

## Shareholder Value Diminution and Tools of Redress: Uncertainty in a Post-*Citizens United* Era

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*Corporations are ostensibly affected each day by the decisions of lawmakers. Hence, it would seem that their participation in the political process—through the support of campaigns, candidates, and causes that may buttress business strategies and enhance corporate goodwill—would necessarily be commensurate with the aspirations of the shareholder. But when such participation is effected using resources without preauthorization or disclosure of purpose, rectification of a tarnished reputation and misused monies can only be attempted post facto through limited, often ineffectual ways.*

### INTRODUCTION

Corporate political spending is certainly not a new concept. With the advent of the political action committee (PAC),<sup>1</sup> and more recently the Super-PAC,<sup>2</sup> corporations have found ways to support political candidates and campaigns financially. But not until the United States Supreme Court decided *Citizens United v. Federal Election Commission* (*Citizens United*), 130 S. Ct. 876 (2010),<sup>3</sup> has the issue of vulnerable shareholder value become increasingly conspicuous. By invalidating over a century of statutory restrictions<sup>4</sup> and judicial precedent<sup>5</sup> governing corporate political spending, the distinction between PAC and treasury money expenditures has become obfuscated. With respect to this article, I refrain from analyzing the labyrinthine intricacies of whether the Supreme Court was overreaching in expanding corporate political speech rights and from participating in the agonal debate as to whether democratic principles have been compromised. Rather, I have chosen to explore the potential harmful repercussions of *Citizens United* as the ruling affects the financial interests of shareholders of publically-traded corporations and shareholder means of recourse which may be used to protect against unsanctioned corporate executive management.

### HISTORY

To understand how shareholders' capital assets are now available for political expenditures, a timetable of historical developments culminating in *Citizens United* will be examined. The protection of shareholder investments from indiscriminate corporate political spending has been addressed judicially and statutorily since the early 1900s. The following is a truncated timeline, highlighting salient developments:

- The passage of the *Tillman Act* in 1907 represented the first attempt by the federal government to prohibit corporations from using shareholder funds, i.e., the company treasury, to support disfavored political candidates. The idea that a corporation operated at the behest of the state and

for the general public welfare was the prevailing philosophy in the federal and state legislative branches at this time.

- The *Publicity Act* was enacted in 1910 to regulate political financing and was amended in 1911 to require post-election disclosure of contributions made to U.S. House and Senate races which exceeded the contemporary equivalent of \$1,667. Loopholes quickly became problematic and the legislation failed to effectively manage the massive wealth of individual contributors (Thayler, 2011).
- In 1925, the federal government passed the *Federal Corrupt Practices Act*<sup>6</sup> (FCPA), amending the *Publicity Act*, with the intent to regulate more effectively politically-related, corporate spending in non-election years. The FCPA also proved ineffective as evidenced by the failure of the government to prosecute even one violation nearly half a century after its passage.
- The *Hatch Act*, passed in 1939, extended a governmental ban on political expenditures; however, corporations were still permitted to funnel money through state and local committees, allowing them to continue to participate in the political process.
- The prohibitions of the *Taft-Hartley Act*, enacted in 1947, covered, *inter alia*, independent expenditures made by corporations and labor unions and represented Congress's first attempt to restrict these entities from tapping into their general treasuries to provide direct political funding.
- The prohibitions on corporate and union spending were reconfirmed, *in toto*, by the U.S. Supreme Court in *United States v. Automobile Workers*, 352 U.S. 567, 571 (1957).
- During the early 1970s, the federal government passed the *Federal Election and Campaign Act* (FECA), increasing disclosure requirements by assessing penalties for failing to make proper disclosures and by limiting the amount of media spending in Congressional races. FECA also limited individual donations and created the Federal Election Commission.
- The Supreme Court overturned spending limits with respect to political expenditures in *Buckley v. Valeo*, 424 U. S. 1 (1976), by distinguishing direct "contributions" to a political candidate from "expenditures" made to support a political cause. While the *Buckley* Court overturned expenditure limitations (Potter, 2000), it would not be until January of 2010 when *Citizens United* would eliminate restrictions on *contributions* as well.
- In 1978, the Court widened its approach to free speech protections in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), by acknowledging that corporations possessed the same free political speech rights under the First Amendment to the U.S. Constitution as natural persons.
- In 1982, the Court held in *Federal Election Commission v. National Right to Work Committee (NRWC)*, 459 U. S. 197 (1982), that the special characteristics of the corporate structure, including its ownership and governance, required careful and deliberate regulation.
- In 1986, the Court, by a 9-0 decision, expanded its First Amendment coverage to include non-profit organization contributions and advocacy of expenditures in connection to federal elections. The *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986), involved a non-profit organization that opposed abortion and sought financial support for candidates and campaigns committed to advancing this purpose. In this ruling, the Court distinguished the salient attributes of a nonprofit from a for-profit business entity: whereas the nonprofit typically operates through its members and administrators, it lacks shareholders or other investors with a direct financial stake in its operations. It advocates particular issues instead of advancing products and services in the marketplace.
- By a closer margin of 6 to 3, the Supreme Court in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), upheld a Michigan state statute which forbade any corporate capital asset spending (i.e., general treasury expenditures) on state elections but reinforced the permitted practice of individuals pooling their personal funds to advance a candidate or campaign or advocate a particular cause or issue. The *Austin* court warned explicitly that such contemplated expenditures would generate a corrosive atmosphere and distort the political process by inferring quid pro quo expectations.

- After years of research, investigations, and conclusory findings, a bipartisan committee proposed a bill which became the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>7</sup> More popularly referred to as the McCain-Feingold Act, this legislative enactment expressly forbade all corporations and unions from using political expenditures within certain time limits without restricting spending by natural persons. These proscriptions would be deemed unconstitutional and invalidated by the *Citizens United* decision less than a decade later. The BCRA allows for employee or shareholder contributions to PACs.
- By a 5-4 decision, the Court in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*, 551 U.S. 449 (2007), ruled that expenditures that merely advocated or advanced a particular issue, but fell short of appealing the public “to vote for or against a specific candidate,” were permissible. Although this decision reaffirmed regulating a corporate communication under §203 of the BRCA, it nevertheless quickly drew ire from many shareholders and other affected stakeholders, fearing that allowing unbridled corporate election expenditures without erecting necessary safeguards for shareholder protection was inevitable.
- *Citizens United v. Federal Election Commission* was first decided by a three-judge federal district court which granted the FEC summary judgment which respect to the nonprofit organization Citizens United’s request to enjoin the application of certain punitive sections of the BRCP to its proposed broadcast of a political-related documentary within certain prohibited time restrictions. The monies used to produce this electioneering communication were wholly derived from a collective pool of individual contributions. Transcending the scope of the original petition, the Supreme Court reversed the district court’s ruling, finding that such restrictions on the identity of the speaker were facially unconstitutional under First Amendment protections of free speech. In his dissent, Justice Stevens warned that the tremendous power and wealth of a corporation or union—historically unequivocally restrained and monitored—as well as the unchecked use of treasury funds, not only threatened political discourse but necessitated shareholder safeguards.

## ANATOMY OF THE DECISION AND ITS INHERENT THREAT TO SHAREHOLDER VALUE

The *Citizens United* decision was basically premised on the judicial finding that since corporations are “legal persons,”<sup>8</sup> and persons enjoy First Amendment free speech rights (including political speech), and further that since the exercise of free speech includes the giving of money, then any attempt to restrict free speech premised on the identity of the speaker is unconstitutional. The Court’s majority held that there should be no distinction of the identity of the speaker – be it a union, a corporation, or an individual.

By virtue of *Citizens United*, all U.S.-chartered businesses, whether controlled domestically or by foreign interests, have been granted the unfettered ability to direct corporate funds to support political candidates and campaigns which may conflict with shareholder wishes and deplete corporate coffers which could otherwise be used to issue shareholder dividends. Citizens United members already had the right to pool their resources, together with monies contributed by administrative and other organizational personnel, to finance electioneering communications under the BRCA. Justice Stevens critiqued that the inclusion of a corporate entity as a permitted *speaker* might appeal rhetorically, but failed to delineate when a corporation may engage in electioneering opposed by some of its holders. With respect to such potential divergence of interests, how will shareholders in this post-*Citizens United* era either:

- Serve as an effective tool to curb the potentially exploitative exercise of unlimited treasury spending; and/or
- Ensure officer adherence to its fiduciary duties to its stockholders?

Political contributions reflect company values. Thus, with non-alignment of political choices and stated company values, the danger exists of community and consumer criticism, a tarnished reputation and brand, and ultimately, a decrease of shareholder value. Regardless as to whether political contributions emanate from corporate treasuries or corporate PACs, there exist the real dangers of such

negative public perception and compromised value. PACs are created by the company, expenses of such formation and maintenance of PAC operations are paid by the company, the name of the company is used in association with the PAC, and the PAC may solicit both its shareholders and salaried employees for contributions to the PAC. Ultimately, however, senior management exercises discretion over how that money is spent. Such outward, political activities expose unwilling or unwary shareholders to unavoidable critique.

Several empirical studies show that politically-active corporations are not financially beneficial to their shareholders; rather, the interests that are served are the political aspirations of their executives. Hence, these companies are less valued by the market. One national study conducted in 2010 demonstrated that “companies with disclosure policies had a 7.5 percent higher, industry-adjusted, price-to-book, ratio than other firms” (Coates & Taylor, 2012). This study’s findings were based upon market valuations of Standard & Poor’s 500 companies in similar industries, using a control for research and development, size, political activity, and growth potential.

### **POLITICAL CORPORATE SPENDING POST-*CITIZENS UNITED***

To assess any impact of *Citizens United* on shareholder value as a result of unimpeded corporate political spending, the 2010 federal and state midterm elections held less than 9 months after the decision’s publication offer relevant data and guidance.

Corporate political spending related to these elections rose markedly. One source indicates that independent expenditures for the 2010 midterms increased fivefold in contrast to the 2006 midterm election year. The 2010 contributions totaled \$211 million,<sup>9</sup> and were often given anonymously through nonprofit organizations<sup>10</sup> or by other similarly situated associations.<sup>11</sup> Yet another source tallies the total spending for the 2010 elections to be \$266 million – all spent by outside groups with half attributed to anonymous donors. This undisclosed amount doubled the total spending by third party groups during the previous midterm election in 2006 (Coates & Taylor, 2012). Despite this unbridled spending, such practices have not been targeted as running afoul of FEC prohibitions.<sup>12</sup> In light of this upsurge, publically-traded corporate shareholders may have suffered loss of value of their capital investments, the total effects of which may be premature to accurately gauge.

### **INHERENT DEFECTS OF *CITIZENS UNITED***

#### **Traditional Definitions of the Corporate Configuration**

None of the Justices, including the four dissenting, ever provided a clear definition of the meaning of a corporation, the inclusion of which would be arguably necessary to understand the repeated reference to the corporate “speaker.” Traditional definitions have included:

*A Corporation is an Artificial Entity.*

In 1819, Supreme Court Chief Justice John Marshall unambiguously stated that: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, expressly, or as incidental to its very existence.”<sup>12</sup> In congruity with the longstanding tenet that corporate powers are limited by their charters, Justice Stevens in his *Citizens United* concedes in his dissent that while corporate entities invariably serve the public in a variety of positive ways, unlike natural persons, they are not actual members of society and cannot vote or run for office or otherwise participate in the political process. Furthermore, as corporate assets in some situations may be governed and controlled by nonresidents who are also unable to vote in the American electoral process, their political expenditures may impose deleterious effects on non-concurring shareholders.

### *A Corporation Operates and “Speaks” through an Association of Natural Persons.*

While not technically human, the corporation can be perceived as collectively human by acting through an association of natural persons. Unfortunately, with respect to politically-related, capital asset expenditure, it is virtually impossible to identify the precise actors in this spending process without rules of disclosure (Heiman, 1977). In attempting to identify the protected speaker as well as those “spoken for” under the majority’s rationale in *Citizens United*, Stevens queries:

“It is an interesting question ‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. *It cannot realistically be said to be the shareholders*, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends.”<sup>14</sup> [Emphasis added].

### *A Corporation is a State-Chartered, Quasi-Public Entity Whose Internal Structure and Governance was Created and Supervised to Serve the Public Good.*

The historical concept of the corporate form was restricted to serving a particular public purpose. Whether the charge be to construct a bridge over the St. Charles River in Boston or construct a transcontinental railroad, ultimately the betterment of society achieved through these limited undertakings dictated the corporate organization and defined its central purpose. While executive functions were quarantined to the advancement of these defined purposes, management concomitantly retained a fiduciary duty to safeguard shareholder investments and respect investor will, albeit, at times, by implied proxy (Seavoy, 1982).

### *A Corporation is the Agent of the Shareholder.*

While giving due deference to its charter limitations, under the Friedman approach, the sole purpose of a corporate entity was to generate the highest financial returns possible on shareholder capital investments (Friedman, 1970). More recently, this charge has been broadened to respect and appease a wider array of interests exhibited by that corporation’s stakeholders. Under either definition, the corporation is not established to advance the personal political interests of those in positions of formable power and authority (Shaw, 2009).

## **Independent Segregated Funds and Company Treasury Monies**

*Citizens United* has blurred the distinction between privately-solicited shareholder contributions and the shareholder capital assets which fund the company’s general treasury. Whereas the former practice is voluntary and contributions are made for a known purpose, the use of corporate treasury funds (i.e., shareholder property) without shareholder authorization to advance a personal political viewpoint rather than to invest in company growth, explore emerging markets, promote research and development, and issue stockholder dividends not only constitutes a serious breach of fiduciary duty owed by management to the individual investor, but is tantamount to outright thievery. “When corporations use general treasury money to finance electioneering communication, they use their shareholders’ money to fund their corporate speech” (Thaler, 2011).

## **Presumption of Shareholder Protections**

Upon a thorough reading of the entire opinion, including the dissent, there not only appears to be a lack of knowledge of shareholder protection but an assumed charge of shareholder democracy to monitor corporate political spending:

“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their

positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits."<sup>15</sup>

The Court surmises that abuses of shareholder money could routinely be corrected "through the procedures of corporate democracy." There is an inherent presumption in this remark that the Court believes that the rights of shareholders to elect directors and to bring derivative suits for breach of fiduciary duty are sufficient safeguards against loss of shareholder value. In practice, however, the subterfuge of the "business judgment rule" (discussed *infra*) has been virtually impenetrable. Since the majority of American investors own stock through intermediaries such as mutual funds and pension plans (Evans, 2009) and as shareholders cannot protect what they do not know in the absence of disclosure laws or rules,<sup>16</sup> the efficacy of these corporate procedures is, at best, *de minimus*.

It should be noted that even with the limited FEC disclosure requirements, reports of receipts and expenditures may be filed on a monthly, or even quarterly, basis and the reporting entity retains the option to change its filing frequency once per year. PACs that have chosen to file quarterly may, depending upon the nature of their activities, be required to submit pre- and post-election reports. This practice, therefore, allows the reporting entity to legally withhold disclosure of information to the concerned shareholder until *after* the expenditure is made, preempting any attempts to seek a preemptive injunction (Copelin, 2012).

## **POST-CITIZENS UNITED CORPORATE BACKLASH: CASE EXAMPLES**

The true moral compass of corporate values should be reflected in their policies and mission statements rather than dictated minimally by statutory and judicial guidelines. Self-defined values allow shareholders a meaningful choice in this manner and do not have to resort to potentially time consuming and costly litigation or complete divestiture as an alternative to executive political decision-making backlash and public criticism. Such values must be supported by action for without such alignment, these policies serve merely as a smokescreen or a *passé* token to a collective cry for social responsibility.

### **Target and Best Buy**

In 2011, the Target Corporation, a claimed supporter of the lesbian, gay, bisexual, and transgender (LGBT) community, generated national protests after the company was discovered to have donated money to Tom Emmer, a Minnesota candidate for governor, who openly opposed gay marriage. After weeks of protests and calls for boycotts outside of the company's headquarters in Minnesota, Target's CEO Gregg Steinhafel, publicly apologized and vowed to monitor political expenditures by the company more closely. Emmer lost his gubernatorial bid in 2010 (Thaler, 2011). This originally anonymous corporate donation made in an election cycle has been regarded as one of the first examples of negative corporate backlash (Montopoli, 2010).

Target had donated \$150,000 to "Minnesota Forward," a political action committee, which paid for Emmer's advertising. Best Buy had also donated \$100,000 to this same PAC. Because the companies' upper management officials had made all political funding decisions using both the company treasury and company PAC contributions, shareholders had no input in these decisions (Thaler, 2011).

### **Home Depot**

In 2010, Home Depot, without shareholder knowledge or support, made a financial donation in support of Virginia Governor Bob McDonnell, whose objectives included the elimination of non-discrimination protections for LGBT state workers in that state. McDonnell was successful in this regard (Hyatt, 2011). In the Home Depot aftermath, Vanguard Group founder John C. Bogle posted an opinion editorial in the *New York Times*, advocating the case for mandatory shareholder vote on political contributions as the first step toward creating true shareholder democracy. Bogle argued that self-interested managers "exploit provisions in the law...to make lavish political contributions without disclosure...and subvert our political system which can only be corrected by imposing a requirement for a binding 'supermajority' (75%) shareholder vote on political contributions" (Bogle, 2011).

## **FedEx**

During the 2009-2010 campaign season, FedEx's PAC donated \$6,500 to sitting U.S. Senator David Vitter for reelection. Vitter was an original co-author of and voted for the Federal Marriage Protection Amendment that would have effectively eliminated same-sex marriage in all states even where it is currently legal and concomitantly would have prevented any states from adopting same-sex marriage legislation in the future. His position stands in direct violation of the stated FedEx corporate commitment to provide same-sex domestic partner benefits and same-sex marriage benefits, in states where it is legal, to all U.S.-based employees by January 1, 2012. Eight additional co-sponsors of the anti-LGBT proposed legislation in the U.S. Senate also received contributions from the FedEx PAC including Senators Brownback, Chambliss, Crapo, DeMint, Enzi, Isakson, Roberts, and Thune.<sup>17</sup> Furthermore, candidates receiving FedEx PAC contributions voted against hate crimes bills and as well as against the repeal of the "Don't Ask, Don't Tell" policy that formally prohibited LGBT alliance members from serving openly in the U.S. military.<sup>18</sup>

## **Proctor & Gamble**

Vitter also received campaign donations from P&G's PAC in 2009 and 2010. In addition to his legislative proclivities which have alienated the LGBT community, Vitter, in 2007, was "identified as a client of a prostitution service" yet continued to serve in the Senate (Keilar, 2007). Contributions have also been made in support of Senator Chuck Grassley, an admitted "C Street" radical right, anti-gay group (Sharet, 2009), alleged to have ties, as far back as the 1980s, to advocating the "Kill the Gays Bill" in Uganda. And another five senators receiving PAC money signed onto the Federal Marriage Amendment as co-sponsors including Senators Burr, Crapo, DeMint, Isakson, and Kyl. Many of the officials supported by P&G PAC contributions also voted for the Amendment and voted against both hate crimes bills and the repeal of the former "Don't Ask Don't Tell" military policy.<sup>19</sup>

## **SHAREHOLDER RECOURSE**

With this unprecedented threat to shareholder value and investment security coupled with the ever-salient problem of negative corporate perception and widespread boycotts, what remedies and protections exist for the individual investor in the post-*Citizens United* marketplace? Before shareholder remedies and tools are individually examined, certain contemporary tenets of corporate governance are assumed:

- Corporations exist through the financial investments of their shareholders.
- Shareholders delegate daily managerial decisions to the Board of Directors and ultimately to the presiding officers. This hierarchal structure of decision-making is necessary to prevent chaos and to better synchronize the interests of multiple stakeholder interests in the operation of a large business enterprise.
- Corporate managers are protected from individual liability by the business judgment rule for decisions proven to be well-informed.
- Corporate decision-makers owe a fiduciary duty to their shareholders to maximize profit without compromising the needs of the entity's other stakeholders.

Faced with unchecked managerial autonomy over the disbursement of corporate treasury funds, shareholders do have access to certain tools which may offer protection but inevitably are imbued with drawbacks. Most vehicles of redress only serve to address past wrongdoings and their negative consequences. As questionable actions are typically not revealed until after they have taken place (Arendt, 1958), changes in corporate governance and/or the law must be pursued.

## **The Shareholder Resolution**

Following the aftermath of Home Depot's leaked donation, the company announced on June 2, 2011, that it would give its shareholders an opportunity to vote during their annual meeting on a nonbinding resolution concerning proposed political contributions. In March of 2011, the Securities and Exchange Commission (SEC), in tandem with Boston-based NorthStar Asset Management (NorthStar), paved the way for this vote when it authorized the dissemination of proxy proposals requiring shareholder resolution on this issue. This was particularly significant in light of the fact that "mutual funds, our largest holders of stocks, are now required to publicly report how they voted during the year," finally giving shareholders the means to hold financial institutions accountable as well (Bogle, 2011). By allowing this resolution, the SEC adopted NorthStar's postulation that seeking an advisory vote on electioneering contributions is a fundamental shareholder right. The resolution also represented a significant social policy issue of concern to shareholders since it addressed issues outside the ordinary business of the company, was clearly defined, and gave shareholders a vote on preauthorization – a right extending beyond mere disclosure of activities already performed.

The vote on the Home Depot shareholder resolution was defeated on June 9, 2011, however, under SEC rules, since the vote to adopt the resolution of shareholder preauthorization of corporate political spending exceeded more than 3% of the ballots cast, it could be resubmitted for adoption the following year. Additionally, with the backing of the SEC, similar shareholder resolutions aimed to promote full transparency and shareholder input are currently being considered by Citigroup, I.B.M., Charles Schwab, Prudential, and JPMorgan Chase (Bogle, 2011).

## **The Shareholder Derivative Lawsuit**

The most valuable tool available to the shareholder in protecting the interests of the corporation against unpopular and potentially damaging decisions exercised by upper-level management has historically been the shareholder derivative lawsuit. While informed, yet ultimately detrimental decisions of corporate agents already receive protection under the business judgment rule from shareholder challenges (McGaughey, 2010), the derivative action still poses a significant deterrent to renegade decision-making. Especially since *Citizens United*, the aggrieved shareholder(s), on behalf of their corporation, may have stronger arguments when the acting managerial agents breach their fiduciary duties to the corporation proper by: (1) acting for on behalf of their own interests by amplifying the political ideations of the few with shareholder monies; and/or (2) using political expenditures to support politicians whose records are in direct contradiction to a company's Equal Employment Opportunity (EEO) policies, stated mission objectives, and values statements (DeNicola et al., 2010). There are, however, some stumbling blocks:

### *The Business Judgment Rule*

The authority of making political contributions with respect to both private company giving and publically-created corporate PACs has historically been relegated to the discretion of executive management, regardless of any negative impact to company perception and hence, to shareholder value. Historically, derivative lawsuits that are not settled and survive preliminary motions to dismiss are well protected under this rule due to the discretion incumbent on the decision-maker (McGaughey, 2010). McGaughey opines that courts tend not to favor derivative lawsuits mainly due to court submissiveness to the business judgment rule in regard to matters of corporate management. There is a judicial suspicion that derivative lawsuits are abused in order to unduly antagonize public corporations. As long as evidence is produced was honest, well-informed, made in good faith and with due care, and adherence to fiduciary responsibilities, the business judgment rule has typically offered protection: "There is no single blueprint that a board must follow to fulfill its duties."<sup>20</sup>

Using corporate treasury monies to advocate a political side, while already done overtly, is now in the public limelight. Sponsoring a NASCAR to advertise the company's services or products, purchasing box seats at a major league game to entertain corporate guests or reward employees, and wining and dining new suppliers are all discretionary decisions made by executive managers with the intent to stimulate



business.<sup>21</sup> In this context, an argument could be made by executive decision-makers seeking refuge under the business judgment rule that advocating certain political speech would ultimately benefit the shareholders by enforcing conservative philosophies that: (1) shift regulatory costs to the public and away from corporations; (2) affect the tax code so that corporations pay less; (3) lobby to the fullest extent to gain political favor; and (4) lobby to eliminate restrictions on lobbying (Fukuyama, 2011).

#### *Pre-Suit Demands*

Federal Rule of Civil Procedure 23 implies pre-litigation notification since the “derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce.” Shareholders, having the requisite standing (i.e., owning voting stock at the time of the alleged wrongdoing), must first attempt to effect internal redress before asking an adjudicator to weigh the actions of an administrative decision. Failure to do so can result in a successful motion to dismiss. Aggrieved shareholders must detail in their complaints all efforts undertaken to address the particular grievance to the board member or similarly-situated authority as well as relate the resulting consequences.<sup>22</sup> Although this pre-suit demand requirement is excused when the director either receives a personal benefit not shared by the shareholders or performs a risky action,<sup>23</sup> how can any demand be made if there is no knowledge about a potential wrongdoing in the first place? Such non-transparency could arguably create more of an atmosphere of distrust of management and the shareholder’s requirement to meet the pre-suit demand, impossible.

#### *Establishing a Factual Basis*

The factual basis requirement for initiating shareholder derivative litigation may be satisfied by demanding to review the company’s fiscal records.<sup>24</sup> However, even if the corporate records are offered for review, they may not disclose political expenditures, especially in the absence of prevailing law or internal rules. And, in the wake of *Citizens United*, with corporate treasury giving now deemed lawful, how can there be a factual basis established for an alleged wrongful action when the action is, in itself, lawful?

#### *Limited Remedies*

Assuming that the shareholder derivative action does survive demurrer and proceeds to judgment or ends in a settlement favorable to the complainant, *any* relief garnered with respect to this type of action, whether monetary or injunctive, all inures to the benefit of the corporation and not to the individual shareholders. Traditionally, shareholder derivative suits only reap limited governance changes and only rarely exact monetary awards (McGaughey, 2010).

#### *The Costs of Litigation*

Recently, an investigation conducted by the Center for Naval Analyses has shown that although approximately half of derivative actions are dismissed, for those that do succeed, plaintiffs’ attorney fees and awards as well as defense costs can be substantial and pose the most critical financial exposure for officers, directors, and insurers. Conversely, however, shareholder derivative lawsuits, especially if they result in protracted litigation, inevitably entail substantial costs and attorney fees. The substantial investment in time and expense effectively function as a deterrent to the initiation of these cases (Bradford, 2005). Thus, while the action purportedly benefits the corporation as a whole, the individual shareholders bear the financial burden disproportionately.

#### *Delaware Law and Chancery Courts*

As most publicly-owned corporations are incorporated under Delaware law, the majority of derivative actions have been historically adjudicated by the Delaware Chancery Court, deemed by many as “corporate-friendly.”<sup>25</sup> Because the shareholder complainant must already cope with a potentially impossible burden of proof before an alleged biased tribunal, the pressure to pursue out-of-court settlements is readily apparent. Unsurprisingly, those cases resulting in monetary settlements have

averaged only a few million dollars. Moreover, since successful derivative actions are sparse and yield *de minimus* monetary damages, plaintiffs' attorneys have been motivated to settle quickly and to collect their fees – usually from the defendant's insurer – which inevitably increases the company's insurance premiums in the future. As more attention is being directed to corporate accountability and shareholder democracy, however, settlement figures have increased to “the tens of millions of dollars” and have become “increasingly commonplace.”<sup>26</sup>

Invariably, despite all of the drawbacks noted *supra*, shareholder derivative actions will always constitute a concern for boards of directors and officers of corporations. Empirical evidence has even revealed a positive aspect for these cases: companies that endure derivative lawsuits ultimately improve in their type of corporate governance and there is a positive change in that board's characteristics (Ferris, Stephen P., Lawless, Robert M., & Makhiga, 2010). Perhaps the longevity and tenacity of the derivative action will effect greater consideration of shareholder input before corporate treasury monies are spent on politically-related matters.

### **The Shareholder Class Action Lawsuit**

Since victorious shareholders in derivative action lawsuits do not personally benefit, aggrieved shareholders may opt to pursue a separate class action or add it as a component to the derivative litigation. As corporate officials are agents of the corporation and the corporation is represented by the shareholders, the nature of the shareholder's complaint in a class action suit is premised on managerial breach of fiduciary duty. Shareholders of corporations are ensured particular rights, both implied and statutorily regulated. These include the right to vote on corporate matters not delegated to management, to elect and remove corporate officials, to appoint those persons who advance their values, and to demand dividends in years of fiscal prosperity (DeNicola et al., 2010).

### **Federal and State Legislative Protections**

*Citizens United* ushered in a new, unmonitored wave of anonymity in corporate political spending at a time when public pressure for greater transparency and accountability by those acting on behalf of the corporate entity is increasing. Politically-related advertisements, funded by super-PACs and other similar organizations, need not be endorsed or approved by the candidate – in fact, collusion between the organization and the candidate is prohibited. As the dissemination of information is now instantaneous and widespread through private, public, and social media, demand that corporations be more accountable for what their representatives do “outside the workplace” is at an unprecedented level.<sup>27</sup> In essence, a new shroud of secrecy has collided with a global call of accountability. So how have legislatures responded?

#### *Disclosure Laws*

Company reputation, and therefore shareholder value, is closely predicated on maintenance and adherence to the business's stated values. Mandatory disclosure of political spending is not a novel trend and would be a natural progression of transparency, advancing from issues of executive pay to prospective mergers and acquisitions and more currently, to political expenditures. By January 2010, at least 38 states and the federal government required disclosures relating to electioneering communications. To skirt these requirements, donors often funnel money through a 501 (c) (3) non-profit or a 527 organization, delay posting donor lists, or contribute through a limited liability company. According to the Center for Political Accountability, currently only eighty-eight companies in the Fortune 500 voluntarily disclose electioneering contributions while all Fortune 500 companies are subject to a legal duty to disclose PAC contributions. If a company's internal policies do not allow its shareholders an informed investment choice by revealing the extent and nature of its political expenditures, are there any external measures either in place or proposed which would adequately inform the shareholder of its corporate activities?

*Disclose Act of 2010 (Democracy Is Strengthened by Casting Light On Spending in Elections)*<sup>28</sup>

This proposed legislation, which would have required the disclosure of the identification of a donor contributing more than \$1,000 to the purchase of a political ad, passed Congress but only garnered 59 votes in the Senate, falling one vote short of defeating a filibuster. The bill would have required that “any solicitation of a proxy, consent, or authorization with respect to any security of an issuer: (1) describe the specific nature and total amount of expenditures proposed for political activities for the forthcoming fiscal year; and (2) provide for a separate shareholder vote to authorize such proposed expenditures.” If a company is not in compliance of these disclosure and preauthorization rules, it risks its NASDAQ listing. This proposed legislation would additionally provide for a mandatory shareholder vote in the corporation’s bylaws: “The corporate bylaws of an issuer shall expressly provide for a vote of the directors of the issuer on any individual expenditure for political activities (as such term is defined in section 14C (d)(1)) in excess of \$50,000.”

*Disclose Act of 2012*

In February, 2012, a similar version of the original act was introduced which would require any organization that spends \$10,000 or more in any election cycle to file a report with the FEC within 24 hours. It would also require that any organizational leader posting an ad on even television or radio to state that he or she approves the message (Dolan, 2012).

*State Disclosure Acts*

Since 2002, 17 states had already adopted regulations concerning electioneering communications. Unfortunately, many of these disclosure laws have failed to keep pace with the changing structure of modern political campaigns, still attributing election spending solely to candidates and political parties while overlooking the growing presence of outside groups that wish to influence political outcomes: “Many states have not adapted to the many ways political spenders spend. Some states lack a clear definition of independent expenditures or do not require reporting of independent expenditures. ... [I]n approximately half of the states, the number of entities that could potentially fund future political ads has jumped significantly, while transparency is on the wane” (Torres-Spelliscy, 2011).

While individual states are preempted from prohibiting political speech, states may pass or maintain disclosure laws designed to provide the electorate with information regarding contributors. As of October 2010, thirty-four states required disclosure for independent expenditures. North Carolina’s laws require disclosure for “candidate-specific communications” while Arizona and Utah impose disclosure requirements specific to independent corporate expenditures. Conversely, Hawaii and Vermont require disclosure for electioneering communications, but not for independent corporate expenditures” (Winik, 2010).

Many state disclosure laws have withstood judicial scrutiny. Nearly two years after *Citizens United*, the U.S. Ninth Circuit Court of Appeals ruled against *Family PAC*, a self-described pro-family, anti-tax political action committee, holding that all PACs created or doing business within the State of Washington had to conform to that state’s election laws which required disclosure of the names and addresses for all persons contributing over \$25, and if more than \$100, their occupations and employers as well.<sup>29</sup> On January 31, 2012, the U.S. First Circuit Court of Appeals held that the State of Maine’s disclosure laws, designed to ensure an informed electorate, did not violate First Amendment free speech rights and therefore, complainant’s attempts to keep its donor list secret was prohibited.<sup>30</sup> Although states have successfully championed the informed electorate cause, the Delaware legislature has gone a step further: “The standard (under Delaware corporate law) requires a unanimous shareholder vote to ratify a gift of corporate assets other than for charitable purposes” (8 Del. Code §220).

*Shareholder Protection Act*

First introduced in 2010 to amend the Securities and Exchange Act of 1934, this proposed piece of legislation was designed to require that any solicitation of a proxy, consent, or authorization with respect to any issuer’s security: (1) describe the specific nature and total amount of expenditures proposed for

political activities for the forthcoming fiscal year; and (2) provide for a separate, shareholder vote to authorize such proposed expenditures. These shareholder protections would be imbedded in the corporate bylaws of an issuing company. Noteworthy are the specific findings associated with this proposed act which emphasize the need for this protection: “Historically, shareholders have not had a way to know, or to influence, the political activities of corporations they own. Shareholders and the public have a right to know how corporations are spending their funds to make political contributions or expenditures benefitting candidates, political parties, and political causes.” Furthermore, a violation of the proposed Act’s safeguards would be considered a breach of fiduciary duty by the company’s officers and directors, making them jointly and severally liable to the affected shareholders at the time of the breach for three times the amount of the unauthorized expenditure. Although the bill failed to garner the necessary support of Congress in 2010, it was reintroduced in July 13, 2011, and at the time of this writing, is currently buried in Congressional subcommittees.

### **Federal Election Commission Disclosure Rules**

Despite striking that portion of the Bi-Partisan Campaign Reform related to the identity of the speaker, the Court in *Citizens United* did uphold the requirement of disclosures by sponsors of political ads. The FEC still requires that all individuals and entities must file informational or “disclosure reports” in connection with two types of advertising: (1) “express advocacy,” i.e., ads that expressly advocate the election of a federal candidate, and (2) “electioneering communications,” i.e., broadcast ads that mention a federal candidate and run within 30 days of a primary election and 60 days of a general election (Coates & Lincoln, 2012). However, the FEC only demands disclosures of receipts and disbursements, not the identities of the original donors.

### **Securities and Exchange Commission**

As proposed federal disclosure legislation appears hopelessly stalled in Congress and no Executive Order has been issued mandating either donor disclosure or shareholder pre-approval of corporate treasury political contributions, relief may be sought through the less odious process of agency rule-making. There is historical precedent for agency relief. When the stock market crashed in October 1929, public confidence in the markets plummeted, ultimately ushering in the Great Depression. To help assuage investor fear and stimulate market re-entry, Congress passed the Securities Act of 1933 which ultimately resulted in investor protections through the regulation of Initial Public Offerings (IPOs) of new publicly-traded companies.

In the following year, Congress passed the Securities Exchange Act which mandated that the activities of all publicly-traded corporations be disclosed in the form of public reports.<sup>31</sup> The primary purposes of these laws were twofold: (1) To ensure that companies publicly offering securities for investment inform the public about all facets of their businesses, the type of securities they are selling, and the risks involved in investing; and (2) To ensure that brokers, dealers, and exchanges that sell and trade securities treat investors equitably. Ostensibly, financial markets depend on the availability of accurate information regarding corporate strategy, performance, and policies to give investors the knowledge required to make rational investment decisions. These reporting requirements are the primary way to timely disseminate information to shareholders to allow them to monitor, and, if warranted, challenge decisions made by the corporation’s agents on behalf of the corporation.

Currently, there is a pending SEC rule which would require public companies to disclose the nature and amount of political contributions (Eggen & Farnam, 2012). In support of this rule, the SEC has posted comments issued by the International Corporate Governance Network, an organization comprised of institutional investors representing in excess of \$18 trillion in assets collectively (Eggen & Farnam, 2012, p. 43). This SEC rule would not, however, apply to private companies.

### **Federal Communication Commission**

The *Citizens United* ruling, which jettisoned limitations on corporate political-endorsement spending, is giving new hope to advocates of greater transparency and unimpeded communication on broadband

Internet due to “net neutrality” rules promulgated by the U.S. Federal Communication Commission in 2011. “Net neutrality” refers to a principle that prohibits restrictions imposed by Internet Service Providers (ISPs) which obstruct a consumer’s open access to information posted on wired ISP networks. The FCC’s net neutrality regulation “interjects the government into private decisions about speech” ... even though a “central purpose of the First Amendment is to prevent the government from making just such choices about private speech” (Salway, 2011). Net neutrality rules preserve the public’s ability to access legal websites and applications on the Web without discrimination to content, allowing free and open communication and prohibiting privileged access by businesses, social organizations, or political associations.

## **Constitutional Protections**

### *The First Amendment*

Sabina Thaler (2011) terms the act of corporate executives using shareholders’ money to fund their own personal political interests without prior disclosure or approval by the shareholders is “Forced Speech.” The “Forced Speech Doctrine” explains that the First Amendment right to free speech champions freedom *from* compulsory speech as well (Thaler, 2011). If the original intention of the First Amendment to protect speech was to ensure that everyday citizens could be heard, and not silenced by powerful elites, then the same right used by the high court in its *Citizens United* decision might be used by disenfranchised shareholders who protest the distortion of their speech by those using their money to amplify other opinions.

### *The Fourteenth Amendment*

Added in 1868 primarily to ensure that the post-Civil War states would not abridge rights of newly-freed slaves “of due process and the right to equal protection under the laws of life, liberty, and the pursuit of happiness,” there certainly could be an argument that corporate treasury spending without shareholder authorization would be tantamount to depriving investors of their property without effective recourse.<sup>32</sup> In fact, in his dissent, Justice Stevens even termed this unauthorized use as a type of “implicit tax.” When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions (Winkler, 1998).

## **Internal Changes to Corporate Governance**

Where there is a desire by both the shareholders and the executive managers to avoid political side-taking and to maintain a neutral public image, several measures could be undertaken which would promote greater transparency and accountability while generating mutual trust between stakeholders and management. Such measures include:

### *Greater Shareholder Management*

Disgruntled shareholders can always try persuasive tactics of private meetings before the annual meeting of their peers to propose changes in corporate governance. One of the greatest deterrents, however, is the fact that shareholders are generally represented by financial fund managers: “Our nation’s money managers now hold 70 percent of all shares of American corporations, compared to a mere 8 percent in the 1950s, giving them absolute voting control. To be sure, these money-management agents are duty-bound to represent their principals’ mutual-fund shareholders, for instance – but have not always honored this responsibility” (Bogle, 2011).

### *Greater Stakeholder Involvement*

While shareholders have traditionally relied upon governmental regulations to monitor and curb corporate wrongdoing, many of their own corporations are determined to overturn these same legislative protections. Corporate executives engage in quid pro quo arrangements with politicians who pass

legislation while companies give money to their campaigns (Yosifon, 2011). Aggrieved shareholders lack the ability to uphold the principle of shareholder primacy on their own. In an attempt to safeguard their interests, shareholders may elect to partner with other corporate stakeholders with similar interests (Bainbridge, 2008). Power in numbers may prove to be an effective method to exact greater accountability and transparency from corporate managers: “[F]irms are not managed in the exclusive interests of shareholders, but instead operate under a multi-stakeholder regime which requires directors to attend directly to the interests of multiple stakeholders at the level of firm governance” (Yosifon, p. 1199).

#### *Increased Vestment*

In order to better defend the best interests of the corporation with more at personal risk, key directors and executive officers should be remunerated, as a substantial portion of their compensation, in company stock. Until there is full disclosure and preauthorization of political expenditures from company treasuries or the corporate entity pledges not to interfere in political matters, this proposal of greater managerial vestment may increasingly gain investor support.

#### *Amend By-Laws*

By convincing and coalescing other affiliates and peers of the corporation, the officers may revise the company’s bylaws to provide for pre-approval of corporate political expenditures and full disclosure of the identities of those affiliates who authorized each particular expenditure.

#### **Shareholder Activism**

While not impossible, shareholders may endeavor to overturn *Citizens United*. Of course, only the Supreme Court can overturn its own decisions, but with a narrow split ruling accompanied by a lengthy and comprehensive dissenting opinion, increasing public pressure, and an ever-changing judicial composition, rescission is conceivable. Without this judicial action, however, Congress can only pass laws (e.g., donor disclosure) to address the negative ramifications of a contentious high court opinion or strive to amend the Constitution. An Executive Order limiting the decision’s impact, while possible, would more likely be deemed overreaching and invasive of the U.S. system of checks and balances. Rather, it might be less complicated of a process for disgruntled shareholders to advertise their dissociation from the political spending of their corporations, emphasizing that the views subsidized do not reflect their own but merely amplify the personal speech of an exclusive group of executive decision-makers.

#### **Shareholder Divestiture**

Often referred to as the “Wall Street Rule,” some argue that if certain shareholders object to corporate spending they can certainly elect to sell their holdings. Thus, if and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they should simply sell or trade and exit the company under scrutiny. This solution is illusory as the injury to the shareholders’ expressive rights has already occurred. These shareholders are now being deprived of their original desire to keep that company’s stock in their individual portfolios for any number of economic reasons. By divesting, they may incur a capital gains tax or other penalty from the sale of their shares and perhaps unwittingly changing their pension plans.

#### **CONCLUSION**

Corporate political spending is a preliminary stake to meaningful shareholder suffrage. This is not tantamount to micro-managing the company; rather, it is an attempt to make financial support of campaigns and candidates congruous to the companies’ policies and protective of investors’ interests. A divergence inevitably generates stakeholder backlash and ultimately a lessening of company value. Unquestionably, to be an informed electorate, affected parties must have access to information. In

*Citizens United*, eight Justices assumed that corporate democracy would enable shareholders to ensure alignment of political interests without simply representing executive interests (Kwak, 2012). That has not come to fruition. Instead, *Citizens United* undercut shareholder value and primacy. Until laws are passed, rules promulgated, or internal measures adopted advocating full disclosure and shareholder preauthorization of politically-related expenditures from corporate treasuries, shareholders will have to resort to available tools of redress, each with their own distinct drawbacks. Thus, unless or until such laws or moral dictates are in force to protect shareholder value and ensure true shareholder democracy, corporations are best advised, as American economist Robert Reich espouses, to voluntarily pass on their new powers under *Citizens United*, avoid unforeseen and often serious consequences of clandestine political spending of corporate treasury funds, and simply remain neutral (Reich, 1998).

## ENDNOTES

<sup>1</sup>The term “political action committee” (PAC) refers to two distinct types of entities required to be registered with the Federal Election Commission (FEC): (1) those with separate segregated funds (SSFs) and (2) non-connected committees. SSFs are political committees established and administered by corporations, labor and/or trade unions, and membership organizations specifically designed to solicit contributions directly from the entity’s employees and other individuals associated with or connected to the sponsoring organization. These voluntary contributions are held in separate, non-treasury funds, enabling political financial participation in federal campaigns. Longley, Robert (2012). About PACs - Political Action Committees, *About.com*, Available at <http://usgovinfo.about.com/od/thepoliticalsystem/a/aboutpacs.htm>. Without using any shareholder money from the corporation’s general treasury, PACs may donate \$5,000 to a campaign committee each primary, special, or general election and contribute up to \$15,000 annually to any national party committee. PACs may receive up to \$5,000 from any one individual, another PAC, or a party committee each calendar year. What is a PAC? *Center for Responsive Politics*. Available at <http://www.opensecrets.org/pacs/pacfaq.php>.

<sup>2</sup> The Super-PAC prominently surfaced after the *Citizens United* ruling, however unlike PACs, there are no longer federal limitations on politically-related expenditures nor prohibitions on tapping into the company’s treasury funds for these purposes.

<sup>3</sup> In 1985, the Supreme Court in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, had already eliminated spending limitations in election campaigns, but still protected general treasury funds from being used in this manner. While *Citizens United* eliminated restrictions with respect to independent corporate expenditures, it upheld the BCRA’s disclaimer and disclosure requirements, which, as discussed *infra*, offer unwary shareholders inadequate protection.

<sup>4</sup> *Citizens United* invalidated sections of the Bi-Partisan Campaign Reform Act of 2002 (BCRA), more commonly known as the McCain-Feingold Act. Section 203 of the BCRA (codified at 2 U.S.C. 441(b)) specifically, prohibited corporations and unions from using their general treasury funds to make politically-related expenditures on “electioneering communications” – defined as political advertisements broadcasted within 30 days of a primary election and 60 days of a general election – or for speech that expressly advocated either the victory or defeat of a particular candidate. Under 2 U.S.C. §441(b)(2), the use of PAC monies could be used for these purposes. Direct contributions to candidates and campaigns, however, were still banned under *Citizens United*.

<sup>5</sup> E.g., *McConnell v. Federal Election Comm’n.*, 540 U. S. 93 (2003) (upholding limits on electioneering communications in a facial challenge, partially overturned by *Citizens United*) and *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990) (banning political speech based on the speaker’s corporate identity, overturned by *Citizens United*).

<sup>6</sup> See the *Federal Corrupt Practices Act of 1925* (FCPA), codified at 2 U.S.C. §241 and amended by the *Federal Election Campaign Act of 1971* (FECA), Pub. L. No. 92-220, §2, 85 Stat. 795.

<sup>7</sup> Pub. L. No. 107-155, §§201, 203(c)(2); codified at 2 U.S.C. §§434 (f)(3)(A), 441b(b)(2) (2006).

<sup>8</sup> Actually it is arguable the corporate entity is more powerful than a “natural” person due to its long-recognized limited liability protections and perpetual existence. With the post-Civil War ratification of the Fourteenth Amendment to the Constitution granting equal protection of the laws to all “persons,” the purpose of which was intended to elevate the status of newly-freed slaves, corporations quickly asserted their standing as “legal persons.” As such, the corporation acquired the ability to possess and sell property and to sue or be sued. These rights were first acknowledged by the U.S. Supreme Court in *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), in a headnote: “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 the opinion that it does.”

<sup>9</sup>A Guide to the Current Rules for Federal Elections, *Campaign Legal Center*. Available at: [http://www.campaignlegalcenter.org/index.php?option=com\\_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59](http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59).

<sup>10</sup>501(c)(3)s are nonprofit organizations that are characterized under a certain tax designation. Donations to 501(c)(3)s are tax deductible under the Internal Revenue Code. While 501(c)(3)s are not allowed to engage directly in election influencing, they are permitted to engage in public education, charity, and research – areas which often involve direct participation in limited lobbying expenditures and political advocacy. 501(c)(4)s are formed for social advocacy purposes and there are no budgetary restrictions on politically-related expenditures. Donations to 501(c)(4) organizations are not tax deductible. Available at: [www.irs.gov/pub/irs-tege/eotopic03.pdf](http://www.irs.gov/pub/irs-tege/eotopic03.pdf).

<sup>11</sup>A group can create a 501(c)(3) organization to conduct its research, public education, and policy work while it can maintain

Use a 501(c)(4) to spearhead its lobbying efforts and run its election ads as a non-primary activity. The 501(c)(4) can provide a subterfuge for those donors who do not want to be publicly associated with the group’s election advocacy. A Guide to the Current Rules for Federal Elections, *Campaign Legal Center*. Available at [http://www.campaignlegalcenter.org/index.php?option=com\\_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59](http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid=48%3Amain&Itemid=59).

<sup>12</sup>A group can also establish a 527 organization if it desires to engage in unlimited independent spending on election ads. If the 527’s primary purpose concerns the election of a federal candidate, then it must register with the FEC as a federal political committee. However, even if the 527 registers as a political committee, if it engages only in independent spending (i.e., a Super-PAC), it no longer has to comply with the federal contribution restrictions. 527s not regulated by the FEC can raise unlimited sums of money and spend without limitation as long as their advertisements are considered “issue ads”—as opposed to communications directly advising the public on how to vote or endorsing a particular candidate. *Id.*

<sup>13</sup>*Dartmouth College v. Woodward*, 17 U.S. 517, 636 (1819).

<sup>14</sup>588 U.S. 1, 77 (2010).

<sup>15</sup>*Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010).

<sup>16</sup> At the time of the decision, there was an absence of federal laws and regulations requiring shareholder pre-approval of such expenditures and furthermore, the requirement of disclosure of each original donor was ambiguous. After registering with the FEC, PACs were required to file regular reports disclosing dates and amounts of receipts and disbursements while individuals and entities were obligated to register disclosure reports in connection with express advocacy advertising and electioneering communications. See [http://www.fec.gov/ans/answers\\_pac.shtml](http://www.fec.gov/ans/answers_pac.shtml).

<sup>17</sup> See S. J. Res. 1: Marriage Protection Amendment: <http://www.govtrack.us/congress/bill.xpd?bill=sj109-1> and S. J. Res. 43: Marriage Protection Amendment: <http://www.govtrack.us/congress/bill.xpd?bill=sj110-43>.

<sup>18</sup> See <http://politics.nytimes.com/congress/votes/111/senate/2/281/csv> and <http://politics.nytimes.com/congress/votes/111/house/2/638/csv>.

<sup>19</sup> See <http://politics.nytimes.com/congress/votes/111/senate/2/281/csv> and <http://politics.nytimes.com/congress/votes/111/house/2/638/csv>.

<sup>20</sup> *Lyondell Chemical Company v. Ryan* (Del. 2009). “Absent an abuse of discretion, that judgment will be respected by the courts.” *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

<sup>21</sup> Examples of decisions protected by the business judgment rule include *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. 1968) (shareholder action asserting corporate mismanagement of the Chicago Cubs’ major league baseball stadium facilities); *Grobow v. Perot*, 539 A.2d 180 (Del. 1988) (upheld premium purchase buy-out by General Motors of majority shareholder Ross Perot); and *Brehm v. Eisner*, 746 A. 2d 244 (Del. 2000) (director for Disney who was let go after 14 months of work received approximately \$150 million in compensation).

<sup>22</sup> *Mona v. Mona Elec. Group, Inc.*, 934 A.2d 450, 466 (Md. 2007).

<sup>23</sup> *Baca v. Crown and Insight Enterprises, Inc.* C.A. No. 5105-VCL (Del. Ct. of Chancery, 2010).

<sup>24</sup> See *In re Consumers Power Co. Derivative Litig.*, 132 F.R.D. 455, 465 (E.D. Mich. 1990) (shareholders possess less corporate financial information than directors because shareholders have less access to corporate books and records).

<sup>25</sup> According to the Delaware Counsel Group LLP in 2010, nearly one-million business entities currently recognize Delaware as their corporate home, representing 64 percent of the Fortune 500 companies and half of all United States firms traded on the New York Stock Exchange and NASDAQ. In addition, over 90 percent of United States public offerings in 2007 were of companies incorporated in Delaware.” *The Complete Package: Why You Should*



Choose to Incorporate in Delaware. Available at: <http://www.delawarecounselgroup.com/resources/why-do-business-in-delaware>.

<sup>26</sup>See Recent Developments in Shareholder Derivative Suits (2009). *Zurich American Insurance Company*. Available at: [https://docs.google.com/viewer?a=v&q=cache:R4y-FBTP7MwJ:zurichhpdelivered.com/internet/zna/SiteCollectionDocuments/en/media/whitepapers/DOCold5RecentDevinDerivSuits082609.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESgAJyUYBkaG5zLukUEXHx8XFJxvAFozP7avFMr50vC5fpNd6XO2xZqPYycMkkP6aBnWEpjZvwifkmalR88CzEg8iphRmydnU\\_RAsYNVJhHH30W0eBQs3inLEoWovD-3jnB7aPn7&sig=AHIEtbQvmIaj-GczSbz\\_t192PQAoUsfuEg&pli=1](https://docs.google.com/viewer?a=v&q=cache:R4y-FBTP7MwJ:zurichhpdelivered.com/internet/zna/SiteCollectionDocuments/en/media/whitepapers/DOCold5RecentDevinDerivSuits082609.pdf+&hl=en&gl=us&pid=bl&srcid=ADGEESgAJyUYBkaG5zLukUEXHx8XFJxvAFozP7avFMr50vC5fpNd6XO2xZqPYycMkkP6aBnWEpjZvwifkmalR88CzEg8iphRmydnU_RAsYNVJhHH30W0eBQs3inLEoWovD-3jnB7aPn7&sig=AHIEtbQvmIaj-GczSbz_t192PQAoUsfuEg&pli=1).

<sup>27</sup>Henning, Graham K. (2011). Corporation and Polis. *Journal of Business Ethics*, 103:289-303 at 296.

<sup>28</sup>Shareholder Protection Act of 2010. *GovTrack.us*. Available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-4790>.

Proposed to amend the Federal Election Campaign Act of 1971 as H.R. 5175 and S.3628; introduced in the U.S. House of Representatives on April 29, 2010 and in the U.S. Senate on July 21, 2010.

<sup>29</sup>*Family PAC v. McKenna*, 664 F.3d 296 (9<sup>th</sup> Cir. 2011).

<sup>30</sup>*National Organization for Marriage, Inc. v. McKee*, 649 F.3d 34 (1st Cir. 2012), ruling that an entity or individual's solicitations to support a campaign or to pass or defeat a ballot measure would clearly fall within Maine's reporting and disclosure requirements.

<sup>31</sup>E.g., 10(k) (annual reports); 10(q) (quarterly reports); and 8(k) (reports which alert the public as to unusual events affecting the company such as mergers, bankruptcies, and takeovers) – all designed to provide disclosure of corporate activities to the investor and ensure an informed public.

<sup>32</sup>See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) which provides a similar analogy. In *Abood*, nonunion public school teachers challenged an agreement between the State of Michigan and the teachers' union requiring all teachers to pay a service fee. The teachers suspected that the union had been using those fees to fund certain nonconforming political interests in contravention to their First and Fourteenth Amendment rights. Since these political contributions did not prove to be relevant to the union's responsibilities, "the court held that the States could not require an individual payer to have her funds used to advance these ideas." This same rationale could arguably apply to the unauthorized use of shareholder property.

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