Goodwill and the Excesses of Corporate Political Spending

David Rosenberg
Goodwill and the Excesses of Corporate Political Spending

David Rosenberg*

I. INTRODUCTION

Between 2010 and 2014, the Supreme Court of the United States handed down two important decisions that expanded the rights of corporations to engage in activities rooted in First Amendment freedoms. Its decision in Citizens United held that, as an exercise of free speech, corporations may make unlimited contributions to support or oppose candidates in political elections. In the more recent Hobby Lobby, the Court held that the Religious Freedom Restoration Act allows closely held corporations to opt out of certain provisions of the Affordable Care Act in order to protect their rights to the exercise of religion free from substantial government burden. Taken together, these two decisions extend the rights of for-profit corporations to engage in fundamental freedoms traditionally understood to belong only to individuals or groups of people such as churches and political organizations. The extension of the protections of these freedoms to for-profit corporations forces us to examine...
more closely the ways that corporate leaders decide to exercise these rights and to understand better how the law governs the rights of other stakeholders who are affected by their decisions.4

The decision in Citizens United permits corporations to provide unlimited funding to organizations that are purportedly independent of the candidates themselves. This change in law quickly gave rise to the “super PACs” that were so prominent in the 2012 presidential campaign and other election contests.5 Now that corporate political speech is understood to be constitutionally protected, regulation of such speech must come from the body of law that controls how companies decide to speak in the first place: corporate governance.6 Subject to the law of the state of incorporation,7 corporations are a complex set of relationships among shareholders, managers and a board of directors.8 The specific rules of these relationships arise from the articles of incorporation of each business as well as the default

4. Hobby Lobby applies only to closely held corporations and its holding will, in the meantime, have little effect on the way large publicly held corporations do business. However, the majority opinion in that case specifically addresses the question of what it means for a corporation with many disconnected shareholders to practice religion in the first place. Hobby Lobby, 134 S.Ct. at 2768–70. The court’s skepticism regarding this prospect sheds important light on the way it views corporate political spending. See infra notes 22 and accompanying text.

5. Super PACs are political action committees that may raise unlimited amounts of money from corporations and other donors for use in their own independent campaign advertising. The super PACs have wide discretion in using their funds but may not donate directly to a candidate’s campaign treasury. Unlike with some other expenditures, neither campaign finance law nor state corporate law obligate corporate leaders to disclose to shareholders, to the public, or to regulators the details of much of their political spending. CIARA TORRES-SPELLISCY, BRENNA CENTER FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 9–13 (2010). A variety of other kinds of political organizations exist to which corporations may also make unlimited donations with varying degrees of secrecy and tax-related consequences. However, this article will focus on the decision making that goes into a corporate donation to a super PAC.


7. Delaware has long been the most popular state for incorporation of large publicly held corporations; further, for legal scholars, its courts have provided much of the most insightful analysis and discourse on corporate governance.

8. Increasingly, some legal scholars would add other “stakeholders” (employees, customers, communities) to the mix of parties who have or are owed duties by shareholders, directors and corporations themselves. Mark J. Roe, Can Culture Constrain the Economic Model of Corporate Law?, 69 U. CHI. L. REV. 1251, 1251–52 (2002). For a provocative discussion of the subject, see Virginia Harper Ho, Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide, 36 J. CORP. L. 59, 71–72 (2010). In the meantime, however, corporate law still focuses almost exclusively on the duties owed by and to shareholders, managers and directors.
rules under state corporate law. For the purposes of this article, the most important aspect of that law is the fiduciary duties imposed on the directors and managers of the corporation. If these duties are breached, shareholders may sue to enforce them through a shareholder derivative lawsuit—subject, of course, to the severe limitations on such lawsuits provided by the business judgment rule.

The business judgment rule allows corporate directors extremely broad discretion to make decisions on behalf of the corporation without fear of personal liability even when those decisions result in losses. Courts have justified the rule on the grounds that, although it allows corporations to frequently fall short of “best practices,” it maximizes profits for shareholders by allowing business leaders to take the kinds of risks that lead to new ideas and innovations.9 The rule plainly protects the rights of directors to engage in charitable giving10 and other conduct motivated by “corporate social responsibility”11 (hereinafter “CSR”) for two main reasons. First, such action is often perceived as designed to promote profitability in the long run. More importantly, allowing courts to second-guess such action would result in excessive judicial intrusion into corporate decision-making and reduce the kind of risk-taking that results in long-term profits.12

When a corporation makes contributions to political campaigns, it often does so because it believes that such donations directly increase profits by influencing the way the government regulates the company’s business. These kinds of decisions to engage in corporate political spending are likely to survive any judicial review. But some political outlays might not carry with them an obvious intention to

---

10. Corporate law statutes in many states explicitly allow this as well. See, e.g., 8 DEL. CODE ANN. § 229 (2000).
11. Defining “corporate social responsibility” is a tricky proposition. It means something like a decision by a corporation that benefits stakeholders other than the shareholders and arises from no obvious profit-maximizing motive.
influence regulation. Rather, they might appear to be more like the kind of charitable giving (perhaps justified as “community outreach” or “goodwill”) that receives business judgment rule protection although it does not have a clear relationship to creation of profit. Finally, some donations might be neither of these; rather, they might be designed to enhance the interests of the decision-makers themselves or the managerial class to which they belong.  

Of course, the business judgment rule allows corporate leaders to make decisions on behalf of the corporation even when those decisions provide no obvious intended benefit to the company’s bottom line and indeed even when those decisions turn out to hurt the corporation in the long run. Under current law, this broad discretion applies to campaign spending as much as to any other decision to pursue risky business opportunities, spend corporate funds, or to associate the corporation’s name with a political or community cause. Further, corporate law provides no requirement that corporations disclose information to the shareholders regarding the company’s participation in political activity. Nor do shareholders have the right to vote on the specific question of how the corporation spends dollars in the political arena.

Where political spending does not violate a duty owed to the shareholders, shielding directors from liability is plainly appropriate. Indeed, many early responses to *Citizens United* take it for granted


14. Id. at 10.

15. As this article demonstrates, American corporate law takes a decidedly hands-off approach to corporate political spending. Id. In contrast, British law, among other jurisdictions, now contains both disclosure requirements for large donations and shareholder consent for political donation resolutions. Id. at 16.

16. We will leave for another day a discussion of the *morality and ethics* of corporations influencing elections in order to help write the laws that will regulate the corporations themselves. Jill Fisch addresses the question in *The Bad Man Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1610 (2006). Fisch cites Robert Reich’s belief that “corporations have a social responsibility to refrain from politics,” because they are amoral entities in the first place constrained only by laws that they are compelled to follow. Id. (citing Robert B. Reich, *The Meaning of Corporate Social Responsibility*, 40 CAL. MGMT. & 10 (1998)).
that, under existing law, the broad protections offered by the business judgment rule preclude the possibility of limiting the decision’s damage unless lawmakers pass legislation that provide “special rules to govern who may make political speech decisions on behalf of corporations.” 17 This article will argue, however, that such lawmakers is not necessary because the business judgment rule should not be interpreted to protect corporate directors’ decisions to donate to political campaigns in the same way that it protects ordinary corporate charitable contributions or decisions based on CSR. The rule protects donations in the public interest even if they are profit-sacrificing because courts are not in a position to judge whether or not a particular act of giving is designed to maximize profits or is simply an acceptable act of charity with no obvious financial benefit to the corporation itself. 18 We ought to tolerate the latter both because we do not want courts evaluating a corporation’s strategy to create goodwill in the community and because we have no reason to discourage true acts of altruism by American businesses. An act of political giving, however, seems to be based on only two possible motivations, one of which we should not tolerate. First, it might have a pure business purpose by helping to elect politicians whose policies will be favorable to the corporation. Second, it might reflect the self-interest of the corporate directors and officers. This self-interest might take the form of supporting certain politicians because they reflect the decision-makers’ own views or because the decision-makers stand to gain from the politicians’ policies. Alternatively, the self-interest might arise from the director or manager’s hope of receiving a personal benefit in a quid pro quo for their support. 19

17. Lucian A. Bebchuk & Robert J. Jackson, Jr., Corporate Political Speech: Who Decides?, 124 HARV. L. REV. 83, 84 (2010). The authors insist at the outset that “political speech decisions are substantially different from and should not be subject to the same rules as ordinary business decisions.” Id.
18. Elhaug, supra note 12, at 739.
19. As Jackson and Bebchuk wrote, “Political spending might often have consequences that are exogenous to the firm’s performance and directors’ and executives’ preferences with respect to such spending might be influenced by these consequences.” Bebchuk & Jackson, supra note 17, at 90. They propose changes to corporate law to allow shareholders to pass binding resolutions on political spending, among other things. Id. at 100. My solution differs markedly from theirs however because I propose that existing corporate law, if applied correctly, should be sufficient to combat this kind of self-interested behavior.
Political donations do not seem to fit into a third category of pure philanthropy so often used to justify judicial resistance to reviewing charitable giving by corporations.20

Plainly self-interested acts of corporate political spending constitute disloyalty under existing law. Since much corporate political giving fits into this category, courts ought to be willing to review such activity and recognize it as falling outside the protections of the business judgment rule. Such scrutiny will produce two important benefits. It will prevent corporate leaders from exploiting their freedoms under Citizens United to enrich themselves or promote their own personal points of view at the shareholders’ expense. Further, it will remove legal acts of corporate political spending from the category of goodwill and charity in the public eye and focus more attention on their true purpose—for businesses to use their vast monetary resources to influence legislation and regulation in their own interests and against the public good.

II. INTERNAL DISTORTION: THE AGENCY PROBLEMS PRESENTED BY CORPORATE POLITICAL SPENDING

Increased corporate giving to super PACS presents a variety of problems in both American political and corporate life. As Larry Ribstein emphasized, an understanding of the implications of Citizens United requires that we distinguish between the “external distortion” and “internal distortion” brought about by corporate political spending.21 The former refers to the effects that the increased influence of corporations has had on public debate and the outcome of elections. While external distortion has plainly had an important role in recent political campaigns, the decision in Citizens United has settled the issue—corporations have a First Amendment right to pay for speech in the political arena. As such, responding to the effects of external distortion is a question of constitutional law, voting rights, and campaign finance regulation. Internal distortion refers to the extent to which a corporation’s spending presents agency problems

20. See infra notes 35, 54 and accompanying text.
21. Ribstein, supra note 6, at 1024 (citing Citizens United, 558 U.S. at 466).
within the corporation itself; for example, by allowing directors and managers to give money in ways that do not necessarily reflect the views of the shareholders themselves or that call into question their adherence to their fiduciary duties to the shareholders. Much of the discussion of internal distortion in the wake of *Citizens United* has focused on the ruling’s implications for the expressive rights of the shareholders. This paper will focus instead on the disjunction that arises when corporate leaders spend shareholder’s money on political causes in ways that might violate their fundamental fiduciary duties to the corporation. It will argue that a proper interpretation of current fiduciary law ought to call into question the legitimacy of much corporate political spending because it falls outside the bounds of the protection of the business judgment rule. Further, the consequent narrowing of the kinds of political spending that corporations can engage in will draw greater public attention to corporate political spending that benefits the business itself but harms other stakeholders. This will result in a greater public focus on proper corporate political spending and its consequences and allow shareholders, consumers, and others to make decisions with fuller knowledge about the nature of the companies in which they invest or with whom they do business.

A. IS CORPORATE POLITICAL SPENDING DIFFERENT FROM OTHER DECISIONS/EXPENDITURES?

Many kinds of corporate political contributions are not, in principal, necessarily different from other profit-motivated actions that shareholders disapprove of. For example, a corporation might

---

22. See, e.g., Bebchuk & Jackson, supra note 17, and Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 498–99 (2010). Another line of scholarship has focused on the relationship between political spending and firm value. See, e.g., John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMP. LEGAL STUDIES 657, 658–64 (2012). Such studies are certainly useful from the point of view of management and strategy, but they do not seem to have as much to say about the fiduciary duties of corporate leaders because, as discussed below, corporate law does not demand that they always pursue the most profitable course or even the course that they believe to be the most profitable. See infra notes 37, 45, 58, 81 and accompanying text.

follow a legal but environmentally harmful procedure because doing so seems to maximize profit.²³ Some shareholders may well disapprove of such action (even though its intent is profit-maximizing)²⁴ because they care more about preventing damage to the environment than they care about dividends or the trading price of their shares. The harm to shareholders is plain: as citizens, their environment (along with everyone else’s) is damaged and, as shareholders, they are associated with environmental destruction through their ownership of stock in that corporation.²⁵ Aggrieved shareholders have a few, largely ineffectual, remedies.²⁶ They might attempt to elect directors who will take environmental questions into account when formulating corporate policy or they might pursue

Responsibilities After Citizens United, 89 N.C. L. REV. 1197, 1228 (2011). Indeed, the Supreme Court itself recognized this in First National Bank of Boston v. Bellotti, pointing out that the appellant had failed to distinguish between political expenditures and other “controversial corporate decisions . . . made by management.” 435 U.S. 765, 794 n.34 (1978). Roger Coffin nicely frames the issues that inevitably arise from this: “Shareholder-directed reformers essentially posit the question— is corporate support of a federal candidate for office enough of a deviation from the corporate function to justify a change in the basic allocation of power between boards and shareholders itself?” Roger Coffin, A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks, 8 HASTINGS BUS. L.J. 103, 129 (2012).

²⁴ A more environmentally friendly alternative procedure might create positive PR that is nonetheless outweighed by its added expense.

²⁵ There is no doubt that polluting is often good for the bottom line for obvious reasons. Many advocates of CSR argue that corporations should “go green” because to do so maximizes long term profits, for example, by ensuring the continuing existence of the natural resources required to make certain products. While CSR advocates are certainly correct in many instances, these arguments belong to the study of management and strategy and not corporate governance.

²⁶ As Einer Elhauge points out, this problem is much less severe in corporations than in partnerships or sole proprietorships because corporate shareholders are less easily identified with a business’s conduct than are partners or sole proprietors. Elhauge, supra note 12, at 788. Other commentators have noted that corporate shareholders themselves likely “do not identify with the speech of the corporations they invest in.” Ribstein, supra note 6, at 1029. Ribstein goes on to say that the dissent in Citizens United notes that “corporate speech is often the expression of the firm’s executives or directors who actually decide what the corporation says.” Id. The Supreme Court decision in Hobby Lobby suggests that future courts will distinguish between closely held and publicly held corporations regarding the extent to which expressive activity is associated with the individual shareholders themselves. Hobby Lobby; 134 S.Ct. at 2774.

²⁷ Reza Dibadj puts it this way: “As corporate lawyers recognize, shareholders can only do three things to protect themselves: sell, vote, and sue.” Reza Dibadj, Citizens United as Corporate Law Narrative, 16 NEXUS: CHAP. J. L. & POL’Y 39, 49 (2011) (citing Robert B. Thompson, Delaware, the Feds, and the Stock Exchange: Challenges to the First State as First in Corporate Law, 29 Del. J. Corp. L. 779, 781 (2004)). My article largely addresses the third of the options that Dibadj suggests: shareholder lawsuits based on the directors’ breach of their fiduciary duties.
some kind of proxy-based collective shareholder action provided for in the by-laws of the corporation. Alternatively, in their capacities as private citizens, they might advocate for the election of government officials who will pass stricter environmental laws that would make the corporation’s behavior more expensive or illegal. Or, they can sell their shares.

When a corporation chooses to contribute to a super PAC that promotes views that a certain shareholder personally disagrees with, the effects are similar to when a corporation takes other kinds of actions that the shareholder opposes although they are intended to (and likely in fact do) benefit the corporation and the shareholder’s financial interests. For example, a corporation might donate to a super PAC that supports a candidate who opposes environmental regulations that are adverse to the corporation’s immediate or long-term interests. Alternatively, a corporation might donate to a super PAC that is largely disconnected from the interests of the corporation but which the directors and managers want to support in order to create “goodwill” for the corporation in the community. In either

28. The Citizens United decision depends in many ways on the factual accuracy of Justice Kennedy’s assertion that “There is, furthermore, little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’” Citizens United, 558 U.S. at 361 (citing Bellotti, 435 U.S. at 794 (2010)). Many of the most strident criticisms of the decision in Citizens United argue that the majority opinion mischaracterizes the ability of shareholders to influence corporate policy through exercise of their voting rights. In his dissent, Justice Stevens asserts, “In practice, however, these rights are so limited as to be almost nonexistent.” 130 S.Ct. at 978. See also Paul S. Miller, Shareholder Rights: Citizens United and Delaware Corporate Governance Law, 28 J.L. & POL. 51, 53 (2012). Roger Coffin counters that Stevens’ dissenting view is “paternalistic” and that it does not acknowledge “a governance landscape that has changed, and is no longer tilted in favor of management and the board of directors.” Coffin, supra note 23, at 126.

29. A pure law and economics argument might go this way: the welfare of shareholders is maximized by allowing the corporation to seek profits through any legal means however destructive to the collective it might be. By doing so, the stock’s value will be maximized and shareholders can use their increased wealth to donate to the campaigns of politicians who will pass laws making that same destructive activity illegal. See Coffin, supra note 23, at 158 (“If a shareholder is conflicted by political speech, they are free to take the money they make from the stock and start a PAC in opposition to the cause”).

30. When corporate directors authorize action that is illegal, shareholders have a remedy under law: a shareholder derivative lawsuit. Shareholders will win in such actions even if the directors can show that the illegal action was in fact profit-motivated. See David Rosenberg, Delaware’s “Expanding Duty of Loyalty” and Illegal Conduct: A Step Towards Corporate Social Responsibility, 52 SANTA CLARA L. REV. 81, 87 (2012).

31. See Yosifon, supra note 23.

32. See Elhauge, supra note 12, at 777. As I will discuss below, under the business judgment
case, not only is the shareholder associated with opinions with which he might disagree, but he is also indirectly paying for the propagation of those opinions. Whether this implicates the shareholders’ First Amendment rights is an open question.\(^3\) As with other kinds of unsavory behavior taken by a corporation, the shareholder’s remedies are weak: use her voting rights to change corporate policy (Fat chance!), sell her shares, or use her own personal funds to finance political speech in opposition to the corporation’s position.

In all of these examples, the directors at least have acted in a way that promotes the interests of the corporation,\(^4\) although the shareholders might not approve of them in their capacities as stakeholders in the corporation or as citizens. However, directors might also make decisions to spend corporate funds on political speech that are based on self-interest and not the interests of the corporation.\(^5\) For example, they might give corporate money to a super PAC that supports candidates whose views the directors personally agree with although the corporation would appear to gain nothing from such a contribution. Worse, a corporation might give to a super PAC that supports candidates who oppose limits on executive compensation or because the directors believe that they (and their

rule, corporations are empowered to spend money promoting goodwill in the community. Whether political spending constitutes goodwill is the crucial question.

33. Bebchuk & Jackson, supra note 17, at 114. Larry Ribstein, a strict contractarian believes that the shareholders’ First Amendment rights are not violated by corporate speech with which they disagree. Ribstein, supra note 6, at 1029-30. It is hard to disagree with the argument that this is not a free speech issue for two reasons: (1) The government is not controlling speech; and (2) If shareholders don’t like the speech they are subsidizing, they can sell their shares.

34. Or in a way that at the very least has a “nexus” to the business of the corporation. See Coffin, supra note 23, at 125. The rule that allows apparently corporate sacrificing behavior as long as it has a nexus to the corporation’s interests is hazy because it is so difficult to define what we mean by “nexus,” Elhauge, supra note 12, at 772. This is specially true in a world in which corporate charters state the business purpose of the company as broadly as possible in order to avoid claims that certain activities are ultra vires. STEPHEN M. BAINBIDGE, CORPORATION LAW AND ECONOMICS, 59-60 (Found. Press 2002).

35. Faith Stelwman Kahn, Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. REV. 579, 609 (1997) (“Because traditional mechanisms of accountability are absent in this area, corporate philanthropy represents an area of corporate conduct in which managerial self-interest may flourish.”); Bebchuk & Jackson, supra note 17, at 90 (“The basic problem arises from the fact that political spending decisions may be a product not merely of a business judgment regarding the firm’s strategy, but also of the directors’ and executives’ own political preferences and beliefs.”). In addition to using corporate funds to promote their own political agendas, managers can do something far worse: use the funds to solicit personal benefits (an ambassadorship to Tahiti?) from the politicians they help to elect.
friends) will personally benefit from such spending.\textsuperscript{36} Worse still, the directors might send corporate dollars to certain causes because they believe that such donations will generate personal goodwill for themselves by, for example, ultimately leading to a political appointment or favorable treatment from a government agency in a private matter. As discussed below, corporate law makes it difficult to distinguish between political spending motivated by a desire to benefit the corporation and political spending motivated by self-interest. The law must recognize the difference not only because good corporate governance demands it, but also because it will effectively combat some of the potential ill effects of the decision in \textit{Citizens United}.

\textbf{III. HOW THE BUSINESS JUDGMENT RULE PROTECTS ALTRUISTIC ACTIONS BY CORPORATIONS}

While American corporate law has a long history of describing corporations as entities motivated solely by profit,\textsuperscript{37} it has nonetheless traditionally allowed directors to make decisions motivated by altruism or even philanthropy. This permissiveness arises not so much because the makers of corporate law want corporations to be charitable institutions but because they believe that profit is maximized when courts refrain from reviewing the decisions of corporate directors even when those decisions appear to be motivated by something other than the bottom line.\textsuperscript{38} The hands-off approach is embodied in the business judgment rule, which holds that shareholders cannot sue directors for breach of duty unless they can show that the directors did not “act[] on an informed basis, in good faith and in the honest belief that the action taken was in the best

\textsuperscript{36} Bebchuk & Jackson, supra note 17, at 89.

\textsuperscript{37} See Dodge v. Ford, 204 Mich. 495, 495 (1919). This case, a favorite of corporate law professors for years, may be falling out of fashion. See, e.g., Lynn A. Stout, \textit{Why We Should Stop Teaching Dodge v. Ford}, in \textit{THE ICONIC CASES IN CORPORATE LAW}, 1–11 (Jonathan R. Macey ed., 2008). Professor Stout makes a compelling argument that \textit{Dodge v. Ford} should not stand for the proposition that corporations exist only for the purpose of maximizing value for the shareholders. Nonetheless, its language continues to be cited for just that idea: “A business corporation is organized and carried on primarily for the profit of the stockholders.” \textit{Dodge}, 204 Mich. at 507.

\textsuperscript{38} Elhauge, supra note 12, at 776.
interests of the company."\textsuperscript{39} This rule has protected directors from liability for almost any decisions that can be justified as motivated by the desire to create goodwill in the community, to engage in CSR, or to express opinions in the political arena, including situations in which there is no obvious or even indirect financial benefit resulting from the action.

The precedent that most influenced the substantial breadth of the business judgment rule’s protection is the beloved case of \textit{Shlensky v. Wrigley}\textsuperscript{40} (the Wrigley family of baseball and chewing gum fame). It involved the refusal by the principal owner of the Chicago Cubs baseball team to install lights at the team’s stadium, Wrigley Field, which would have allowed the team to play night games. At the time of the decision, every other Major League baseball team had begun to play night games. Minority shareholders had been clamoring for the installation of lights because they believed that it would substantially increase the team’s revenue. They sued, arguing that the owner was ignoring his obligation to maximize profits. The court dismissed the plaintiffs’ claim, stating that, under the business judgment rule, absent fraud, illegality, or self-interest, it would not second-guess a business decision even if it did not appear to be the wisest decision.\textsuperscript{41} The court noted that there were, after all, numerous possible legitimate business purposes for maintaining a day-game-only policy (e.g., the effect it might have on the goodwill of the residents of the neighborhood who were concerned about noise and traffic during evening hours). Importantly, however, the court was unwilling to evaluate whether Wrigley was wise or correct in pursuing these outcomes. Rather, the court said that judging such a decision is “beyond our jurisdiction and ability.”\textsuperscript{42} Since Wrigley’s decision to forego night games was not fraudulent, illegal, or self-interested, the court refused to review it. In the wake of \textit{Wrigley} and cases that followed it, corporate directors have enjoyed broad discretion to make decisions that take into account the place of the corporation in the community even if such decisions do not appear to

\textsuperscript{39} Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
\textsuperscript{41} See BAINBRIDGE, supra note 34, at 123.
\textsuperscript{42} Wrigley, 237 N.E.2d at 780.
be motivated by profit maximization in the short or long term.

The reasoning in Wrigley is all that is needed to justify virtually any decision based on CSR. Corporate directors can almost always defend a decision to, for example, continue to locate a factory in an Indiana town even though it would seem to be more profitable to move the operation abroad. Further, Wrigley would protect managers from liability for a decision to donate to a charity or provide free goods and services to a community group. Such decisions are unreviewable by courts because these actions are designed to result in goodwill and positive public relations. They can be viewed, like a decision to advertise, as based on a rational expectation that they will result in greater profits for the corporation in the long run.

But the business judgment rule in the wake of Wrigley allows even more discretion than that. The rule does not require that decisions be intended to result in greater profit; it requires only that decisions be based on a motivation other than fraud, illegality, or self-interest. The rule, therefore justifies a decision to engage in an activity apparently related to CSR or pure altruism even if the directors believe that it ought not to bring monetary benefits. Allowing such actions, however, does not necessarily mean that the business judgment rule ignores the primacy of profit. As Einer Elhauge has written, “This is the rule because the economic efficiencies that come from delegating the management of the business to someone other than shareholders or judges cannot be achieved without creating such discretion.”

The business judgment rule, he says, “effectively eliminates any enforceable duty to profit-maximize and leaves managers with de facto discretion to sacrifice a reasonable degree of corporate profits to further public interest objectives.” But it also leaves them that discretion to sacrifice profits to further goals that might appear to be public interest objectives but are really self-interest (like donating to a super PAC in order to gain a personal benefit for one of the directors). Indeed, it is not clear if

43. Elhauge, supra note 12, at 776.
44. Id. at 777.
45. As Elhauge notes, “Managers achieve the level of profits necessary to avoid interference with their discretion but otherwise run the firm to advance other aims.” Id. at 804. Those other aims might well be the directors’ own self-interest.
Elhauge views donations to political causes as part of the “public interest” that he so often invokes as the beneficiary of corporate giving. The result of the breadth of the business judgment rule’s protection is that “a strained claim that the activity somehow increases corporate profits (by building goodwill with clients or the community) will allow the conduct to survive legal scrutiny.”

According to Elhauge, from the shareholders’ point of view, a cure for this problem would be worse than the disease because such a cure would end business judgment deference and eliminate the kind of risk-taking that results in greater long-term profits. The business judgment rule seems to protect almost all corporate political spending, not in order to encourage such activity, but because allowing courts to review it would require excessive judicial monitoring. This would in turn ultimately lower corporate profits.

Courts have long emphasized the importance of allowing directors to take risks as a justification for a broad interpretation of the business judgment rule. Common sense (and economic history) tells us that a company will not succeed if it takes no risks whatsoever. Courts seem to hold as almost sacred the idea that directors should be motivated to take risks to benefit the corporation, free from the fear that they will be held personally liable if the results of their decisions do not in fact benefit the company and its shareholders. The owner of shares in any corporation will likely agree that she wants the directors and managers to take risks and that they ought not to be held responsible every time such a risk results in losses. But advocates of a broad business judgment rule take it further. They argue that since most investors own shares in more than one corporation, these shareholders should want business leaders to pursue riskier courses of action because, across a diverse portfolio of holdings, the investor’s profit will be maximized by more risk-taking rather than less.

46. Elhauge, supra note 12, at 804. This article argues that much corporate political spending relies on just that kind of strained claim: it can be argued that just about any corporate political donation (no matter how transparently self-interested) might result in goodwill and possibly greater long-term profits and therefore deserves business judgment rule protection.

47. Elhauge, supra note 12, at 810-11.


49. For a criticism of this view, see David Rosenberg, Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule, 6 BERKELEY BUS. L.J. 216, 222-23
and commentators alike often rely on investors’ ability to diversify as a key justification for the business judgment rule’s breadth.50

Directors typically justify decisions to engage in political spending using the reasoning of Wrigley, which, according to one commentator, “provides broad latitude for corporate political activity.”51 Much of the time, of course, political donations are indeed motivated by profit-maximization. A director might sincerely argue that he voted to donate tens of thousands of dollars to a particular super PAC because its agenda, if successfully implemented, could save the corporation millions. But even if no such obvious motivation is present, the directors will likely be protected by the business judgment rule because they could argue that the donation, like Wrigley’s decision to forego night games, “showed no fraud, illegality or conflict of interest in their making of that decision.”52 Recognizing when a conflict of interest arises in the context of corporate political giving is, of course, notoriously difficult.

IV. WHY A BROAD READING OF THE BUSINESS JUDGMENT RULE IS INADEQUATE TO PROTECT THE INTERESTS OF SHAREHOLDERS WHEN CORPORATIONS MAKE POLITICAL DONATIONS

If we ignore, for the moment, political giving clearly motivated by a desire to bring about legislation and policies favorable to a corporation’s bottom line, there appears to be a great deal of political spending that ought not to receive the protection of the business judgment rule. Undoubtedly, directors sometimes decide to pass corporate funds on to political organizations in order to benefit

50. See, e.g., Gagliardi v. Trifood Int’l, 683 A.2d 1049, 1052 (Del. Ch. 1997), (“[s]hareholders’ investment interests, across the full range of their diversifiable equity investments, will be maximized if corporate directors and managers honestly assess risk and reward and accept for the corporation the highest risk adjusted returns available that are above the firm’s cost of capital”). See also BAINBRIDGE, supra note 34, at 107.

51. Larry Ribstein, Corporate Political Speech, 49 WASH. & LEE L. REV. 109, 126 (1992). Although that article was written well before Citizens United, its application of the business judgment rule to corporate political spending is still useful.

52. Wrigley, 237 N.E.2d at 781.
themselves rather than the corporation. But, absent a palpable *quid pro quo*, the nature of the self-interest might be hidden in a way that ordinary disloyalty is not. For example, a corporate director might decide to donate to a super PAC that supports candidates who, among other things, oppose changes in corporate law that would limit executive compensation or that would increase shareholder rights. But it seems extremely unlikely, using the *Wrigley* standard, that a shareholder could hold the director liable for this misdirection of corporate funds even though it was not designed to benefit the corporation and did not have any kind of nexus to the corporation’s purpose. Even if the donation could not easily be justified as an attempt to generate goodwill, it would still not be reviewed absent a showing of fraud, self-interest, or illegality. Indeed, one study of the existing case law, by Thomas W. Joo (published nearly ten years before *Citizens United*), found that courts are deferential to managerial decisions regarding corporate political spending as they are to more ordinary business decisions. The most prominent case cited in the study, *Marsili v. Pacific Gas & Electric Co.*, held that the business judgment rule would protect managers from review of any political spending decision that could be “construed as incidental or expedient for the attainment of corporate purposes.”

As Joo usefully observes, a shareholder lawsuit that objects to a

53. Of course, this kind of self-interested behavior also takes places when directors make ordinary business decisions. For example, a director might vote to award contracts to a certain company, not because he believes that company is providing the best deal, but because he believes that he will receive some future benefit arising from his vote, such as being nominated as a director of that corporation in the future. When this happens, shareholders ought to be able to recover from the director for breach of the duty of loyalty if they can demonstrate the conflict of interest and the unfairness of the deal. Because decisions regarding political giving are not easily subjected to a fairness analysis, the situations are not entirely analogous in practice. Indeed, at least one commentator has noted the utter impracticality of attempting to subject corporate political contributions to the fairness test. James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251, 281 (2013). Further, as Reza Dibadj points out, many states, including Delaware, have very loose standard when evaluating claims for unfairness. Dibadj, supra note 27, at 50.

54. Victor Brudnev & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1200 (2002) (“... such reciprocity is too ephemeral to be feasibly identified in court as improperly ‘purchased’ for the manager by the corporate gift.”).


56. *Id.* at 71.
political spending decision is not really objecting to the wisdom of the action but rather “raises the question of whether election-related spending is a business-related decision at all.” Indeed, absent evidence of fraud, disloyalty, or illegality, under the existing interpretation of the business judgment rule, shareholders could never call into question any such decisions because there is always a plausible argument (or “strained claimed” as Elhauge might call it) that the spending was “incidental or expedient” or had a “nexus” to corporate purposes. But the specter of disloyalty or illegality will always hang over every act of election spending that does not have a clear link to the profit motive; why would a manager thrust his company (its funds and its reputation) into the gutter of American politics if he didn’t expect it to benefit himself (disloyalty!) or if he didn’t expect to get something in return (illegality!)?

The business judgment rule is designed to maximize corporate profits, not to maximize corporate free speech or engagement with the community. It allows those activities without subjecting them to judicial review because allowing such review would, in the long run, result in lower profits for the corporation and its shareholders. But the business judgment rule need not be as broad as that to achieve this goal. As discussed above, the rule allows just about any decision based on goodwill or CSR because to review such decisions would harm long-term profits and because they rarely can be attributed to a disloyal motive.

It is important to consider here the evolution of fiduciary duties under Delaware law in recent years and what some commentators have termed “the expanding duty of loyalty.” Traditionally, the fiduciary duties of corporate directors and officers included care, loyalty, and good faith under Delaware law. However, in the wake of both a game changing decision that seemed to enhance the duty of care to an impractical standard and the Delaware legislature’s rapid

57. Id.
58. This is not to say that the business judgment rule requires corporate leaders to try to maximize profits. See infra notes 73, 83, and accompanying text.
response, the courts of that state began a long process that ultimately distilled the fiduciary duties of care, good faith, and loyalty down to a standard under which loyalty is dominant. Essentially, any breach of the duty of care or good faith is also a breach of the duty of loyalty. When a corporate officer approves a political donation that involves a blatant self-interested quid pro quo, such an act is plainly a violation of the duty of loyalty even as it was traditionally understood. But, according to Hill and McDonnell, the duty of loyalty has expanded to include a “vast middle ground” that courts often describe as “good faith.” The standard of good faith applies, they argue, to situations in which structural bias is at work or in which the directors act with “suspect motivation.” It is hard to think of an action that is more influenced by structural bias and more potentially tainted by suspect motivation than a decision by a corporation to donate to a super PAC. Given the negative implications of so much campaign spending by corporations, courts ought to be able to use the good faith standard to apply to any “strained claim” that a corporate political donation is business related even where no quid pro quo is evident.

In the Wrigley case, the defendant argued that his decision not to install lights, though risky, had a rational and legitimate business purpose—to create goodwill in the community. Further, as one commentator has queried, “Wrigley appears to have preferred the neighborhood’s interests to those of shareholders . . . [but] what selfish interests was he advancing?” That is to say that Wrigley’s decision was not disloyal and therefore not actionable as a breach of fiduciary duty even though it was placing the interests of the neighborhood over those of shareholders. Nonetheless, it could be plausibly argued under Delaware’s standard that Wrigley’s decision was made in bad faith because what he was really doing was placing his own interests (his personal aesthetic belief that baseball is a day

61. DEL. CODE ANN. tit. 8, § 102(b)(7) (2009). For a more in-depth discussion of this history, see Hill & McDonnell, supra note 59.
62. Given the confusion over the definition of good faith during its prominence in Delaware law, this is plainly a positive development.
64. Hill & McDonnell, supra note 59, at 1796.
65. STEPHEN M. BAINBRIDGE, CORPORATE LAW 123 (2d ed. 2009).
game) over the interests of the corporation. Further, the bad faith at the core of at least some corporate political spending is much more blatant than that possibly displayed by Mr. Wrigley.

A. POLITICAL SPENDING IS NOT THE KIND OF ACTION THAT THE BUSINESS JUDGMENT RULE WAS DESIGNED TO PROTECT

A key justification of the business judgment rule is that if the directors are denied broad discretion to make business decisions, they will not take the kind of inspired risks that separate the great innovative and successful companies from the also-rans and soon-to-be-bankrupt. But this should not be used to allow political spending where it cannot really be regarded as a business decision at all. As an example, a corporation might make a donation to a super PAC, not in order to offer support to a political agenda that will directly benefit the company but as an exercise of goodwill. Under the conventional thinking, such a donation might be considered similar to a corporation’s decision to fund a free concert in a public park or to donate to a food pantry, especially where it appears that the super PAC’s agenda is unrelated to the corporation’s business.66 But a closer look at pure so-called goodwill political giving suggests that it differs from other decisions based on community outreach or CSR.

In many instances, it is hardly credible to argue that giving to a super PAC promotes goodwill in the broader sense the way traditional charity does. Far from it. Corporate political donations, especially since Citizens United, are divisive in a number of obvious ways. First, nobody, not even the corporations themselves, believes that this kind of spending is non-partisan. Biased and controversial spending by corporations is precisely the kind of action that the First Amendment (as interpreted by the Citizens United majority67) is meant to protect. The right to freedom of speech that the Supreme

66. If it is directly related to the corporation’s business, for example if an oil company gives to a super PAC that opposes environmental regulation, then it should be protected like any other business decision.

67. Indeed, the majority opinion in Citizens United acknowledges that much corporate political spending will go towards speech that “was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.” Citizens United, 558 U.S. at 351.
Court went so far in protecting is not worth very much if it cannot be used to express highly partisan opinions. A big donation by a corporation to an unrelated controversial political cause is not likely to create goodwill in the community and should not be seen as serving a legitimate business purpose.\(^{68}\) Second, where there is no obvious business purpose for the corporate outlay, it will have an immediate taint of disloyalty to both stakeholders and the larger community. If it is not plainly designed to further a corporate purpose (again like ensuring the passage of friendly legislation), then whom does it benefit? The perception will likely be that it benefits the people who made the decision in the first place: the corporate managers and directors. Third (and worse), a decision to give to a super PAC might lead to the perception of a *quid pro quo*. Why would a powerful corporate officer offer other people’s money to the benefit of a political cause if he did not expect something in return? Ironically, it appears that corporate political spending is the most pernicious when it masquerades as CSR and not when it simply represents an overt attempt to influence regulation to benefit the corporation itself at the expense of the public good.

If a court takes into account the difference between real goodwill spending and non-business related political donations, it will do no harm to the discretion corporate leaders have in making the kind of actual business decisions that help companies to succeed. The business judgment rule allows goodwill and CSR-motivated decision making because allowing such activity gives the directors the discretion they need to pursue profits on behalf of the corporation. That goal would not be inhibited if courts were to review corporate political spending that does not arise from an obvious business purpose.\(^{69}\) Nor would such review deviate from the existing law that

\(^{68}\) To be sure, many political donations that are related to a company’s business will be controversial as well and will likely result in bad will in the community. Such donations should be protected because it is well within the discretion of corporate leaders to decide whether the negative response to the donation from the public will be outweighed by the possibly favorable treatment the corporation will receive from government regulators or through legislation promoted by friendly elected officials.

\(^{69}\) In his dissent in *Citizens United*, Justice Stevens acknowledges the crucial point that corporate political spending that benefits only the decision-makers themselves is a breach of fiduciary duty: “... their fiduciary duties generally prohibit them from using corporate funds for personal ends.” *Citizens United*, 558 U.S. at 467.
allows shareholders to sue directors for other kinds of blatantly self-interested and bad faith conduct. All that is required is for courts to acknowledge what they see in front of them: corporate political spending that has no purpose but the enrichment of the decision-makers themselves. Such an acknowledgment would do little to inhibit the kind of risk-taking that the business judgment rule is meant to promote.

A number of the proponents of corporations' rights to make political contributions argue that such actions should receive strong protections because they are designed to increase firm value. For example, Roger Coffin writes: “Corporate political spending, when undertaken by boards of directors properly discharging their fiduciary duties of care, loyalty and its associated element of good faith, should be directed at maximizing the long-term value of the firm, and thus be in alignment with shareholders' economic interests.”

The problem is that the business judgment rule protects political giving even when it is not designed to maximize shareholder value or create goodwill in the community. Because so much corporate political spending is justified simply as a legal act of goodwill or charity, it avoids the possibility of a judicial inquiry into its legitimacy, even though it bears little apparent relation to the creation of shareholder value. Advocates like Coffin want to have it both ways: they justify political spending as maximizing shareholder value but they want the discretion to do it even when it bears no relation whatsoever to increasing profits and, indeed, is likely to stray outside the protection of the business judgment rule.

B. THE DIVERSIFICATION ARGUMENT

70. Coffin, supra note 23, at 105.

71. Again, this is not to say that courts should review all decisions that are not designed to increase firm value. Rather, they should review only corporate political spending that is dressed up as charity or goodwill and is not presented as an attempt to influence legislation or regulation in the corporation's interest.

72. Coffin states the rule that corporations may ignore shareholder value as long as their actions have a “nexus to the long term best interests of the corporation.” Coffin, supra note 23, at 125. Of course, it is virtually impossible to think of a political donation for which an argument could not be made that such a nexus exists.
It may well be true, as an empirical matter, that corporate profits are maximized over a range of investments by the business judgment rule and that a diversified investor would therefore prefer that directors have the broad discretion that it provides\(^7\), although it might result in an occasional misuse of funds. Nonetheless, this is surely problematic from the point of view of a stockholder who purchases shares in an individual corporation. Even if we view the purchase of shares as a contract of sorts between the shareholder and the corporation, it does not seem implicit that the shareholder is authorizing the directors and managers to make decisions based on the understanding that the shareholder approves of certain risky behavior because, after all, he probably owns shares in lots of other companies and if they all make risky, speculative decisions, that will likely maximize the value of the investor’s entire portfolio.\(^7\)

The assumption that this implicit understanding exists becomes even more problematic when the action taken by the corporation is not really speculative risk in pursuit of profit but rather, the exercise of the corporation’s constitutional right to express its views through political spending. When a corporation pays for a political advertisement, money that could be used for some other purpose is instead being used to express an opinion that may or may not maximize profits and that may or may not reflect the opinion of its shareholders. When such speech arises from the corporation’s exercise of goodwill or charity, rather than a pure profit-motive, its utility exists only as pure political expression.\(^7\) Assuming that shareholders have diversified portfolios (as we must to justify a broad interpretation of the business judgment rule) they likely own shares in a variety of corporations that express a diversity of political views, all of which taken together cannot possibly make a coherent statement of value in the proverbial marketplace of ideas.\(^7\)

---

73. This view is best expressed by Chancellor Allen in *Gagliardi*. See supra note 50. See also Rosenberg, supra note 9, at 221–24 for my discussion of “The Primacy of Risk-Taking” in business judgment rule jurisprudence.

74. *Gagliardi*, 683 A.2d at 1052

75. See infra notes 13, 19, 32 and accompanying text for a discussion of why it cannot really be goodwill in the traditional sense.

76. Further, not only do most stockholders own shares in numerous corporations, they also frequently buy and sell their shares either as individual investors or through the institutions that
sense to diversify risky decisions aimed at profit, it makes no sense whatsoever to force shareholders to pay for political speech that will, when taken together, simply reflect the conflicting opinions of the decision-makers who choose to engage in that speech. Under *Citizens United*, corporations have a First Amendment right to engage in free speech, but allowing it as an exercise of the corporation’s goodwill simply produces more speech at great expense that provides no expressive value to the shareholders who indirectly pay for it.

The Supreme Court recently reinforced this point regarding a corporation’s exercise of a different right with roots in the First Amendment: the free exercise of religion. In *Hobby Lobby*, the Court discounted the possibility of a publicly-held corporation having a right to the free exercise of religion, stating, “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”77 Surely the diversity of political opinions among shareholders of a publicly traded corporation is no less great than the diversity of their religious beliefs and practices. The majority in *Hobby Lobby* suggests that it is unlikely that the shareholders of a publicly traded corporation could agree on a religious issue such as whether to close a business on the Sabbath.78 And the majority rightly indicates that such a dispute ought to be resolved using the appropriate procedures under state corporate law.79 But it is clear that the majority would not regard the action that the corporation chooses to take as an “exercise of religion” that should be protected under law. Rather, it would simply be a disagreement about the conduct of business . . . relating to religion80 not unlike a disagreement regarding any other matter that is only indirectly related to the creation of profits. Similarly, when a corporation makes a goodwill donation to a political cause that does not have an obvious business purpose, its value both as goodwill and

manage the shares they own in mutual funds. See Coffin, supra note 23, at 153. Shareholders may well simultaneously or consecutively own shares in corporations that have diametrically opposed interests in the political arena.

77. *Hobby Lobby*, 134 S.Ct. at 2774.
78. Id.
79. Id.
80. Id.
as speech is nil. It likely creates discord (because of the divisiveness of partisan politics) and cannot possibly be of value as speech because of the diversity of the opinions of the shareholders of the corporation itself. If a publicly held corporation cannot engage in the practice of religion, it cannot really engage in political speech unless that speech is motivated solely by a desire to increase profits for that specific corporation. Further, since a key justification for the business judgment rule’s breadth relies on the assumption that shareholders hold diversified portfolios, it should not apply to corporate political donations masquerading as goodwill because the resulting speech has no expressive value.

C. CAN WE DISTINGUISH BETWEEN CORPORATE ACTIONS AND CORPORATE SPEECH?

*Citizens United* established that corporations have the right to free speech more or less like the rest of us. As such, the decision can be viewed as one in a long line of cases that have made the United States perhaps the greatest bastion of free speech in the world. When a corporation chooses to engage in political expression through the donation of funds, it is exercising a fundamental right that *cannot be abridged* by the government. Further, as long as the decision has met the standard applied to acts of charity and goodwill under corporate law, it cannot be called into question by the shareholders through a derivative lawsuit. In contrast, when a corporation engages in its everyday business (say, drilling for oil) it is exercising a right that *can be abridged* by government regulation. For example, a federal, state, or local legislature might prevent a corporation from drilling in an area teeming with endangered species by passing a law deliberately designed to prohibit that specific activity in that specific place. Such a prohibition (if properly enacted) does not threaten a constitutional right of the corporation or its shareholders because the Supreme Court has not found that the Constitution protects any such right. If directors were to authorize now-illegal drilling, they would be liable on two counts: to the regulators for violating the law; and to the
shareholders for breaching their fiduciary duties.\textsuperscript{81}

Drilling for oil and donating money to a super PAC can both be actions motivated solely by a desire to maximize profits for the shareholders. A decision to drill for oil might fall short of the business judgment rule’s protections if it were not made on an informed basis (say, a decision to drill in a place where the corporation had no information indicating a likelihood of finding oil or because it is illegal to drill there). Further, it might lose the rule’s protection if it were based on self-interest, for example if the corporation agrees to pay fees to the landowner, a nephew of the chairman of the board of directors, although the commercial prospects of the project were not promising. But given the broad protections provided for speech that might be motivated by goodwill (even if it is in fact self-interested), shareholders can almost never call into question a corporation’s decision to donate to a super PAC. Corporate speech therefore seems to enjoy a kind of double protection—it cannot be banned or regulated by the government (because it is constitutionally protected) and it cannot lose business judgment rule protection because of courts’ long tradition of refusing to evaluate actions that might be considered attempts to create goodwill.\textsuperscript{82}

Unlike with other disloyal activity, there can be no “fairness test” for a self-interested political donation. If a corporate director votes to award a contract to his nephew’s construction firm, a court might find disloyalty where the nephew’s firm did not give the corporation a fair deal. Even with evidence of obvious disloyalty, a court will allow the deal if the price appears fair given the market for the good or service provided. But when a corporation donates to a super PAC on the basis of a director’s self-interest, an aggrieved shareholder could not conceivably argue that the corporation did not receive a fair deal in return.\textsuperscript{83} This leaves shareholders in the position of being powerless to

\textsuperscript{81} Again, when corporate directors authorize illegal conduct (even if the conduct is profit motivated and in fact profit maximizing), it is almost always viewed as a breach of fiduciary duty. See Rosenberg, supra note 30. Of course, the goal of much corporate political spending is to help the businesses write the laws that keep their harmful activities legal. Increasing the ability of corporations to do this is the most insidious effect of the decision in \textit{Citizens United}. Allowing officers to spend corporate funds in their own interest is a close second.

\textsuperscript{82} Kahn, supra note 35, at 609.

\textsuperscript{83} Ribstein seemed to believe that market forces are sufficient to prevent directors and
ever call into question directors' decisions to engage in political speech, even when it is based on self-interest and not the interests of the corporation and its shareholders and when its value as goodwill is dubious.

In order to correct the problem, courts simply need to recognize the inherent disloyalty or bad faith of much corporate political spending. The business judgment rule gives business leaders a great deal of discretion to expend corporate funds in a variety of ways because profit is maximized when courts refrain from second-guessing such decisions. That discretion extends to corporations that funnel money to charitable recipients as an exercise of goodwill even if the act does not appear to be related to increasing corporate profits. But almost all corporate political spending can really only be one of two things: (1) an effort to increase profits for the corporation by influencing government policy; or (2) an act of disloyalty designed to bring a personal benefit to the decision-makers. If it is the latter, a court should recognize it as such and allow shareholders to recover for breach of the duty of loyalty. This will be an important first step in combating the negative effects of *Citizens United*.

**D. Recognizing Corporate Political Spending for What It Is**

Allowing recovery by shareholders for disloyal corporate political spending will bring a second benefit. In addition to preventing such self-serving actions that hurt shareholders,
corporations, and the democratic process, it will shine more light on the kind of political spending that corporate law does allow and that *Citizens United* intended to keep fully protected. When a corporation donates to a super PAC intent on helping reelect a certain United States senator, that donation should not be viewed as charity or goodwill. Rather, it is simply a perfectly legal attempt by a business to influence the way the government regulates it. It may be a very wise business decision, but it might also have negative consequences to numerous stakeholders who may respond with actions of their own. While many critics of *Citizens United* have little faith in the usefulness of corporate democracy, we ought to retain more confidence in the ability of voters in public elections to use their franchise to elect officials whose values, conduct, and policy choices they support. Once voters understand that there is indeed a direct correlation between corporate political spending to super PACs and subsequent legislation that benefits businesses at the public’s expense, the accountability of both corporations and our governmental institutions will be improved. Further, although it is doubtful that shareholders will be able to bring about much change through corporate ballot initiatives, director elections, pressure, or through selling their shares, their increased awareness of the nature of most corporate political activity ought to bring about more scrutiny on the spending itself. Finally, consumers may respond by favoring corporations who refrain from campaign spending or by avoiding those companies whose actions they disagree with. All of these effects may go a long way to countering the “external distortion” created by *Citizens United*.

V. CONCLUSION

Under current law, the duty of loyalty reigns supreme among the fiduciary duties owed by directors to the shareholders. That duty prohibits, among other things, self-interested transactions that are not intended to benefit the corporation. Much corporate campaign

---

84. See *supra* text accompanying note 23.
85. See *supra* text accompanying note 23.
spending seems to meet this definition. Virtually any corporate campaign spending smacks of the potential for disloyalty in a way that ordinary business decisions and ordinary acts of charity do not. When a corporation chooses to drill for oil, the profit-based motivation is clear and the likelihood of self-interest on the part of the directors is low. On the other hand, when a corporation donates to a political campaign, the profit-based motivation is often obscure and the potential for self-interest by the directors is manifest: they have unilaterally directed the corporation’s money into the hands of powerful people whose mission is to ensure that other powerful people achieve elected office or hold on to their seats. Unless the directors can show a true business purpose for the outlay of funds, courts should waive the protections of the business judgment rule and permit the shareholders to sue the directors for breach of the duty of loyalty. Existing corporate law allows for such an interpretation; this would go a long way toward limiting the damage of the *Citizens United* decision.

***