two significant Supreme Court decisions,[48] struck down twenty-two state laws,[49] and ended a century-old precedent that state legislatures had consistently relied upon to limit electioneering by corporations.[50]

There was an instant public reaction and spirited debate between those who defended the decision[51] and those who denounced it.[52] A

44. Citizens United v. FEC, 530 F. Supp. 2d 274 (D.D.C. 2008) (per curiam).

45. McCain-Feingold provided for a direct appeal from the federal district court to the Supreme Court. 2 U.S.C. § 437h (2006).

46. Instead of simply addressing the law as applied to CU, the Court found aspects of the law facially invalid. 130 S. Ct. at 876.

47. *Id*. at 913.

48. *Citizens United* overruled part of *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld McCain-Feingold's application to independent corporate expenditures, and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), which found a compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

49. *See* Michael Waldman, *Campaign Finance Ruling Reflects Supreme Court's Growing Audacity*, WASH. POST, Jan. 22, 2010, at A19.

50. *See* 130 S. Ct. at 940 (Stevens, J., dissenting).

51. *See How Corporate Money Will Reshape Politics*, N.Y. TIMES ROOM FOR DEBATE BLOG (Jan. 21, 2010), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ [hereinafter Room for Debate] (defending the decision were Christopher Cotton, Eugene Volokh, and Jole Gora); *see also*, Stephen Dinan, *Divided Court Strikes Down Campaign Money Restrictions,* WASH. TIMES, Jan. 25, 2010 (quoting Hans A. von Spakovsky, a former FEC Commissioner: "The Supreme Court has restored a part of the First Amendment that had been unfortunately stolen by Congress and a previously wrongly-decided ruling of the court.").

52. *See, e.g.*, Room for Debate, *supra* note 51 (condemning the decision were Richard Hasen, Michael Waldman, and Fred Wertheimer, with Heather Gerkin describing it as a "nail in the coffin" but finding hope that reformers might redirect their efforts toward other types of campaign finance reforms). President Obama condemned the decision at his State of the Union address delivered within a week of the decision ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests . . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the Amer-

robust debate continues among the leading constitutional scholars who condemn the decision as to the opinion's flaws in constitutional analysis, and potential remedies for the judgment.[53] However, some commenters have downplayed the ruling's significance.[54]

Scholarship that examines the intersection between corporate governance and corporate political activities has been scarce.[55] Among corporate governance scholars and practitioners,[56] including some who have worked over the years to improve shareholders rights vis-à-vis corporate managers, there is no consensus as to the best next steps. However, most who advocate for reform do share the view that, at the very least, improved disclosure is essential.[57] Even the Committee for Economic Development, whose membership is comprised of corporate managers, instantly denounced the decision and is seeking ways to remove corporate money from the political process. The or-

---

ican people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems."). President Barack Obama, Address Before a Joint Session of Congress on the State of the Union (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address. An ABC News/Washington Post poll taken less than a month after the opinion revealed that 80% of Americans oppose the ruling. *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS BLOG, (Feb. 17, 2010, 7:00 AM), http://abcnews.go.com/blogs/politics/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents/.

53. *See*, *e.g.*, Geoffrey Stone & Richard Pildes, The First Amendment: Are Elections Special?, Debate at the Brennan Ctr. for Justice (Apr. 28, 2011), *available at* http://www.brennancenter.org/blog/archives/the_first_amendment_are_elections_special/.

54. *See*, *e.g.*, Jacob Sullum, *Is* Citizens United *a Big Deal Only Because People Mistakenly Think It Is?*, REASON (Oct. 11, 2010), http://reason.com/blog/2010/10/11/is-citizens-united-a-big-deal ("[T]he Supreme Court had already (in the 2007 case *FEC v. Wisconsin Right to Life*) narrowed McCain-Feingold's ban on 'electioneering communications' to exempt 'genuine issue ads' and cover only 'express advocacy' or its 'functional equivalent.'").

55. Coates, *supra* note 20, at 1 ("[T]here has been surprisingly little research focused on the relationship between corporate governance – shareholder rights and power – and corporate political activity.").

56. Corporate governance practitioners include attorneys, shareholders and others professionally engaged in matters related to the allocation of power between and among managers, directors, shareholders and other stakeholders.

57. *See, e.g.*, Professor Petition, *supra* note 11 ("We differ in our views on the extent to which corporate political spending is beneficial for, or detrimental to, shareholder interests. We all share, however, the view that information about corporate spending on politics is important to shareholders—and that the Commission's rules should require this information to be disclosed."). In addition, some institutional investors who have supported shareholder empowerment efforts in the past do not wish to support the SPA "sanctioning" regime, but do support disclosure. *See*, *e.g.*, private conversations with an executive from large public pension fund, in Cambridge, MA (Mar. 17, 2011), and with executive from socially responsible investment fund manager in New York, NY (Apr. 29, 2011).

ganization suggested that businesses refuse to spend money on political campaigns, or at least subject such decisions to board oversight and fully disclose spending to shareholders and the general public.[58]

II.
MISCONCEPTIONS OF THE CORPORATION AND CORPORATE GOVERNANCE

In *Citizens United*, the majority suggested that a corporation is an "association of citizens" and Justice Scalia's concurrence described the business corporation as an "association of individuals."[59] Though a corporation comprises many different stakeholders, the citizens or individuals referred to by the Court were the shareholders. The Court also treated these shareholders as capable of monitoring corporate political spending and empowered to prevent being forced to "speak" or to support candidates and causes against their interests. Both assumptions are deeply flawed. Most shares and voting power at large corporations are held by institutions, not natural persons. The natural persons that associate through business corporations, including shareholders, employees and suppliers, have no say in corporate political spending. And given the explosion of secret funding of political ads, neither individual nor institutional shareholders have sufficient information. Even if such information were available, shareholders are not empowered to stop corporate managers from spending against their individual or collective interests.

A. Misconception: Shareholder as a Natural Person and Corporation as an Association of Individual Citizens

The *Citizens United* majority treated the corporation as a group of shareholding citizens joined together by their common equity investment, and by extension, the corporation as deserving of the rights

58. Press Release, Comm. for Econ. Dev., Supreme Court Decision on Citizens United Case is a Major Setback for Campaign Finance Reform (Jan. 21, 2010) (quoting CED President, Charles E.M. Kolb, "Polls conducted by CED and others consistently show that a strong majority of business leaders favor campaign finance reform and limits on corporate spending on elections. I am hopeful that the Congress will again step in and enact campaign finance reform that reduces the influence of large contributors in federal elections."), *available at* http://www.ced.org/images/newsroom/2010/PRcfr0121.pdf; *see also* Kenneth P. Doyle, *Committee for Economic Development, Campaign Reformers Hail Business Group's Effort to Respond to* Citizen's United *Ruling*, BNA DAILY REPORT FOR EXECS., Sept. 27, 2011, at A12, *available at* http://www.ced.org/newsroom/ced-in-the-news/771-campaign-reformers-hail-business-groups-effort-to-respond-to-citizens-united-ruling.

59. 130 S.Ct. at 904, 907–08; *see also id.* at 925, 928–29 (Scalia, J., concurring).

of a real person.[60] The Court's endorsement of this view is most apparent in its criticism of *Austin v. Michigan Chamber of Commerce.*[61] In 1990, the *Austin* Court upheld a state law that prohibited corporations other than media companies from using general treasury funds to make independent expenditures to support or oppose a candidate for state office. However, the law did permit the use of funds that were solely collected from members and segregated for political purposes. The *Austin* Court upheld the law as narrowly tailored[62] to advance a compelling government interest in preventing corruption.[63] In rejecting *Austin*, the *Citizens United* majority asserted that *Austin* permitted "the Government to ban the political speech of millions of associations of citizens."[64]

The majority treated the corporation as equivalent to and thus entitled to the same rights as individuals. In support, it referenced a case that predated *Austin*, *First National Bank of Boston v. Bellotti.*[65] In 1978, the *Bellotti* Court struck down a Massachusetts statute that limited corporate expenditures and contributions unless they related to the corporation's business interests on the grounds that the law prohibited protected speech without a compelling state interest.[66] The majority in *Citizens United* referred to *Bellotti* when rejecting "the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[67] This view is backed by a long line of Supreme Court cases establishing the concept of corporate personhood for the purposes of a variety of rights under the Constitution.[68]

---

60. This view was pushed by the petitioners during the reargument. Justice Ginsburg questioned treating a legal fiction as a real person. Challenging the notion of the corporation as individual, Justice Ginsburg asked Theodore B. Olson, lead counsel for CU, whether he was "taking the position that there is no difference in the First Amendment rights of an individual?" She went on to note that "[a] corporation, after all, is not endowed by its creator with inalienable rights." And she then again asked, "[Is] there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?" Olson contended that the Court should make no such distinction. Transcript of Reargument at 4–5, Citizens United v. FEC, 130 S. Ct. 875 (2009) (No. 08-205).

61. 494 U.S. 652 (1990).

62. *See id.* at 661.

63. *See id*. at 660.

64. 130 S. Ct. at 906–07.

65. 435 U.S. 765 (1978).

66. *See id*. at 795.

67. 130 S. Ct. at 899.

68. *See, e.g.*, United States v. Martin Linen Supply, 430 U.S. 564 (1977) (protection against double jeopardy under the Fifth Amendment); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (freedom of the press under the First Amendment); Hale v.

However, both case law and common sense establish clear limits to treating a corporation exactly like a natural person.[69] Indeed, the *Bellotti* majority avoided the question of whether a corporation was entitled to First Amendment rights, noting that "[t]he proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts law] abridges expression that the First Amendment was meant to protect."[70] The *Bellotti* Court continued, "[t]he question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[71] Even after *Belotti* was decided, the question of whether a corporation had the same rights under the First Amendment as an individual was considered open for debate.[72]

Further illustrating this theory of the corporation as an "association of individuals," in his concurring opinion, Justice Scalia contended that "[t]he authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members."[73] Justice Scalia criticized the

Hankel, 201 U.S. 43 (1906) (protection against unreasonable searches and seizures under the Fourth Amendment); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819) (Contract Clause); Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886) (As the court reporter wrote in the case syllabus, "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument, Mr. Chief Justice Waite said: 'The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.'").

69. Of particular note is that the Court in *Citizens United* did not challenge the ban on direct campaign contributions by corporations, pursuant to the Tillman Act of 1907. Perhaps the line still exists between independently funding advocacy (as speech) and giving the money to the campaign to fund advocacy (as money).

70. 435 U.S. at 776.

71. *Id*. at 778.

72. *See* Charles T. O'Kelley Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank v. Belotti, 67 GEO. L.J. 1348, 1349 (1979) ("Legislative prohibitions of corporate expenditures would be foreclosed by a Supreme Court determination that the First Amendment rights of corporations are co-extensive with those of individuals.").

73. Citizens United v. FEC, 130 S.Ct. 875, 928 n.7 (2010). Oddly, the word "human" is used several times in the opinion to describe shareholders. Even the word "citizen" is used to describe corporations as "associations of citizens" or "associations of individuals." Yet the term "institutional investor" or "institution" or any similar expression never appears.

dissenting justices for "never show[ing] why 'the freedom of speech' that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form."[74]

The dissent attacked the majority's treatment of an association of individuals as deserving of the same rights as an individual: "In the context of election to public office, the distinction between the corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office."[75] The dissent contended that the Framers would not have subscribed to the Court's framing. "Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."[76] In treating the corporation as an association of citizens, the majority ignored both empirical reality as well as precedent.

B. Misconception: Shareholders as Owners and Corporation as an Association of Owners

The Court also relied upon another misconception of the corporation. It treated a corporation as an association of owners, each possessing the rights traditionally associated with property ownership. This treatment reflects the structure of a closely held corporation or a partnership; however, it no longer applies to our contemporary business corporation.

At reargument, Justice Scalia advanced the perspective that shareholders do not need protection from corporate managers. He did so by conflating a corporation with its owners. He contended that:

> most corporations are indistinguishable from the individual who owns them, the local hairdresser, the new auto dealer . . . who has just lost his dealership and . . . who wants to oppose whatever Congressman he thinks was responsible for this happening . . . . There is no distinction between the individual interest and the corporate interest. And that is true for the vast majority of corporations.[77]

In making this claim, Scalia intended to undermine the argument that managers take actions that are not in the best interests of shareholders.

---

74. *Id.* at 925.
75. *Id*. at 930.
76. *Id*. at 950.
77. Transcript of Reargument at 55, Citizens United v. FEC, 130 S. Ct. 875 (2009) (No. 08-205).

Yet it collapses on itself. For a small corporation where the owner is the manager, there is literally no separation of ownership from control. Therefore, the owner can easily and freely engage in independent political spending without needing to use the corporate form.

Moreover, while these small corporations may be large in number, they are not rich in resources. In 2007, there were approximately 27.8 million businesses in the United States. Of these, about 21.7 million had no employees and generated a total of just $991 billion in sales or receipts. To provide some perspective, in 2007, Wal-Mart alone generated nearly $350 billion in sales revenue. And, that year, just four of the largest sales-generating firms in the U.S. combined (Wal-Mart, ExxonMobil, General Motors, and General Electric) brought in more than those aforementioned 21.7 million firms.[78]

Nor are these numerous small corporations the ones dominating political spending. In 2010, S&P 500 Companies spent $1.1 billion on political activities.[79] Eighty-seven percent of this total was spent on federal lobbying, 3% of which was spent on federally registered political committees[80] and 10% of which was spent at the state level on candidates, party committees, and ballot initiatives.[81] Of the disclosed spending, the largest companies in terms of revenue accounted for nearly all of the spending, with $915 million, or 93%, of the total spent by firms with revenue between approximately $10 billion and $419 billion.[82] Given this data, one can see that Scalia's example of the small, closely held corporations where owners do not need protection from managers is not representative. Giant companies with more than $10 billion in revenue—typically those with disempowered minority shareholders—are the big spenders.

There are further problems with treating shareholders of modern corporations as equivalent to owners. Shareholders lack many of the

78. U.S. Census Bureau, Statistics About Business Size (Including Small Business) (2007), *available at* http://www.census.gov/econ/smallbus.html; *The Global 2000*, Forbes (Mar. 29, 2007), http://www.forbes.com/lists/2007/18/biz_07forbes2000_The-Global-2000_Sales.html (providing sales figures for Wal-Mart, Exxon, General Motors, and General Electric).

79. Heidi Welsh & Robin Young, IRRC Inst. & Sustainable Inv. Inst., Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies 2, 59 (Nov. 2011) [hereinafter "2011 Benchmark"], *available at* http://www.irrcinstitute.org/projects.php?project=51 (The report shows that 93% was spent by firms in the top two revenue quintiles. The top two quintiles are those among the 492 US companies in the index with revenue between $10 billion and $418.95 billion.).

80. Under section 527 of the Internal Revenue Code. 26 U.S.C. § 527 (2006).

81. This total does not include money channeled by corporations through conduits that then engaged in political spending.

82. 2011 Benchmark, *supra* note 79.

powers we associate with property ownership. The rights of property owners include the right of possession, the right of use, the right to manage (to exclude or manage the use by others), the right to earn income from it, the right to capital value upon selling it, the right to seek security from expropriation and the right to transfer it by sale, gift, or bequest.[83] A recognized duty includes the duty to refrain from harming others.[84] The rights of shareowners do not fully correspond to these traditional property rights. A shareholder holding a small percentage of a corporation's outstanding shares cannot gain access to the office buildings nor can she use a company cell phone. She cannot stand at the door of the office or factory and decide who may come and go. She may not hire or fire employees. However, she may possess and transfer her shares. And, she is entitled to the capital gains from such a sale, subject to the satisfaction of higher priority claims, such as the claims of creditors. She has no duty to refrain from harming others, and instead is protected through limited liability. Regardless of the harm caused by the corporation, her greatest loss will be the value of her investment; neither victims of said harm nor other creditors can tap her personal assets. In comparison, the owner of a closely held corporation, who may in fact be one of a handful or the only shareholder, has a bundle of rights more comparable to traditional ownership. Today, what a shareholder owns is merely a residual claim on the corporation's assets and earnings.[85] By equating those who associate through a corporation as owners, an impression is given that when the corporation "speaks" through political spending, the owners are controlling or at least endorsing that script.

In addition, historical shifts have resulted in a movement away from the idea of shareholders as owners. In the United States over the past 200 years, the structure of the business corporation has developed considerably, and no longer resembles the institution the Court describes. This progression corresponds with what Robert Clark described as the four overlapping stages of capitalism.[86] In the first

---

83. John Kay & Aubrey Silberston, *Corporate Governance*, 2 PERSP. ON COMPANY L. 49, 52–56 (1996), excerpted in LYNNE L. DALLAS, LAW AND PUBLIC POLICY 489–91 (2005) ("[W]e are using the word 'own' in a slightly different sense to the one we employ when we say 'I own my umbrella.'"); *see also* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 105 (5th ed. 2011).

84. *See* Kay & Silberston, *supra* note 83, at 52–56.

85. STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 32 (2008) ("[S]hareholders own the residual claim on the corporation's assets and earnings. . . . Ownership of the residual claim, however, is not the same thing as ownership of the corporation itself.).

86. Robert Charles Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981).

stage—the age of the entrepreneur—state laws allowed for chartering of the business corporation. These laws initially restricted corporations by lifespan, size, and scope of activities. By 1875, however, these state laws permitted incorporation for "any lawful purpose."[87]

In the late 19th and early 20th centuries, we entered an era of managerial capitalism with the rise of the professional manager. Whereas in the late 19th century, owners of corporations also controlled the corporations, by the early 20th century, shares were offered to the broad public and "persons other than those who [had] ventured their wealth were directing industry."[88] The separation of ownership from control gave rise to a new class of professional managers, and in turn, the agency problem.[89] Left to their own devices, professional managers were thought to "serve their own pockets better by profiting at the expense of the company than by making profits for it."[90] To respond to these changes, laws were developed with the purported aim of addressing the "agency problem" and protecting public shareholders from professional managers.[91] Yet these laws actually ensured that managers retained control.[92]

The third phase of capitalism was marked by the intermediation of ownership. This change further complicates the treatment of shareholders as owners. Generally, the person investing his money was no longer making decisions about how it should be invested; instead, he now relied on professional managers. The decision of how to invest had been separated from the decision to provide capital for investment.[93] This represents a shift from managerial capitalism to what the

87. *Id*. at 562 n.4.

88. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 4 (2d ed. 1991).

89. For an explanation of the "agency problem," *see* John Armour, Henry Hansmann & Reinier H. Kraakman, *Agency Problems, Legal Strategies, and Enforcement*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda & Edward Rock eds., 2d ed., 2009), *available at* http://ssrn.com/abstract=1436555 ("Because the agent commonly has better information than does the principal about the relevant facts, the principal cannot easily assure himself that the agent's performance is precisely what was promised. As a consequence, the agent has an incentive to act opportunistically, skimping on the quality of his performance, or even diverting to himself some of what was promised to the principal. This means, in turn, that the value of the agent's performance to the principal will be reduced, either directly or because, to assure the quality of the agent's performance, the principal must engage in costly monitoring of the agent.").

90. BERLE & MEANS, *supra* note 88, at 122.

91. Clark, *supra* note 86, at 563–64.

92. *Id*.

93. *See id.* at 564.

esteemed economist Hyman Minsky deemed "money manager capitalism."[94] Leo E. Strine, Jr., chancellor of the Delaware Court of Chancery, refers to this shift as the "separation of ownership from ownership."[95] In the 1970s, around the time *Bellotti* was decided, individual investors owned about 80% of U.S. corporate equity.[96] Since the late 1970s, the rise of money managers as intermediaries between individual investors and corporate issuers was apparent.[97] A notable catalyst for this change was the rise of the defined contribution retirement plan, the most popular of which was the employer-sponsored 401(k) plan.[98] To give a sense of the shift from direct ownership to intermediation, in 1980, only 3% of household financial assets were invested in mutual funds. In comparison, by 2010, 23% were. That year, of the $11.8 trillion U.S. mutual fund net assets, about half was in stock mutual funds.[99]

As an example of intermediation, an employee who participates in an employer sponsored 401(k) plan receives a list of investment options, often including a variety of mutual funds. The employee may direct a portion of her salary each month toward these options. The investment adviser to the designated mutual fund, often part of a large "fund family" complex, selects corporate stocks in which to invest, or in the case of an index fund, passively manages the portfolio holdings so that they mirror the index. As such, with a 401(k) plan, the individual employee is a plan participant. The plan owns shares in the mutual fund and the mutual fund owns shares in the corporation. Thus, the links in the chain go from the real human who is the "ultimate" inves-

---

94. *See* STEVEN FAZZARI & DIMITRI B. PAPADIMITRIOU, FINANCIAL CONDITIONS AND MACROECONOMIC PERFORMANCE: ESSAYS IN HONOR OF HYMAN P. MINKSY (1992); *see also* L. Randall Wray, *Minksy's Money Manager Capitalism and the Global Financial Crisis* (Levy Economics Institute of Bard College, Working Paper No. 661, 2011).

95. Leo E. Strine, Jr., *Why Excessive Risk-Taking is Not Unexpected*, N.Y. TIMES DEALBOOK (Oct. 5, 2009), http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/ ("[T]here is now a separation of 'ownership from ownership' that creates conflicts of its own that are analogous to those of the paradigmatic, but increasingly outdated, Berle-Means model for separation of ownership from control.").

96. JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE AMERICA MORE DEMOCRATIC xii (2000).

97. *See* L. Randall Wray, *The Rise and Fall of Money Manager Capitalism: A Minskian Approach,* 33 CAMB. J. ECON., 807, 815–28 (2009) (describing, *inter alia*, the ascendance of money managers since the 1970's).

98. In 2010, of assets in defined contribution plans and IRAs, $4.7 trillion were in mutual funds. This represents a large portion of the total of $11.8 trillion in US mutual fund assets. INV. CO. INST., 2011 INVESTMENT COMPANY FACT BOOK ii (2011) [hereinafter FACT BOOK], *available at* http://www.ici.org/pdf/2011_factbook.pdf

99. *Id.* at 130 tbl.3.

tor with her capital at risk[100] to a retirement plan to a mutual fund to a corporation. The growth or diminishment of her retirement savings depends upon the performance of the corporation at the other end of the chain, as well as fees deducted by the various intermediaries. However, the ultimate investor has absolutely no rights in the "corporate democracy" realm at that corporation. While owners of a public company have the right to vote at annual or special meetings, these ultimate investors do not have those voting rights. Instead, they depend on intermediaries to make voting decisions for them. In doing so, the intermediaries, including mutual funds, aggregate voting rights.[101]

Institutional investors presently hold more than 70% of the shares of the top 1,000 firms, leaving fewer than 30% of the shares owned directly by real people.[102] Institutional investors include public and private pension funds, mutual funds, and insurance companies. While Clark considers the rise of the retirement plans as perhaps a fourth stage of capitalism, I consider this a continuation of the intermediation stage. In an earlier article, I have referred to this transition as an "intermediation revolution,"[103] meaning a major transition in capitalism from owners holding both title and economic interest in shares to owners that hold title as fiduciaries, or otherwise as intermediaries, on behalf of underlying investors whose equity capital is actually at risk. Unfortunately, the *Citizens United* Court missed the revolution.

The majority's reliance on the idea of a U.S. corporation as an association of individual owners is in keeping with the "aggregate" view of the business corporation.[104] There are other alternatives, however. These include concepts that developed in the same era as did the aggregate theory, such as the artificial entity view[105] and the real en-

100. HAWLEY & WILLIAMS, *supra* note 96, at 60.

101. Taub, *supra* note 30, at 844–45, 855 ("Unlike direct retail investors who can take actions to influence corporate governance, these 77.7 million individuals depend upon mutual fund advisers . . . to advocate for them . . . . The mutual fund customer loses the ability to vote those shares in the portfolio company. Those voting rights get aggregated with other mutual fund owners' rights.").

102. *See* Heineman & Davis, *supra* note 27, at 4, 8 (Conference Board data).

103. Taub, *supra* note 30, at 847.

104. In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), Chief Justice Marshall opined that a corporation could only sue in federal court, as it was a "company of individuals." *Id.* at 87; *see* Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 501–02 (2011).

105. Later, in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819), the court described the corporation as an "artificial person" created by law through a charter spelling out its powers and attributes.

tity view.[106] There are also more modern stakeholder theories for a non-shareholder centric conceptualization of the corporation, including (1) Frank Easterbrook and Daniel Fischel's "nexus of contracts,"[107] (2) Margaret Blair and Lynn Stout's team production theory,[108] and (3) Lynne Dallas' power coalition theory.[109] Considering the corporation as any one of these other types of organizations undermines the Court's holding. As a nexus of contracts, a corporation would have no entity status and would not be an association of owners, but instead would be an association of contractual rights negotiated with counterparties for which shareholders are just one of the many. Under a team production perspective the public corporation is a "mediating hierarchy" with a board of directors resolving disputes that arise among a team of contributors that includes workers, managers, creditors, and other stakeholders in the community.[110] Under a power coalition theory, the corporation is an institution that seeks to decrease its uncertainty by increasing its own autonomy and discretion over its environment. Corporate decisions and control result from a contest for control among power coalitions comprised of various stakeholders. The objective is to become part of the dominant coalition with respect to certain decisions.[111] With each of these frameworks, it would strain

---

106. Then, in *Bank of the United States v. Dandridge*, Marshall described the corporation as an "entire impersonal entity, distinct from the individuals who compose it." 25 U.S. 64, 91–92 (1827).

107. FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 8–12 (1996); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) ("[M]ost organizations are simply legal fictions which serve as a nexus for a set of contracting relationships among individuals.").

108. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 257 (1999) ("[B]oards exist not to protect shareholders *per se,* but to protect the enterprise-specific investments of *all* the members of the corporate "team," including shareholders, managers, rank and file employees, and possibly other groups, such as creditors.").

109. Lynne L. Dallas, *Working Toward a New Paradigm*, *in* PROGRESSIVE CORPORATE LAW 35, 51–59 (Lawrence E. Mitchell ed., 1995) ("[W]hile corporate goals derive from individual and group goals, no one individual or group is usually powerful enough to impose its goals on the corporation. Through corporate processes, corporate goals emerge that satisfy the parties or coalitions comprising the dominant coalition; these goals are distinct from the goals of any one individual or group."); Lynne L. Dallas, *Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Omsbudperson*, 54 WASH. & LEE L. REV. 91, 94–95 (1997) ("Under power coalition theory, the board provides the corporation with relational resources that decrease the corporation's uncertainty and enhance its chances of survival.").

110. Blair & Stout, *supra* note 108.

111. Dallas, *supra* note 109.

credulity to argue that the respective constituencies speak through the corporation when it engages in political spending.

C. Misconception: Shareholder (and "Ultimate Investor") as Capable of Monitoring and Already Empowered

The next misconception relied upon in *Citizens United*, that shareholders have the ability to monitor and control corporate decision making or exit their positions if they cannot, surfaced at the reargument and appeared in the Court's opinion. Chief Justice Roberts asked then-Solicitor General Elena Kagan: "[I]sn't it extraordinarily paternalistic for the government to take the position that shareholders are too stupid to keep track of what their corporations are doing and can't sell their shares or object in the corporate context if they don't like it?"[112] Embedded in his question were three shaky premises. First, Justice Roberts assumed that existing disclosure by corporations is sufficiently clear and available. Second, he assumed that shareholders have the ability to track this data. And, third, he presumed that shareholders who are unhappy can effectively "object" or sell their shares.

Regarding the first and second premises, under current disclosure rules and even with unlimited time and energy, it is impossible for even the most diligent shareholder to trace political spending by corporations. Corporations are not required to disclose.[113] The information is simply not available. For example, in the 2010 midterm election cycle outside organizations unaffiliated with candidates or political parties spent more than $300 million, nearly half of which came from secret sources—organizations that do not have to disclose their donors.[114] This total was more than four times the $68.8 million spent by outside organizations on the 2006 midterm election.

---

112. Transcript of Oral Argument at 58, Citizens United v. FEC, 130 S.Ct. 876 (2010), 2009 WL 6325467.

113. *See, e.g.*, CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 3 (2010) ("Corporate law is ill-prepared for this new age of corporate political spending by publicly-traded companies. Today, corporate managers need not disclose to their investors—individuals, mutual funds, or institutional investors such as government or union pension funds—how funds from the corporate treasury are being spent, either before or after the fact. And the law does not require corporate managers to seek shareholder authorization before making political expenditures with corporate funds.").

114. *Outside Spending*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/outsidespending/index.php (last visited Jan. 24, 2012); *see also* Paul Blumenthal, *Super PACs and Secret Money: The Unregulated Shadow Campaign*, HUFFINGTON POST (Sept. 27, 2011, 1:49 AM), http://www.huffingtonpost.com/2011/09/26/super-pacs-secret-money-campaign-finance_n_977699.html.

This increase in spending may have been facilitated not just by *Citizens United*, but also by a subsequent decision, *SpeechNow.org v. FEC*.[115] In *SpeechNow.org*, the U.S. Court of Appeals for the District of Columbia Circuit struck down contribution limits on unincorporated nonprofit associations registered under section 527 of the Internal Revenue Code. On March 26, 2010, the D.C. Circuit held that because of the *Citizens United* ruling that the government had no anticorruption interest in limiting political expenditures, "contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption."[116] Thereafter, the FEC announced that it would allow unlimited contributions to "SuperPACs" from individuals, corporations, and unions.[117] While SuperPACs must reveal their donors, they can receive donations from conduits such as 501(c)(4) social welfare organizations that do not have to reveal *their* donors. The conduits of this type and others can spend unlimited funds to expressly promote the election or defeat of particular candidates and to lobby, so long as lobbying or electioneering are not the "primary activities" of the organization.[118] Many corporations provide funds to these intermediary conduits. For example, the U.S. Chamber of Commerce uses membership dues, paid by corporations, to fund political spending.[119] These conduits can spend the money or then pass money to SuperPACs or other entities that can then fund express advocacy of candidates or issue ads. Depending upon how they are

115. 599 F.3d 686 (D.C. Cir. 2010).

116. *Id.* at 694.

117. Press Release, FEC, FEC Statement on *Carey v. FEC*: Reporting Guidelines for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011) ("The Commission will no longer enforce 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), as well as any implementing regulations, against any nonconnected political committee with regard to contributions from individuals, political committees, corporations, and labor organizations. . . ."); *see also* Press Release, FEC, FEC Approves Two Advisory Opinions on Independent Expenditure-Only Political Committees (July 22, 2010) (announcing the approval of two advisory opinions allowing unlimited contributions to groups engaged solely in making independent expenditures).

118. B. Holly Schadler & Laurence E. Gold, *The Effect of* Citizens United *on Tax and Campaign Laws Governing Tax Exempt Organizations*, 65 EXEMPT ORG. TAX REV. (2010).

119. Eric Lipton, Mike McIntire & Don Van Natta Jr., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N. Y. TIMES, Oct. 21, 2010, http://www.nytimes.com/2010/10/22/us/politics/22chamber.html?pagewanted=all ("[T]he chamber has increasingly relied on a relatively small collection of big corporate donors to finance much of its legislative and political agenda. The chamber makes no apologies for its policy of not identifying its donors. It has vigorously opposed legislation in Congress that would require groups like it to identify their biggest contributors when they spend money on campaign ads.").

organized, the conduits may not have to disclose the identities of their corporate donors.[120]

In addition, the current disclosure requirements are inadequate. Disclosure of lobbying and campaign expenditures grossly underestimates spending. For example, federal registered lobbying reporting requirements do not cover unregistered individuals like public relations firms that can influence legislation.[121] Campaign expenditure reporting to the FEC captures neither "get out the vote" campaigns nor issue advertising campaigns that do not mention candidates, as long as independent organizations unaffiliated with a candidate or political party pay for them.[122] So even with unlimited time and energy devoted to the task, the most diligent shareholder would be incapable of successfully and completely monitoring the political spending of corporations in which he invests his money.

Challenging Justice Roberts' second premise, that shareholders have the ability to track the data, the solicitor general responded:

> In a world in which most people own stock through mutual funds, in a world where people own stock through retirement plans in which they have to invest, they have no choice, I think it's very difficult for individual shareholders to be able to monitor what each company they own assets in is doing.[123]

This statement shows that the solicitor general had a better understanding of the consequences of the intermediation revolution. Roughly 90 million individuals invest in US mutual funds, including the 44% of U.S. households who invest in mutual funds via an employer-sponsored retirement account.[124] Of these 90 million, nearly 80

120. HEIDI WELSH & ROBIN YOUNG, SUSTAINABLE INV. INST. & IRRC INST., HOW COMPANIES INFLUENCE ELECTIONS: POLITICAL CAMPAIGN SPENDING PATTERNS AND OVERSIGHT AT AMERICA'S LARGEST COMPANIES 38 (2010) [hereinafter INFLUENCE ELECTIONS], *available at* http://www.followthemoney.org/press/Reports/Sustainable_Investments_Institute-How_Compaines_Influence_Elections.pdf; *see also* Professor Petition, *supra* note 11, at 8.

121. Eliza Newlin Carney, *The Transparency Lobby*, NAT'L J. (Mar. 21, 2011, 5:00:04 PM), http://www.nationaljournal.com/columns/rules-of-the-game/the-transparency-lobby-20110321 (showing how public relations consultants operate outside of the lobbying rules).

122. Schadler & Gold, *supra* note 117, at 3 (explaining that these activities are not considered political activities so long as they are conducted in a nonpartisan manner); Peter T. Stone, *Fine Line Between Politics and Issues Spending by Secretive 501(c)(4) Groups*, IWATCHNEWS (Oct. 31, 2011, 6:00 AM), http://www.iwatchnews.org/2011/10/31/7205/fine-line-between-politics-and-issues-spending-secretive-501c4-groups (indicating that 501(c)(4) social welfare organizations only report a fraction of their spending).

123. Transcript of Oral Argument at 59, Citizens United v. FEC, 130 S. Ct. 876 (2010), 2009 WL 6325467.

124. FACT BOOK, *supra* note 98, at ii.

million are invested in corporate stocks by way of their mutual fund investments.[125]

Contrary to the solicitor general's precise wording, mutual fund owners do not actually "own" corporate stock; rather, the mutual funds themselves do. In fact, mutual funds own about 23% of all publicly-traded stock in U.S. corporations.[126] Although the "ultimate" investors are not actually the legal "owners" of the stock, the solicitor general's claim that they have difficulty monitoring what is happening since they are far removed from the corporations in their funds' portfolios was correct. It is not easy for an ultimate investor to discover where the corporation's money is going. They do not vote at the corporation's annual meetings and would thus have no say in a shareholder-sponsored political spending "show me" resolution were it to be introduced at a corporation in which their fund was invested. Moreover, they would not cast any votes or have a say in political spending under a proposed SPA "sanctioning" resolution. The dissent echoed this argument, mentioning that real human beings often get exposure to corporate stocks through "intermediaries such as mutual funds and pension plans . . . which makes it more difficult both to monitor and to alter particular holdings."[127]

Regarding his third premise, Chief Justice Roberts also overstated the power shareholders actually possess to hold accountable managers who engage in political spending that does not support shareholder value. Chief Justice Roberts opined that shareholders can "object" in the corporate context or "sell their shares."[128] Yet these avenues, voice and exit, are not adequate. Exit, or "voting with ones feet," is hardly a viable solution. For some institutional shareholders this is simply not permitted. For example, an S&P 500 index fund must own the 500 stocks in the index. It cannot decide to exclude one because of dissatisfaction with the amount or direction of political expenditures. Similarly, an actively managed fund typically benchmarks against an index and an adviser would likely still hold a position relative to its weight in the index. Even in such cases where it would make sense for an active manager to under-weight a particular holding, advisers with business ties to corporations would sometimes hold a larger position.[129] Even if the advisers to such a fund partially or en-

125. *Id.*

126. *Id.* at 12.

127. Citizens United v. FEC, 130 S.Ct. 876, 978 (2010).

128. Transcript of Oral Argument at 58, Citizens United v. FEC, 130 S.Ct. 876 (2010), 2009 WL 6325467.

129. Cohen and Schmidt, *supra* note 30, at 2125.

tirely divested from a holding, this would not be cost free or necessarily effective. Brokerage fees must be paid, sales can have tax consequences, and moving out of large positions can depress the existing shares and create losses. Selling would not necessarily send a clear message that dissatisfaction was in response to the political spending, as shareholders sell for a variety of reasons. Moreover, if selling did send a message to the CEO and board, the message would be heard and acted upon long after the shares were sold, thus benefiting those who stayed around rather than the selling shareholders.[130]

Objecting in the corporate context or voicing concerns is also challenging for a shareholder. The avenues that exist are rarely effective. They might include suing the management and the board under a state law breach of fiduciary duty theory, removing or "firing" the board of directors, or introducing an advisory resolution for voting at the annual meeting of shareholders.[131] But in most circumstances, litigation against the officers and directors for breach of fiduciary duty would be fruitless and expensive. Even assuming a shareholder could bypass the very high procedural hurdles for bringing a derivative suit, there would be very limited factual circumstances that would result in a legal victory. Assuming that a case actually survived this process, managers and directors are still shielded by the business judgment rule, meaning that if the officers and board are independent, well-informed, exercise judgment in good faith to advance the corporation's interests, and do not have a financial stake nor act wastefully, a decision to spend corporate funds on political activities would not be a breach of their duty of care. It would be very unlikely that the spending would be deemed waste.[132]

---

130. Reactions occur after the damage is done. One such example involved the retailer Target, Inc. Target disclosed its contributions to a PAC called Minnesota Forward, as required under Minnesota law. This PAC gave money to a political candidate who opposed gay marriage. When consumers learned of Target's support for the PAC and thus the candidate, wide scale consumer boycotts of Target stores followed. Some use this example to demonstrate that disclosure will work and provide a cautionary example to other firms. However, many businesses operate in the wholesale markets without retail customers or operate with different corporate names and product brands, making it difficult to nearly impossible for consumers to make a connection.

131. *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 45–52 (2004) (discussing the ability of shareholders to intervene in executive compensation matters).

132. *See*, *e.g.*, In re Walt Disney Company Derivative Litigation*,* 907 A.2d 693, 748–49 (Del. Ch. 2005) ("Corporate waste is very rarely found in Delaware courts because the applicable test imposes such an onerous burden upon a plaintiff—proving 'an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration. In other words, waste is a rare, 'unconscionable case[ ] where directors irrationally squander or

Removing members of the board of directors is also extremely difficult. Though some of the board, and sometimes the full board, is on the proxy ballot each year, they generally run uncontested.[133] For example, if there were ten seats available on the board, there would usually be just ten nominees. These ten potential board members, largely incumbents, would have been nominated by a committee of the board.[134] With plurality voting, a director need only receive one vote to get elected. Even where majority voting is in place, if an incumbent nominee does not receive a majority, he is still not required to step down. To empower shareholders, the SEC attempted through a 2010 rulemaking to give shareholders the right to nominate directors for inclusion under certain circumstances within the official proxy mailing.[135] While Congress gave express authority for this rulemaking, the SEC lost a recent legal challenge brought by the Business Roundtable and the U.S. Chamber of Commerce. As a result, minority shareholders dissatisfied with board members will need to pay the expense of their own independent mailing containing their nominees, to shareholders as well as associated costs with launching a proxy fight.[136]

Of course, voting for directors under the existing Soviet-style[137] election regime or the one the SEC proposed only applies to direct shareholders. The approximately 80 million ultimate investors who invest in stocks through mutual funds, for example, do not vote at all. Instead, they depend upon the adviser to the mutual funds they own to vote on their behalf. As documented in a number of research studies,

give away corporate assets.' ") (citations omitted); Lawrence Lederman, *Disney Examined: A Case Study in Corporate Governance and CEO Succession*, 52 N.Y.L.S. REV. 558, 567 (2008) ("Waste is the most difficult standard because corporate assets must literally be given away to constitute waste.").

133. *See* Brian Miller, Hal White, Jeffrey Gramlich & Paul Fischer, *Investor Perceptions of Board Performance: Evidence from Uncontested Director Elections* 1 (Working Paper, 2009), *available at* http://ssrn.com/abstract=928843 ("Every year the vast majority of publicly traded firms' shareholders vote to approve members of the board of directors in uncontested elections (i.e., elections not involving proxy fights or vote-no campaigns).").

134. *See* LINDA O. SMIDDY & LAWRENCE A. CUNNINGHAM, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 352 (7th ed. 2010) ("Historically, as a matter of general practice, a corporation's incumbent board nominates directors for elections and presents its nominations in annual proxy statements produced at the corporation's expense.").

135. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,669 (2010) (codified at 17 C.F.R. § 240.14a-11), *vacated by* Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

136. *See* Business Roundtable v. SEC, 647 F.3d 1144, 1147–57 (D.C. Cir. 2011).

137. *See* STEPHEN DAVIS, JON LUKOMNIK & DAVID PITT-WATSON, THE NEW CAPITALISTS: HOW CITIZEN INVESTORS ARE RESHAPING THE CORPORATE AGENDA 115 (2006).

however, these investment advisers often favor management at the expense of shareholders. This may be due to business ties that the fund families have with CEOs upon whom they depend to include their mutual funds on the corporate 401(k) plan menus.[138]

Qualifying shareholders can submit nonbinding resolutions for inclusion in the proxy mailing. The political spending "show-me" resolutions introduced by shareholders are part of the procedures of corporate democracy. Vote outcomes with these resolutions depend upon the same institutional shareholders discussed above, some of who may favor management over shareholders. Also, as noted previously, either one or none have ever passed, and ultimate investors have no vote.[139]

Shareholders do not have the power that Justice Roberts described; they have few avenues to object and often cannot sell their shares. Index fund managers, for example, have no choice but to hold shares of corporations in the index regardless of political spending. Where they can sell, they do so blindly, without the full knowledge of political spending either at the corporation in which they invest or another. Where they can object, their objections are just that: objections, but not control.

The holding in *Citizens United* depends upon a conception of the corporation as an association of individual owners. The Court envisions that when the corporation uses treasury funds to pay for political ads, these human owners have full knowledge and the ability to use existing procedures of corporate democracy to object. However, disclosure is incomplete, and the minority of real owners, as measured by their holdings and thus voting power, are silenced by the existing procedures of corporate democracy. In this conceptualization, the Court also overlooks alternate frameworks that present a broader constituency comprising the corporation. In addition, the Court ignores the concentration of ownership through intermediaries that hold the vast majority of shares of U.S. publicly traded corporations. As such, the Court avoids the reality that millions of American investors are being

138. *See, e.g.* Davis & Kim, *supra* note 30, at 569 ("[T]he more business ties a fund company has, the less likely it is to vote in favor of shareholder proposals that are opposed by management. That is, although individual votes appear evenhanded, business ties affect the overall voting practices at the fund family level.").

139. While the SEC has permitted corporations to exclude from their proxy mailings advisory resolutions that request the disclosure of lobbying expenses, it has not permitted the exclusion of advisory resolutions requesting the disclosure of political spending. Bebchuk & Jackson, *supra* note 10, at 88, (citing American International Group, Inc., SEC No-Action Letter, 2004 WL 346068, at *1 (Feb. 19, 2004). The SEC deemed lobbying expenses to be ordinary business matters and thus excludable pursuant to Rule 14a-8. *Id.* (citing Bristol-Myers Squibb Co., SEC No-Action Letter, 2009 WL 851540, at *1 (Feb. 17, 2009)).

compelled to speak through political spending without their knowledge or consent.

III.
Proposals for Reform

Prior to *Citizens United*, few academics explored the relationship between corporate governance and political spending.[140] Even after the decision, only a few articles have examined this intersection between politics and corporate governance. For example, in 2010, Professor John Coates produced a study showing less political spending at firms with more shareholder-friendly corporate governance structures.[141] In addition, he found that firm value was negatively correlated with political spending.[142] Coates asserted:

> [E]xisting research establishes beyond doubt that, at least at a large number of public companies, managers cannot be trusted with other people's money, and that observable corporate governance provisions consistently predict the degree to which faithless managers divert shareholder wealth for their own ends, destroy corporate wealth, and reduce public welfare.[143]

A more recent study by Professor Michael Hadani examined decades of research exploring the outcomes associated with corporate political spending.[144] This survey revealed that corporations that spend the most on political activities tended to disclose the least.[145] It also cited other research that supported the negative correlation between political contributions and firm value.[146] Dr. Susan Holmberg, in a survey of the literature, including on agency problems associated with corporate political activities (CPA) found inconsistent results. Some studies suggested a positive impact and others negative. She

140. Coates, *supra* note 20, at 3 (referencing Steve M. Bischoff, Recent Corporate Research in the United States: The Highlights Working Paper (2009) (finding that none of the 141 corporate governance articles published between 1997 and 2009 focused on corporate political activities))

141. *See id.* at 1.

142. *See id.*

143. *Id.* at 2.

144. Letter from Michael Hadani, Assistant Professor of Mgmt., Long Island Univ., to Elizabeth Murphy, Sec'y, SEC (Oct. 13, 2011) (Letter reply regarding "Committee on Disclosure of Corporate Political Spending Petition for Rulemaking, File No. 4-637").

145. *See id.* at 3 (referencing Donald H. Schepers and Naomi A. Gardberg, Baruch Index of Corporate Political Disclosures: 2010 Results 3 (2011), *available at* http://www.baruch.cuny.edu/baruchindex/BIResults.pdf).

146. *Id.* at 4 (referencing Rajesh Aggarwal, Felix Meschke & Tracy Wang, Corporate Political Contributions: Investment or Agency? (Working Paper 2011), *available at* http://ssrn.com/abstract=972670).

therefore concluded that "[t]hese conflicting results suggest that CPA creates uncertainty and risk for shareholders that are well-beyond what typically accompanies economic investment activities."[147] Holmberg concluded the benefits of disclosure outweighed the costs.[148] Both the Hadani and Holmberg papers were used to support, through the comment letter process, the petition for rulemaking at the SEC.

A. Regulating Through Disclosure

The Court invited Congress to regulate disclosure of political spending. Eight justices endorsed part IV of the majority opinion, which made clear that mandating disclosure of spending would be permissible under the Constitution.[149] The Court reasoned that disclosure of the identity of the speaker was a necessary pre-condition for both the general public and shareholders to analyze the merits and weigh the value of the speakers' messages about candidates for political office. Because they are not outright restrictions on speech, disclosure and disclaimer requirements are subject to a lower level of scrutiny.[150] It is not surprising that both the liberal and conservative justices supported improved disclosure and disclaimers. As Kathleen Sullivan notes, disclosure should appeal to both egalitarians and libertarians.[151] According to the eight justices who upheld disclosure requirements:

> Shareholders can determine whether their corporation's political speech advances the corporation's interests in making profits, and citizens can see whether elected officials are 'in the pocket of so-called moneyed interests.' . . . The First Amendment protects political speech; *and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way*. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[152]

---

147. Letter from Susan R. Holmberg, Program Dir., Ctr. for Popular Econ., to Elizabeth Murphy, Sec'y, SEC (Nov. 2, 2011).

148. *See id.* at 8.

149. Justice Thomas dissented from the portion of the Court's opinion upholding McCain-Feingold §§ 201 and 311. He reasoned that disclosure of a funder's identity would lead to "death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters." Citizens United v. FEC, 130 S. Ct. 876, 982 (2010) (Thomas, J., dissenting).

150. *Id.* at 914 (Majority opinion) ("The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.").

151. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 146 (2010) ("[I]ncreasing disclosure and disclaimer requirements for corporations making expenditures in connection with political campaigns . . . seems initially attractive both libertarians and egalitarians . . . .").

152. *Citizens United*, 130 S. Ct. at 916 (emphasis added).

This statement reflects the belief that armed with full disclosure, shareholders and citizens would take some action to discipline the firms that overstep their bounds. Yet, most shareholders do not have meaningful power,[153] and indirect owners have virtually no power at all.

In August 2011, a group of ten prominent corporate and securities law scholars initiated a rulemaking petition with the SEC.[154] The petition requested that the agency use its authority under section 14 of the Securities Exchange Act of 1934 to create new rules requiring public companies to disclose spending on political activities.[155] They recommended that the SEC determine what spending threshold should trigger disclosure. In addition, they recommended the annual proxy mailing as the avenue to make the disclosures, and asked that the SEC consider indirect contributions as well. For example, a corporation that pays dues to a trade association (which then uses the funds for political activities and lobbying) might be required to look through and disclose those expenditures, perhaps on a pro-rata basis. By way of example, they referenced the U.S. Chamber of Commerce, which in 2008 spent 42.8% of the funds it raised on lobbying and political expenditures.[156]

Absent from the existing disclosure reforms, however, is any consideration of ultimate investors. Disclosure to corporate shareholders would not be sufficient to inform mutual fund investors who have exposure to a large number of different corporate stocks in an equity fund portfolio. As part of a disclosure rule, the SEC should mandate disclosure down the intermediation chain. Ideally this would require fund advisers to aggregate and disclose the political spending information in each portfolio holding, so that an investor in a single fund that holds 50 stocks, for example, could look in one location to discern how the companies in which he or she invests are spending.

B. Regulating Through Consent

Some have recommended going beyond enhanced disclosure. For example, Professor Victor Brudney suggested that rules requiring a supermajority or even unanimous vote of shareholders to approve corporate political spending/activities would be constitutional.[157] In a

153. *See* discussion *supra* Parts II.B, II.C.
154. Professor Petition, *supra* note 11.
155. 15 U.S.C. § 78n (2006).
156. *Id.* at 10 n.29 (citing Bebchuk & Jackson, *supra* note 10, at 94).
157. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 241, 256–65 (1981).

later article, Brudney discussed a negative speech interest—the right of an individual to remain silent and not be pressured to speak. He noted that this interest against compelled speech becomes particularly relevant in the context of a business association (as opposed to advocacy organizations, etc.).[158] This was the case, in part, because shareholders might not agree with the collective decision.[159] Additionally, he recognized the distorting effect of aggregating the resources of a large corporation toward political positions not supported by individual shareholders.[160]

Influenced by Brudney, Professors Lucian Bebchuk and Robert Jackson argue that political spending should be treated differently from ordinary business decisions, and should be subject to heightened procedural requirements.[161] Under current law, top executives have tremendous autonomy to determine how to use corporate treasury funds with regard to political activities. Management does not need to disclose corporate political expenses to shareholders, who accordingly have no input on the decision.[162] Independent directors are not required to oversee corporate political spending. Under Bebchuk and Jackson's proposal, the aforementioned safeguards would be in place: political expenditures would be disclosed, subject to shareholder approval, and overseen by independent directors.[163] Bebchuk and Jackson support additional safeguards partly because political spending

158. *See* Victor Brudney, *Association, Advocacy and the First Amendmen*t, 4 WM. & MARY BILL OF RTS. L. J. 1, 63–64 (1995).

159. *See id.* at 24–25 ("The considerations that justify individuals' use of their wealth to power the intensity of their advocacy preferences and magnify their advocacy voices . . . do not justify the advocacy voices of multi-purpose associations. Members of associations often do not all agree with their organizations' collective choice.").

160. *See id.* at 63–64 ("The distortion is in part . . . a function of the magnitude of the public investor-owned corporation's power to communicate by use of collective assets thus assembled (from persons who may not wish to support its advocacy voice) which are apt systematically to be larger than individuals' assets.").

161. Bebchuk & Jackson, *supra* note 10, at 83–84, 97–107 (dedicating the article to "Professor Victor Brudney, who long ago anticipated the significance of corporate law rules for regulating corporate political speech"). The authors defined corporate law broadly to include: "all sources of law—including state corporate law, federal securities law, and listing standards promulgated by the national securities exchanges—that govern firms' internal allocation of authority and relationships with shareholders. In addition, the term 'lawmakers' refers to all federal and state legislators and regulators responsible for corporate law rules (although there is reason to expect that certain rules are most likely to be developed through federal intervention)." *Id.* at 84–85.

162. *See id.* at 89 ("[C]orporate law rules do not require a company to separate political spending from other expenses or to provide shareholders with specific details about that spending.").

163. Bebchuk & Jackson, *supra* note 10, at 97–107.

has expressive value,[164] and partly because the interests of corporate managers and directors may not be aligned with those of investors.[165] Because of the unique challenges posed by political spending, the authors argue that Congress should create an elevated standard to be met before political expenditures are made, and assert that such protections would be constitutional.[166] Another reason they offer to support additional political spending oversight is that political spending has a higher risk reward ratio than ordinary business decisions.[167]

Bebchuk and Jackson also contend that if a "sufficiently large minority of shareholders" oppose political spending, their view should be taken into account.[168] The authors believe the First Amendment rights of the minority shareholders should matter, and might be protected by requiring approval by more than 50% of outstanding shares.[169]

Efforts to turn these policy suggestions into law are moving forward. In 2010 and again in 2011,[170] was introduced in Congress. Under the SPA, corporations would be required to obtain advance

---

164. There might be a situation where the CEO spent a relatively small amount of corporate funds on a political position that the majority of shareholders would find offensive. They note: "While the shareholders may be practically indifferent to an ordinary business decision that results in a cost of such an amount, they might feel differently about spending on the advertisement that associates their company—and, indirectly, the shareholders themselves—with such a political position." *Id.* at 96.

165. *See id.* at 90–91. As previously discussed, the economic interests of mutual fund advisors and ultimate investors may also be misaligned. *See supra* text accompanying note 138.

166. *See* Bebchuk & Jackson, *supra* note 10, at 110 ("[L]ike previous opinions in this area, *Citizens United* seems to contemplate that lawmaking designed to protect shareholders from corporate political speech decisions contrary to their interests serves a legitimate purpose. This aspect of *Citizens United* is consistent with our view that rules reasonably designed to serve such a purpose should be found constitutionally permissible.").

167. *See* 2011 BENCHMARK, *supra* note 79, at 3.

168. *See* Bebchuk & Jackson, *supra* note 10, at 111–12. The authors do not support unanimous shareholder approval, and note that there are some categories of decisions in which the interests of the majority adequately protect the interests of the minority. However, the authors also note that where the interests of the minority diverge from the majority, corporate law rules protect minority interests. *Id.* at 112 ("For example, corporate law mandates that certain procedural requirements be satisfied before a large majority shareholder may effect a 'freezeout' transaction that could divert resources from the minority shareholders for the benefit of the majority. Even when no dominant majority shareholder exists, corporate law limits the ability of a majority of shareholders, and the directors that shareholders elect, to cause the corporation to engage in transactions, or to effect distributions, that do not distribute benefits to shareholders on a pro rata basis.") (internal citations omitted).

169. *See id.* at 115–17.

170. *See* Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010); Shareholder Protection Act of 2011, H.R. 2517, 112th Cong. (2011).

shareholder approval for political expenditures on an annual basis. Specifically, SPA would: (1) require corporations each year to disclose to shareholders the specific nature and total amount of money to be spent on political activities for the upcoming year;[171] (2) require that shareholders have the opportunity to vote in advance on these political expenditures;[172] and (3) prohibit a corporation from spending money on political activities unless a majority of shareholders approved.[173]

To effectuate this notice and consent, managers would have to present a resolution containing the disclosures and requesting approval in the annual proxy materials mailed to investors.[174] In order for the corporation to devote corporate treasury funds to political spending, a majority of all outstanding shares would have to be voted for this proposal.[175] In addition, the SPA would require certain institutional investors with discretion over $100 million in equity securities to disclose their votes on these "show me" resolutions. Failure to obtain shareholder approval before making political expenditures would be considered a breach of fiduciary duty by both the directors and officers who authorized the spending.[176] They would be jointly and severally liable for damages three times the amount of the expenditures.[177]

What each of the aforementioned academic, activist, and policy maker initiatives have in common are a few underlying normative claims. These include some or all of the following: (1) shareholders, as owners, should have access to information about how resources affecting their investments are dedicated; (2) the public has the right to know which corporate interests are backing particular candidates and campaigns; and (3) given the unique importance of political activity in the United States, political spending does not fall within the category of ordinary business decisions and, as such, should require not just notice but also some level of shareholder approval. Within a shareholder-centric framework, all of these claims are valid.

---

171. H.R. 2517 § 3(b)(1)(A).

172. *Id.* § 3(b)(2).

173. *Id.* § 3(c).

174. *Id.* § 3(b).

175. *Id.* § 3(c)(2). The requirement that a majority of all *outstanding* shares be voted in favor of political spending, could, under some circumstances, make it more difficult for management to obtain approval for proposed spending than it would be for shareholders to win approval for a shareholder-proposed "show me" advisory resolution, which requires only that a majority of the shares *voted* support the resolution.

176. *Id.* § 3(d)(1).

177. *Id.* § 3(d)(2).

IV.
Actual Impact of Disclosure and Consent

Although it can be argued that voluntary disclosure of political spending and existing corporate governance procedures make federal mandates unnecessary as a means of achieving disclosure or consent, these mechanisms are slow and incomplete, and are not guaranteed to provide accurate or permanent solutions. Even firms with standing policies regarding political spending may not actually abide by those policies. In 2010, only 23 of 57 S&P 500 companies with policies against making political contributions kept their word.[178] Shareholder resolutions are similarly unattractive as a means for achieving disclosure and consent because they are nonbinding and apply on a firm-by-firm basis, as opposed to a market-wide basis. Nevertheless, the results of votes on shareholder-proposed political spending resolutions may be useful in helping to predict the efficacy of a statutory requirement that corporations obtain shareholder consent for political spending.

A. "Show Me" Resolution Voting

Since 2004, activist shareholders of a small but increasing number of publicly held corporations have attempted to use existing mechanisms of shareholder democracy to influence political spending by proposing and voting on non-binding "show me" resolutions at annual meetings.[179] These proxy resolutions are modeled on and track language crafted by The Center for Political Accountability. The model "show me" resolution asks the corporation to disclose how much it is spending on certain political activities, who is receiving the money, and who inside of the firm is making those decisions.[180] The resolution is non-binding—even if shareholders approve the resolution, management is under no obligation to put it into effect.

In 2010, "show me" resolutions were introduced and voted on at 28 corporations.[181] Raw voting data on these resolutions can be gath-

---

178. *See* 2011 Benchmark, *supra* note 79, at 26.

179. *See* Dana Gold, Solange E. Bitol-Hansen, Charlie Cray, & Bruce Freed, *Protecting the Polity: Strategies for Reform*, 30 Seattle U. L. Rev. 991, 1005 (2007) (discussing the development of the "show me" resolution).

180. *Political Disclosure and Oversight Resolution 2012*, Ctr. for Pol. Accountability, http://www.politicalaccountability.net/index.php?ht=d/sp/i/867/pid/867 (last visited Jan. 25, 2012).

181. Influence Elections, *supra* note 120. These firms were: Allstate Corporation, Amazon.Com, Inc., BB&T, Boeing Co., Citigroup Inc., ConocoPhillips, Coventry Health Care Inc., CVS Caremark Corp., DTE Energy Co., Express Scripts Inc., Ford Motor Company, Goldman Sachs Group Inc., Halliburton Co., Hess Corp., Illinois

ered from Item 5.07 of the corporations' 8-K filings made after the annual meeting.[182] On average, at the 28 firms, the "show me" resolutions received the support of 30% of votes cast "for" and "against." For example, at AllState, the resolution received nearly 40% support.[183] However, on average, the votes cast in favor of the proposals only amounted to about 12% of outstanding AllState shares.[184]

There is no consensus as to how many votes in favor of a resolution are necessary for the resolution to pass. Some companies hold on to the notion that a resolution must receive support from a majority of shares outstanding.[185] Total shares outstanding include "for" votes, "against" votes, abstentions, broker non-votes (shares for which a customer holding shares in a brokerage account had not provided voting instructions to the broker),[186] and shares not voted at all. However, advocates argue that the appropriate denominator is not outstanding shares, but rather shares voted "for" plus shares voted "against" a given resolution.[187] Support for the latter view comes from a staff bulletin from the SEC's Division of Corporate Finance, which addressed the manner in which support for shareholder resolutions should be calculated when determining whether unsuccessful proposals are eligible for inclusion in future proxy materials.[188]

One factor shaping support for "show me" proposals is an increase in voting abstention since 2004. Specifically, some mutual fund

---

Tool Works Inc., Lowe's, Norfolk Southern Corp., Nucor Corp., Regions Financial Corp, Republic Services, Inc., Charles Schwab Corp., Southwestern Energy Co., Sprint Nextel, Valero Energy Corp., Wal-Mart Stores Inc., Waste Management Inc., Wellcare Health Plans, Inc., and Wells Fargo & Co.

182. *See* SEC, Compliance and Disclosure Interpretations: Proxy Disclosure Enhancements Transition (Jan. 20, 2010), *available at* http://www.sec.gov/divisions/corpfin/guidance/pdetinterp.htm ("Any shareholder meeting that takes place on or after February 28, 2010 is subject to the new Form 8-K Item 5.07 reporting requirement.").

183. *See* The Allstate Corp., Current Report (Form 8-K) (May 20, 2010), *available at* http://www.sec.gov/Archives/edgar/data/899051/000110465910029781/a10-10612_18k.htm.

184. *Id.*; *see also* THE ALLSTATE CORP., NOTICE OF 2010 ANNUAL MEETING, PROXY STATEMENT AND 2009 ANNUAL REPORT 1 (2010).

185. *See supra* note 18.

186. Broker non-votes are shares held in "street name" by a brokerage house on behalf of a customer, that are present, but not entitled to vote on the resolution.

187. INFLUENCE ELECTIONS, *supra* note 120.

188. To calculate the percentage of support for a shareholder-initiated resolution, the SEC has stated that the numerator is the votes "for" the proposal and the denominator is the sum of the votes "for" and "against." *See* SEC, DIV. OF CORP. FIN., STAFF LEGAL BULL. NO. 14 (CF), SHAREHOLDER PROPOSALS 25 (2001).

money managers,[189] have shifted their votes on shareholder proposals from "against" to "abstain." Voting to abstain is considered helpful to shareholders in the "show me" resolution realm because, by moving from an "against" vote to an "abstain" vote, a shareholder has increased the power of the "for" vote by increasing the number of votes "for" as a percentage of the total number of votes cast "for" and "against." Thus, assuming that the denominator used to calculate support for "show me" proposals includes only votes "for" and votes "against," and further assuming that votes "for" such proposals remained steady (or increased) over the same period, the trend towards abstention may enable ultimately unsuccessful "show me" resolutions to obtain the level of support required for reintroduction in subsequent proxy materials and ultimately to receive majority support.[190]

According to Jackie Cook of FundVotes,[191] large mutual fund money managers (fund families) are shifting their votes on political spending "show me" resolutions to abstain. Cook examined Form N-

189. Registered investment companies, including mutual funds have been required, since 2004, pursuant to the Proxy Voting Rules to publicly disclose their proxy voting records. Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Securities Act Release No. 8188, Exchange Act Release No. 47,304, Investment Company Act Release No. 25,922, 2003 WL 215451 (Jan. 31, 2003) [hereinafter the Mutual Fund Proxy Voting Rule]. In contrast, investment advisers are not required to publicly disclose their proxy voting records, but, must disclose to investors how the investors might obtain information from the adviser how the investor's securities were voted. Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106, 79 SEC Docket 1673 (Jan. 31, 2003). The mutual fund proxy voting records are disclosed fund by fund, and not rolled up to the fund family level. However, there are data services that compile this information at the fund family level. Previously, the Corporate Library published, for a fee, a number of reports on the proxy voting records of large mutual fund families. Presently, FundVotes.com compiles these data. In the spring of 2011 Jackie Cook made a data set of mutual fund proxy voting by fund family on political spending resolutions from the 2004 through the 2010 proxy season available to me.

190. *See* JACKIE COOK, FUND VOTES, CORPORATE POLITICAL SPENDING AND THE MUTUAL FUND VOTE 1 (2011), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/5990 (at the 40 largest mutual fund families, abstain votes grew from 8 percent in 2004 to 15 percent in 2010). According to the Center for Political Accountability, in the 2010 proxy season there was "a 10 percent increase in mutual funds voting to abstain." *See* Press Release, Center for Political Accountability, Mutual Funds Back Corporate Political Disclosure in 2010 Proxy Season: Opposition Continues to Decline as Overall Support Remains Strong (Dec. 15, 2010), *available* at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/4833.

191. Jackie Cook, formerly of the Corporate Library research firm is the founder of FundVotes which is an independent project that tracks mutual fund voting in the U.S. and Canada.

PX filings.[192] These filings reveal that while in 2004, when these resolutions were first introduced, only 8% of the votes cast by the largest fund families were abstentions. By 2010, 15% of the votes cast by these large fund families were abstentions. Similarly, support increased from 3% to 33% of votes cast by these large fund families. These results show the role that mutual funds, as holders of more than a quarter of outstanding shares, had and continue to have in approving "show me" resolutions.[193]

B. *Predicting Sanctioning Resolution Voting*

The mutual fund voting record from 2010 "show me" resolutions is useful in helping to predict voting patterns on SPA-type resolutions that would require shareholder authorization of political spending. Outstanding shares voted on such resolutions fall into five categories: (1) "for" votes; (2) "against" votes; (3) "abstain" votes; (4) "broker non-votes;" and (5) shares not voted. However, in order to derive predictive value from "show me" resolution voting data, we must decide how to translate a "show me" vote into a "sanction" vote.[194] In other words, it is not entirely certain that a shareholder who voted for or against a nonbinding resolution asking for more disclosure of political spending would necessarily vote to sanction specific spending under the SPA. Moreover, institutional shareholders—particularly those who actively manage their portfolios—turn over shares, causing changes in institutional ownership that could impact voting patterns. However, for the sake of this analysis, we will assume "show me" votes and "sanction" votes are the same.

It is easiest to begin this process of translating "show me" votes into "sanction" votes if we look first at an individual firm, and then at the the group of companies where shareholders voted in 2010 on "show me" resolutions.[195] At Allstate, as of March 19, 2010, there were 537,407,178 common shares outstanding and entitled to vote.[196] According to the company's 8-K, only 85% of shares voted, and the

192. A Form N-PX filing is required for registered investment companies, including mutual funds. This requirement resulted from SEC rulemakings, effective for the 2004 proxy voting season. *See supra* note 189.

193. *See* Cook, *supra* note 190.

194. A "sanction" vote would be a vote mandated by law, such as under the SPA, which would require management to disclose political spending in advance and receive support from at least 50% of all outstanding shares before engaging in political spending.

195. Only 27 firms are included in this part of the analysis. Given the unique ownership structure at Ford Motor Company, it was excluded.

196. *See* THE ALLSTATE CORP., NOTICE OF 2010 ANNUAL MEETING, PROXY STATEMENT AND 2009 ANNUAL REPORT 1 (2010).

results on the "show-me" resolution were as follows: 132,510,653 "for" (25%); 200,928,963 "against" (37%); 63,419,216 "abstain" (12%); and 57,499,580 broker non-votes (11%). This left a balance of 83,048,766 not voted at all (15%).[197]

Had the SPA been in effect that year, 268,703,590 votes would have been required to approve a resolution sanctioning political expenditures. If we assume that all of the shares voted "against" disclosure are pro-management and would vote in support of management political spending plans, this would provide just 200,928,963 votes—still lacking 13% of the outstanding votes necessary for approval. If we also assume that all of the voters who abstained on the "show me" resolutions would vote for a management political spending proposal, then this would add another 12%, bringing the vote closer to approval. Looking at 27 of the firms, on average, those that voted against the "show me" resolutions amounted to 43% of the outstanding shares, and if all of the "abstain" votes are included, this would bring the total pro-management votes to an average of 56% of outstanding shares. It appears, then, that management would have little difficulty passing a political spending proposal if roughly half of those that abstained were pro-management.

However, this analysis invites the question of why we should assume that at least half of those who abstained in the past, and thus helped the pro-"show me" voters, would approve a management-spending proposal. This assumption is based upon the past behavior of the institutional shareholders who abstained. However, it is also possible that none of the "abstain" votes, or some portion shy of half, would sanction spending under the SPA. If so, at such a corporation, spending would be blocked. What this means, then, is that those who abstain have a lot of power. In the mutual fund family realm, some of those that almost always abstain on "show me" resolutions include Vanguard, Fidelity, and TIAA-CREF. Collectively, these fund families hold huge percentages of outstanding shares and thus tremendous voting power at U.S. corporations. Instead of a vision of real people getting together in corporate form and deciding how to spend money on federal candidates, or managers unilaterally making such a decision, under the SPA, it will most likely be money managers with the swing votes making these choices.[198]

197. *See* The Allstate Corp., Current Report (Form 8-K) (May 20, 2010), *available at* http://www.sec.gov/Archives/edgar/data/899051/000110465910029781/a10-10612_18k.htm.

198. *See* Cook, *supra* note 190, at 1 (The 40 largest mutual fund families have "tremendous influence over how companies approach corporate governance issues.").

Thus, generally speaking, management can win approval for political spending by convincing "abstain" votes to approve the spending, and need not convince any of the pro "show me" shareholders to support spending. Furthermore, it is also possible that many of those who sought disclosure would still ultimately support management spending decisions, and the figures for shareholder approval of political spending could then be even higher, effectively assuring approval. Evidence from the United Kingdom supports the expectation that management proposals seeking approval for spending would pass. In the U.K., more than 90% of shares voted approved managers' proposals for political spending.[199] And recent research suggests there may be a correlation between additional oversight by boards of directors and further spending.[200]

CONCLUSION

In *Citizens United*, the Supreme Court left open the possibility of using the procedures of corporate democracy to protect shareholders from being forced to speak without their knowledge or consent. Presently, these procedures are inadequate. Secret spending is on the rise,[201] and corporations have at their disposal several lawful means of hiding political spending. Limited information reveals that known corporate political activity may correlate with negative firm value. Shareholders, employees, customers, and the public are also in the dark as to whether corporations with whom they engage are funding political candidates and causes they do not support. Proposals like the SPA begin to address these concerns by proposing requirements that corporations provide notice and obtain advance consent from shareholders before engaging in political spending. However, even if the SPA were enacted into law, more would need to be done to further the goal of

199. *See* Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 508 (forthcoming spring 2012), *available at* http://ssrn.com/abstract=1853706.

200. *See* 2011 BENCHMARK, *supra* note 79, at 2 ("The 151 companies with board oversight of their spending disburse on average 30 percent more than their peers that do not have such oversight, when the latter comparison is controlled for revenue size. This may give some comfort to investors and others concerned about accountability and transparency, but not to those who think that corporate governance could be used as a lever to reduce spending.").

201. *See, e.g.*, Nicholas Confessore & Michael Luo, *Secrecy Shrouds "Super PAC" Funds in Latest Filings*, N.Y. TIMES, Feb. 1, 2012, http://www.nytimes.com/2012/02/02/us/politics/super-pac-filings-show-power-and-secrecy.html?_r=1&pagewanted=all ("Much of the money raised by the leading Republican and Democratic independent groups went into affiliated nonprofit organizations that . . . do not have to disclose their donors."); Kenneth P. Vogel, *2012: The Year of the Big Donor*, POLITICO, Feb. 1, 2012, http://www.politico.com/news/stories/0212/72307.html.

protecting individual investors and the public. Such a law would merely shift decision-making power from corporate managers to institutional investors who own more than 70% of stock at the top 1,000 firms. These money managers will have the ability to approve or block corporate political spending. The real people who own shares directly are in the minority, and lack power. And those who invest indirectly through mutual funds or defined contribution retirement plans ("ultimate investors") have absolutely no voice, and must depend upon money managers to act for them. However, the interests of these money managers often diverge from those of ultimate investors.[202]

Even if corporations themselves better disclose their political spending, it will still be difficult for ultimate investors like the approximately 80 million that own stocks through mutual funds[203] to find out whether some of the money they have invested is being dedicated to particular political campaigns or lobbying efforts. And even if they learn, they have little power to effect change or voice their concerns. If the procedures of corporate democracy are lacking, the procedures of mutual fund democracy are nearly non-existent.[204] It is very difficult for a mutual fund shareholder to have an impact on the activities of the money manager who operates the fund. Under state law, most funds are not required to hold annual meetings, and directors do not have to stand for election until a large percentage of the board is comprised of those who were never elected by the shareholders. Moreover, even if fund shareholders are entitled to vote, they are often confused by the fund's proxy mailings they receive. If they invest in mutual funds through a 401(k), they do not have voting rights at the fund.[205]

Assuming that the SPA is enacted, some additional steps are necessary to accomplish the bill's presumed goal of obtaining shareholder consent prior to managerial spending. One possibility would be to re-

202. As research on mutual fund proxy voting has shown, there may be conflicts of interest that encourage fund advisors to favor management's position rather than the interests of underlying shareholders. *See* Davis & Kim, *supra* note 30.

203. Roughly 92 million individuals invested in mutual funds in 2011. *See* Inv. Co. Inst., *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2011,* 17 ICI RESEARCH PERSPECTIVE, no. 5, Oct. 2011 at 1. As of 2005, approximately 77.7 million Americans invested in stocks via equity mutual funds. INV. CO. INST. & SEC. INDUST. ASS'N, EQUITY OWNERSHIP IN AMERICA 44 (2005).

204. *See* Tucker, *supra* note 104, at 540 ("The threat of compelled speech is also higher for mutual fund investors whose portfolio contains an indirect investment in the same . . . company. The mutual fund investor has even fewer remedies available to her because of the increased distance between her and the . . . board of directors. She lacks participation rights in the channels of corporate democracy. It is also a difficult decision to sell shares in the entire fund due to political disagreement with one fund holding.").

205. *See supra* text accompanying notes 99–101.

quire disclosure and consent to run across the full intermediation chain. Intermediaries, such as mutual funds and other fiduciaries should be required to vote "no," indicating a lack of consent to political spending, if they fail to obtain consent from a majority of the underlying mutual fund investors. In addition it is worth considering whether, in order to gain approval for political spending, corporate managers should have to obtain votes from a majority of the real human beings who are direct owners in corporations, and whether institutional investors who are acting as fiduciaries should be required to receive votes from their underlying real human investors before approving corporate political spending at portfolio companies.[206] Mutual funds themselves are held by institutions, such as retirement plans, including 401(k) plans. As such, approval from all fund shareholders would not necessarily provide a voice for the plan participants whose capital is ultimately at risk. As an alternative, the statute might also permit investors across the intermediation chain to, like union members, be given the right to opt out of political spending.

206. If opt-in consent is not politically feasible or practically desirable, opt-out might be considered. Given that unions are required to allow members to opt-out of political spending, it seems that at the very least a similar right could be provided to corporate shareholders and to the underlying investors who use money management intermediaries who invest their money. *See* Benjamin I. Sachs, *Unions, Corporations and Political Opt-Out Rights after* Citizens United, 112 COLUM. L. REV. (forthcoming 2012) (manuscript at 2), *available at* http://ssrn.com/abstract=1924916 ("Employees, in brief, enjoy a federally protected right to control the way their dues are spent and to opt-out of funding union political activity.").